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## International Corporate Bribery and Unilateral Enforcement

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# International Corporate Bribery and Unilateral Enforcement

WILLIAM MAGNUSON\*

*This Article explores how unilateral action to regulate international corporate bribery can serve as a partial substitute for multilateral action. The standard account generally assumes that domestic efforts to combat international corporate bribery disadvantage domestic corporations and create a structural impediment to broader multilateral cooperation. This model, however, underestimates the extent to which states can and do regulate international corporate bribery through unilateral action, and in particular, through the enforcement of domestic laws against foreign actors. This Article argues that the extraterritorial enforcement of the Foreign Corrupt Practices Act (FCPA) has created a strong incentive for foreign corporations to comply with anti-bribery norms and that this development mitigates many of the concerns on which corruption theorists have focused. The Article concludes that extraterritorial enforcement of the FCPA provides a powerful motivation for other countries to cooperate in international corruption efforts but that this unilateral enforcement may raise different and equally problematic concerns.*

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INTRODUCTION .....	362
I. INTERNATIONAL CORRUPTION: A THEORETICAL FRAMEWORK ....	366
A. Corruption and Democracy .....	366
B. Domestic- and International-Focused Corruption Regulation .....	372
C. Structural Problems of International Corruption Regulation .....	373
1. International Cooperation .....	374
2. Unilateral Regulation .....	376
II. THE FCPA AND THE STANDARD ACCOUNT .....	379
A. The Enactment of the FCPA .....	379
1. The History of the FCPA .....	379
2. The Structure of the FCPA .....	381
i. Anti-Bribery Provisions .....	381
ii. Accounting Provisions .....	382
B. Standard Accounts of the FCPA .....	383
C. Criticisms of the Standard Account .....	389
1. Lack of Empirical Evidence .....	390
2. Lack of Sanctions for Non-Compliance .....	391
III. THE FCPA AS A UNILATERAL ENFORCEMENT MECHANISM .....	393
A. Extraterritorial Reach of the FCPA .....	394
1. Bases of Jurisdiction Under International Law .....	394
2. Statutory Basis for Extraterritoriality under the FCPA .....	396
3. Extraterritorial Enforcement Practices of the United States .....	399
B. FCPA as Unilateral Enforcement Mechanism .....	403
C. The Anti-Competitive Effect of the FCPA? .....	407
IV. THE PERILS OF UNILATERAL ENFORCEMENT .....	411
A. Biased Enforcement .....	411
B. Over-Enforcement .....	413
C. System Stability .....	415
CONCLUSION .....	417

The way I answer the corruption charge is this: in the last 30 years, we have implemented a development program that was approximately \$400 billion worth. You could not have done all of that for less than \$350 billion. Now, if you tell me that building this whole country and spending \$350 billion out of \$400 billion, that we had misused or gotten corrupted with \$50 billion, I'll tell you, "Yes." But I'll take that any time . . . . We did not invent corruption. This has happened since Adam and Eve . . . . This is human nature.

– Prince Bandar bin Sultan, Former Saudi Ambassador to the United States<sup>1</sup>

## INTRODUCTION

In 2001, a disaffected employee of BAE Systems, the British arms contractor, notified United Kingdom prosecutors that BAE was bribing Saudi Arabian officials in order to win lucrative arms deals.<sup>2</sup> The employee alleged that BAE, Europe's largest arms company, maintained a massive slush fund to pay off senior Saudi officials. Two years later, U.K. prosecutors finally began to investigate the allegations after the *Guardian* reported that the Defense Ministry had covered up the corruption. When the investigation began to pick up steam, however, Saudi Arabia delivered an ultimatum to the U.K.: either drop the investigation within ten days or Saudi Arabia would cut off the flow of counter-terrorism intelligence to Britain and deliver a £10 billion fighter jet contract to France rather than the U.K.<sup>3</sup> Thirteen days later, the U.K. announced that it would terminate the investigation, citing unspecified "security and foreign policy interests."<sup>4</sup>

The case did not end there, however. A few months later, the United States Department of Justice announced that it had launched

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1. Frontline, *Black Money*, Apr. 7, 2009 (PBS television broadcast Apr. 7, 2009, at 52:25) (quoting an earlier *Frontline* interview from 2001).

2. See David Leigh & Rob Evans, *MoD Chief in Fraud Cover-Up Row*, *GUARDIAN*, Oct. 13, 2003, at 1.

3. See Christopher Hope, *Halt Inquiry Or We Cancel Eurofighters*, *DAILY TELEGRAPH*, Dec. 1, 2006, at 1.

4. Clare Dyer, *BAE Enquiry: Attorney General: Clash of Interests Highlighted by Decision to Halt Investigation*, *GUARDIAN*, Dec. 15, 2006, at 7.

its own investigation into corruption at BAE.<sup>5</sup> The U.S. investigation would eventually uncover one of the largest and most extensive bribery schemes in history: BAE had been lavishing Saudi princes and their families with private jets, luxury cars, exotic holidays and hundreds of millions of dollars in return for a multi-billion dollar fighter jet contract.<sup>6</sup> BAE paid a record \$400 million fine to the United States to resolve allegations of wrongdoing.<sup>7</sup>

The BAE affair would appear to represent a success in the international effort to combat corporate bribery. After reports came out that a large corporation was paying huge bribes to foreign officials in return for business, and despite one investigation being shelved due to political pressure, a full investigation of the corruption was launched and the corporation was held criminally liable. But what is most striking about the BAE affair is not *that* BAE was held liable, but *who* held them liable, and for *what*. It was not BAE's home country, Britain; and neither was it the country whose officials received the bribes, Saudi Arabia, that held BAE to account. It was a third country, the United States, holding it liable for violations of U.S. law. This curious situation raises a number of interrelated questions. Why should the United States be concerned about wrongdoing by non-U.S. nationals outside of U.S. borders? When can U.S. laws apply to non-citizens operating abroad? What sort of consequences does U.S. enforcement of domestic law outside its borders entail? And what effects does such enforcement have on the incentives of other countries to enforce anti-corruption norms against their own corporations?<sup>8</sup>

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5. Julia Werdigier, *U.S. Starts Inquiry Into British Arms Contractor*, INT'L HERALD TRIB., June 27, 2007, at 6.

6. Prince Bandar bin Sultan alone received hundreds of millions. See George Jones, *Blair Fends Off Row "To Press for Saudi Deal"*, DAILY TELEGRAPH, June 9, 2007, at 6; Michael Robinson, *BBC Lifts the Lid on Secret BAE Slush Fund*, BBC NEWS (Oct. 5, 2004, 1:39 PM), <http://news.bbc.co.uk/2/hi/business/3712770.stm>.

7. It should be noted that BAE was not convicted of FCPA violations. BAE ultimately pled guilty to a number of other charges, including conspiring to defraud the United States and to make false statements to the U.S. government. It is, however, generally considered an FCPA case, given the nature of the allegations. See Shearman & Sterling LLP, *FCPA Digest: Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977* (Jan. 2011), <http://www.shearman.com/files/upload/FCPA-Digest-Jan-2011.pdf>.

8. The Supreme Court has recently been struggling with similar questions in other issue areas, including securities regulation and human rights. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869, 2878 (2010) (examining the extraterritorial application of the Securities Act); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S.Ct. 248 (2011) (examining the extraterritorial application of the Alien Tort

This Article addresses the problem of political corruption, by which I mean the abuse of public office for private gain. The paradigmatic example of political corruption is *quid pro quo* bribery, where a person pays money to a government official in return for special treatment, such as a promise of government contracts or lower tax rates. Political corruption can be deeply harmful to society, as it distorts government decision-making,<sup>9</sup> delegitimizes political institutions,<sup>10</sup> reduces administrative efficiency<sup>11</sup> and slows economic growth.<sup>12</sup> International corruption, that is, the bribery of government officials by corporations from other countries, presents potentially even more problematic issues for states.<sup>13</sup>

Section I outlines a theoretical framework for understanding the structural impediments that corporate bribery regulation must overcome. This section develops a model to analyze the effect of domestic anti-corruption laws on the incentives of domestic and foreign companies with regard to bribery. The model predicts that domestic prohibitions on international bribery may decrease the payoffs from bribery to a sufficient extent that bribery is no longer in the interests of corporations, but that unilateral action by one country against its own corporations may be counterproductive, steering international business to foreign competitors and making international cooperation more difficult, not less. This theory suggests that effective international corruption regulation must reduce the payoffs from

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Statute).

9. See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 226–47 (2011) (describing the effects of corruption on legislative decision-making); Paulo Mauro, *Corruption and the Composition of Government Expenditure*, 69 J. PUB. ECON. 263 (1998) (finding that corruption alters the composition of government expenditure, and in particular that it reduces government spending on education). *But see* FRANK ANECHARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* 174–85 (1996) (arguing that prosecutions of government corruption may not create a net benefit for the public).

10. See Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 422 (1967) (arguing that “[b]y destroying the legitimacy of political structures in the eyes of those who have power to do something about the situation, corruption can contribute to instability and possible national disintegration”); Susan Rose-Ackerman, *The Political Economy of Corruption*, in *CORRUPTION AND THE GLOBAL ECONOMY* 31, 45 (Kimberly Ann Elliott ed., 1997).

11. See Gerald E. Caiden & Naomi J. Caiden, *Administrative Corruption*, 37 PUB. ADMIN. REV. 301 (1977) (describing the effects of corruption on administrative efficiency).

12. See Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681 (1995) (finding that corruption lowers private investment and thereby reduces economic growth).

13. See *infra* notes 37–39 and accompanying text.

bribery to *all* relevant corporations, not some subset of them.

Section II presents the standard account of the United States's international anti-corruption law, the Foreign Corrupt Practices Act of 1977 (FCPA), which prohibits companies from making payments to foreign officials in return for business. The predominant view among corruption scholars has been that international corporate bribery presents a prisoners' dilemma and that the FCPA represents a kind of unilateral disarmament by the U.S. government. According to this model, the FCPA imposed competitive constraints on U.S. corporations that were not imposed on non-U.S. corporations. The enactment of the FCPA, thus, led to sharp criticism from local businesses, but it also changed the incentives of domestic actors. U.S. corporations that faced the threat of an unequal playing field—they couldn't bribe foreign officials for contracts, but their competitors could—lobbied, not just for revocation of the FCPA, but also in the alternative for a comprehensive international agreement regulating foreign corruption.<sup>14</sup> This domestic pressure, the story goes, led to the conclusion of the OECD Anti-Bribery Convention in 1997.<sup>15</sup> The Anti-Bribery Convention, however, did not alter the fundamental nature of the international corporate bribery game, and foreign governments have failed to enforce their anti-bribery laws in a rigorous manner.<sup>16</sup> Thus, U.S. companies still face the same competitive disadvantages that they did before the international agreement.

Section III argues that the standard account of international corporate bribery fundamentally misunderstands the nature and effect of the FCPA on international business transactions. While the FCPA does place significant restrictions on the way that U.S. companies do business abroad, it also places significant restrictions on foreign competitors. The jurisdictional provisions of the FCPA are ambitiously extraterritorial, and the United States has increasingly used these jurisdictional provisions to prosecute foreign corporations for international bribery, even when the bribery has little or no direct effect in the United States.<sup>17</sup>

This theory of the FCPA's effect on the international bribery

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14. See Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 308 (2010).

15. See Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 677–78 (2004).

16. Brewster, *supra* note 14, at 309.

17. See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1776–84 (2011) (describing the increase in U.S. prosecutions of foreign firms and arguing that such prosecutions deserve more scrutiny).

game thus differs from the conventional wisdom in an important way. By imposing U.S. law on foreign corporations, this Article argues, the FCPA has materially reduced the payoffs from bribery for the majority of large, multinational corporations and thus does not present the same kinds of unilateral enforcement concerns that previous theorists have predicted. Instead of exacerbating the collective action problem underlying efforts to combat corporate bribery, unilateral enforcement appears to have largely resolved them.

At the same time, U.S. enforcement of the FCPA against foreign corporations raises different and potentially equally problematic concerns. Section IV concludes by describing the implications of the model for multilateral regulation of corruption in the future and discussing some potential objections to continued aggressive extraterritorial enforcement of U.S. law.

## I. INTERNATIONAL CORRUPTION: A THEORETICAL FRAMEWORK

Although political corruption is frustratingly difficult to define, there is widespread agreement that it is undesirable. When corruption involves foreign companies paying bribes to legislators from other countries, and thus takes on international relevance, it is arguably even more objectionable. Indeed, international corruption is often described as a kind of “global bad.”<sup>18</sup> Despite the universal condemnation of international corruption, deep structural problems stand in the way of effective corruption regulation at the international level. In the absence of domestic regulation, corporations have strong incentives to bribe foreign officials for business, but unilateral domestic regulation can actually *increase* these incentives for some players. International cooperation could mitigate these obstacles, but the secretive and non-transparent nature of international corruption prevents effective monitoring of any international agreement. Thus, international corruption may require some other solution to reduce the payoffs from bribery for all relevant players.

### *A. Corruption and Democracy*

The focus of this Article is on political corruption, so it may be useful to begin with a working definition of the term. Political corruption occurs when a government official abuses his public of-

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18. Brewster, *supra* note 14, at 304.



fice for improper, private-regarding motives.<sup>19</sup> Of course, distinguishing “proper” from “improper” motives may prove difficult in practice.<sup>20</sup> If we understand democracy as largely a forum for competition between various interest groups,<sup>21</sup> then we may adopt a rela-

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19. This definition is inclusive enough to encompass the three most widely accepted definitions of political corruption. These definitions can be categorized into public-office-centered, public-interest-centered, and market-centered corruption. See Arnold J. Heidenheimer, *Terms, Concepts, and Definitions: An Introduction*, in *POLITICAL CORRUPTION: A HANDBOOK* 3, 8–11 (Arnold J. Heidenheimer, Michael Johnston & Victor T. LeVine eds., 1989); see also Michael Johnston, *The Definitions Debate: Old Conflicts in New Guises*, in *THE POLITICAL ECONOMY OF CORRUPTION* 11, 18 (Arvind K. Jain ed., 2001); Mark Philp, *Defining Political Corruption*, 45 *POL. STUD.* 436, 440 (1997). Of course, these categories cannot encompass all definitions of corruption, and a number of other theories exist. See, e.g., Dennis Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 *AM. POL. SC. REV.* 369 (1993) (extending corruption to include actions that damage the democratic process). The first is related to the public duties of government officials. As Nye has described it, “[c]orruption is behavior which deviates from the formal duties of a public role because of private regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.” Nye, *supra* note 10, at 419. This kind of definition relies on certain formally established rules of behavior for government officials (public duties) and deviations for personal advantage (private regarding gain). Another category of corruption definitions focuses on the public interest. Friedrich, for example, states that corruption exists “whenever a power holder who is charged with doing certain things, that is a responsible functionary or office holder, is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby does damage to the public and its interests.” See Carl J. Friedrich, *Corruption Concepts in Historical Perspective*, in *POLITICAL CORRUPTION: A HANDBOOK* 15 (A. J. Heidenheimer, M. Johnston & V.T. Le Vine, eds., 1989). In addition to the deviation from public duties for private gain, Friedrich argues that corruption must also involve an action that harms the public interest. Finally, some theorists have attempted to define corruption as market-centered behavior: van Klaveren, for example, argues that we should “conceive of corruption in terms of a civil servant who regards his office as a business, the income of which he will . . . seek to maximize.” Jacob van Klaveren, *The Concept of Corruption*, in *POLITICAL CORRUPTION: A HANDBOOK* 26. An alternative market-oriented definition of corruption states that “corruption = monopoly + discretion – accountability.” ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 75 (1988). According to this conception of corruption, a government official acts corruptly if he acts with the purpose of maximizing his own income, as opposed to some other, presumably public-oriented, good.

20. See Johnston, *supra* note 19, at 12 (arguing that definitions of corruption “embody settlements of politically-contested issues, such as where distinctions between public and private roles and interests lie, or which (and whose) uses of economic and political power may justly be limited or held accountable to others”); Philp, *supra* note 19 (identifying a number of reasons why attempts to define corruption fail).

21. See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (1987) (arguing that the “democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a

tively permissive understanding of corruption: as long as all citizens have equal opportunities to vote,<sup>22</sup> there are few compelling reasons to prohibit the methods by which citizens may influence each other and politicians.<sup>23</sup> Each citizen is attempting to realize his preferences, as against the preferences of others, through the electoral process, and each citizen has a legitimate right to express his interests. Improper motives, in this case, would be connected with violations of previously established rules of competition.

If, on the other hand, we understand democracy as more properly a system for reasoned deliberation within a society, we might understand corruption in a different light.<sup>24</sup> Under deliberative democracy theory, a government's actions are legitimate if they are based on public discussion that is not distorted by unequal wealth and power.<sup>25</sup> This public deliberation simultaneously reflects and shapes society's preferences, and its aim is to arrive at rationally-motivated consensus.<sup>26</sup> A variety of actions that might be seen as perfectly acceptable according to a competitive theory of democracy could fall afoul of deliberative democratic ideals. Presumably any decision that

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competitive struggle for the people's vote"); ROBERT DAHL, PREFACE TO DEMOCRATIC THEORY 68 (2006) (arguing that "[i]n a rough sense, the essence of all competitive politics is bribery of the electorate by politicians"); Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 6 (1994) (stating that "[a]ccording to the liberal view, the democratic process takes place exclusively in the form of compromises between competing interests") (emphasis in original).

22. "Equal opportunities," in this case, is understood to mean that there are neutral rules that do not discriminate against any protected group, something akin to Rawls's formal equality of opportunity. See JOHN RAWLS, A THEORY OF JUSTICE 63 (1999 rev. ed.).

23. See Habermas, *supra* note 21, at 6 (arguing that under competitive conceptions of democracy, "[f]airness is supposed to be granted by the general and equal right to vote, the representative composition of parliamentary bodies, by decision rules, and so on"). Of course, even under competitive democracy, we might think that certain rules should govern how competitors play. The key concept here, though, is that these rules will likely be *more* permissive than rules established according to deliberative democratic theories.

24. See AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004); DAVID HELD, MODELS OF DEMOCRACY (3d ed. 2006); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67 (James Bohman & William Rehg eds., 1997).

25. See GUTMANN & THOMPSON, *supra* note 24, at 49; David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1254 (2011).

26. See JÜRGEN HABERMAS, LEGITIMATION CRISIS 108 (Thomas McCarthy trans., 1975) (1973) (explaining that, in ideal deliberation, "no force except that of the better argument is exercised"); Cohen, *supra* note 24, at 75 ("[I]deal deliberation aims to arrive at a rationally motivated *consensus*—to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals.").

would not withstand public scrutiny could be understood as corruption, and improper motives would likely be determined by reference to standards of reasoned deliberation by citizens.<sup>27</sup>

For our purposes, however, we will limit our analysis to the paradigmatic example of political corruption: *quid pro quo* bribery. *Quid pro quo* bribery occurs when an actor explicitly agrees to make payments to government officials in return for special privileges, such as government contracts or lower tax rates.<sup>28</sup> It is this kind of corruption that people most readily identify as bribery, and it is also this kind of corruption that most anti-bribery laws strive to prevent.<sup>29</sup>

International corruption, as opposed to domestic corruption, occurs when a national of one country bribes a government official of another country.<sup>30</sup> There is a plausible argument that the case for regulating international corruption is stronger than the case for regulating domestic corruption. To the extent that we believe that government policies should mirror, or at least internalize and refine, *domestic* preferences, international corruption is more problematic than its domestic counterpart.<sup>31</sup> At least from a domestic standpoint, local citizens may not want the interests of foreign corporations to play

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27. See Jacob Eisler, *The Unspoken Institutional Battle Over Anticorruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 380 (2011) (“[D]eliberative anticorruption is distinguished by how it defines integrity in politics: adherence to public standards of justifiability, as defined by the ability to satisfy discursive assessment.”).

28. The U.S. Supreme Court has suggested that *quid pro quo* bribery corruption may be the only kind of corruption that is validly regulated. In *Buckley v. Valeo*, for example, the Court recognized a governmental interest in preventing *quid pro quo* corruption, as well as the appearance of it, in the electoral process. 424 U.S. 1 (1976). See Eisler, *supra* note 27, at 423–30 (arguing that the Supreme Court has adopted a view of democracy that leads to a definition of corruption that tends towards the *quid pro quo* side of the spectrum). Other kinds of political corruption, such as dependence corruption, may be equally more problematic if we think that they systematically bias the decisions of government officials in favor of certain groups, but they are more controversial and more difficult to identify, and therefore we will not address them. For an extended discussion of dependence corruption, see LESSIG, *supra* note 9, at 226–47.

29. See Bruce E. Yannett, *Foreign Corrupt Practices Act: An Overview*, in THE FOREIGN CORRUPT PRACTICES ACT 2010 721, 733 (PLI Corp. L. & Prac., Course Handbook Series No. 23958, 2010).

30. See Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT’L L. 413, 418–19 (2007).

31. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605–10 (2011) (outlining reasons why the Supreme Court is unlikely to expand its holding in *Citizens United* to allow spending by foreign nationals to influence candidate elections).

any role in their government institutions. The belief that government policies should be shaped by domestic actors is shared by both deliberative and competitive theories of democracy.<sup>32</sup> It is also reflected in U.S. law.<sup>33</sup>

This is not to suggest that in all cases we will prefer the actions of domestic individuals over the actions of foreign individuals. We might very well prefer that a foreign corporation bribe a domestic legislator if we prefer the foreign corporation's policies. After all, our analysis of any given corruption problem will depend on much more than our identification of the nationality of the participants. Rather, the argument is simply that, all else equal, there are good arguments why foreign corruption should be considered more problematic than domestic corruption, and these arguments are based on widely shared premises.

States have a compelling interest in prohibiting international corporate bribery. Not only does international corruption distort government decision making,<sup>34</sup> delegitimize political institutions<sup>35</sup> and reduce administrative efficiency,<sup>36</sup> just like domestic corruption, it also presents an array of special problems, such as wealth transfers,<sup>37</sup> resource extraction<sup>38</sup> and national security issues.<sup>39</sup> Moreover,

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32. See Cohen, *supra* note 24, at 72 (arguing that “the notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal *citizens*”) (emphasis added); Habermas, *supra* note 21, at 1 (defining politics in a competitive democracy as “the *citizens*’ political will-formation”) (emphasis added).

33. See U.S. CONST., art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”); Citizens United v. Fed. Election Comm’n, 130 S.Ct. 876, 911 (2010) (explicitly setting aside the question of whether the government has a “compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process”); 2 U.S.C. § 441e(a)(1) (2006) (prohibiting foreign nationals from making contributions or independent expenditures in connection with a U.S. election).

34. See LESSIG, *supra* note 9, at 226–47. *But see* ANECHIARICO & JACOBS, *supra* note 9, at 174–85 (arguing that prosecution of government corruption may not create a net benefit for the public).

35. See Nye, *supra* note 10, at 422 (arguing that “[b]y destroying the legitimacy of political structures in the eyes of those who have power to do something about the situation, corruption can contribute to instability and possible national disintegration”); Rose-Ackerman, *supra* note 10, at 45.

36. See Caiden & Caiden, *supra* note 11.

37. See Thomas R. Snider & Won Kidane, *Combating Corruption Through*

international corruption creates externalities for other states as well. Criminal organizations that thrive off of corruption, such as Mexican drug cartels or the Russian mafia, export crime to countries around the world.<sup>40</sup> Thus, the harms from international corruption are not limited to the briber nation (the country whose citizens offer the bribe) or the bribee nation (the country whose officials receive the bribe); they extend much more broadly.

Given that international corruption is a kind of “global bad,”<sup>41</sup> we might expect that international anti-corruption legislation would be widespread. Until recently, however, international anti-corruption laws were piecemeal and limited.<sup>42</sup> Indeed, until 1998, many European countries allowed corporations to take tax deductions for bribes to foreign officials.<sup>43</sup> Why, then, have efforts to combat international corruption been so unsuccessful? The answer lies in the

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*International Law in Africa: A Comparative Analysis*, 40 CORNELL INT’L L.J. 691 (2007) (describing the wealth-transferring effects of international corruption in Africa).

38. See Chris Nwachukwu Okeke, *The Second Scramble for Africa’s Oil and Mineral Resources: Blessing or Curse?*, 42 INT’L LAW. 193, 194 (2008) (explaining that the struggle to extract Africa’s natural resources has raised increasing concerns about corruption).

39. Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT’L L. 451 (1999) (arguing that international corruption presents serious national security concerns).

40. Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOREIGN POL’Y, Winter 1996–1997, at 55 (arguing that “[s]ystemic corruption nurtures local criminal organizations and has helped to convert major trading partners such as China, Mexico, and Russia into crime-exporting states”). See also Brewster, *supra* note 14, at 304–05 (describing corruption as a “global bad”).

41. See Brewster, *supra* note 14, at 304.

42. See Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 INT’L LAW. 1259 (2008) (tracing the history of efforts to combat transnational bribery). In recent years, however, more countries have begun to implement FCPA-like corruption laws. In 2010, the United Kingdom enacted its Bribery Act, which some commentators have argued imposes even greater restrictions on companies than the FCPA does. See Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 28 (2011). China has also passed an international corruption law. See Paul R. Berger, *China’s New Push to Combat Foreign Bribery*, FCPA UPDATE (Debevoise & Plimpton LLP, New York, N.Y.), Mar. 2011, at 11, available at <http://www.debevoise.com/newsevents/pubs/publications/detail.aspx?id=d263dadf-70e8-4bbd-b543-00fafbae8044>.

43. See Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORNELL INT’L L.J. 731, 732 (2000).

nature of international cooperation.

### *B. Domestic- and International-Focused Corruption Regulation*

In adopting anti-bribery legislation, states can adopt two approaches. The first is purely domestic: they can prohibit the bribery of domestic politicians. The second is international: they can prohibit the bribery of foreign politicians. The first approach has clearly been the dominant one, and, until recently, the second approach was nearly non-existent.<sup>44</sup>

Purely domestic-oriented legislation has proved ineffectual in combating international bribery for a number of reasons. First, some countries lack the ability to actively monitor corruption and enforce criminal prohibitions.<sup>45</sup> Second, even if countries have the ability to enforce anti-corruption laws, they may lack the will to do so, as the public-sector *demand* for bribes is particularly strong in some countries.<sup>46</sup> Third, multinational corporations are able to circumvent purely domestic anti-corruption laws by either leaving a jurisdiction after completing a transaction or by using economic leverage to dissuade governments from investigating charges of corruption.<sup>47</sup>

For all these reasons, purely domestic anti-corruption legislation may fail to prevent corrupt behavior by corporations and government officials. Most commentators today agree that an effective anti-corruption regime must combine legislation prohibiting domestic corruption with legislation prohibiting foreign corruption.<sup>48</sup> In this regime, a country prohibits individuals and entities from paying bribes to any politicians, whether domestic or foreign. This sort of overlapping regulation reduces the worries about capacity, public-

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44. See Nichols, *supra* note 39, at 453.

45. See Rob Jenkins & Anne-Marie Goetz, *Constraints on Civil Society's Capacity to Curb Corruption: Lessons from the Indian Experience*, 30 IDS BULL. 39 (1999) (arguing that many developing countries lack the capacity to prevent corruption).

46. See Norman D. Bishara, *Governance and Corruption Constraints in the Middle East: Overcoming the Business Ethics Glass Ceiling*, 48 AM. BUS. L.J. 227, 251–53 (2011) (identifying political and economic factors that contribute to cultures of corruption).

47. See V. N. Balasubramanyam, M. Salisu & David Sapsford, *Foreign Direct Investment and Growth in EP and IS Countries*, 106 ECON. J. 92, 98 (1996) (describing the extent of developing countries' dependence on foreign investment).

48. See Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. S141, S158–60 (2002) (explaining how global attitudes about bribery shifted over the course of several decades as a result of interest and value actors).

sector demand and circumvention that plague domestic-level corruption laws, and it provides a more effective disincentive to corporations from engaging in corrupt behavior.

### *C. Structural Problems of International Corruption Regulation*

The implementation of a comprehensive international corruption law, however, faces severe structural problems. If a country prohibits its citizens, including its domestic corporations, from bribing foreign officials, then the cost of bribing will increase for its citizens. If other countries do not implement similar laws, then the regulating country's corporations will be at a competitive disadvantage: they will no longer be able to offer bribes to foreign officials in return for government contracts, but their competitors located in other countries will be able to do so.<sup>49</sup> All else equal, the legislating country's corporations will lose out on business that they would otherwise obtain.<sup>50</sup> To the extent that politicians within a country desire to promote the interests of domestic corporations, they may find this result troubling and therefore hesitate to enact any international anti-

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49. See *id.* at S175–76; Tarullo, *supra* note 15, at 667; Brewster, *supra* note 14, at 304–06.

50. This conclusion depends on some strong assumptions about the behavior of government officials. The conclusion that the bribing company will defeat the non-bribing company is based on a relatively simple rational choice model of legislative behavior, but a number of factors might alter the decisional calculus of the actors. First, the normative beliefs of government officials may change their perceptions regarding the value of bribes. If foreign legislators find the acceptance of bribes morally objectionable, they may not value the bribe highly at all: it is wrong to accept it regardless of its monetary worth. Indeed, to the extent that government officials are constrained by the norms of their profession, they may reject outright the possibility of accepting the bribe in return for favorable treatment of certain interests. Their ideology may trump their material interests. Second, if the foreign country has enacted strong domestic anti-corruption laws that are enforced rigorously, then the cost of accepting the bribe increases. The threat of criminal prosecution may dissuade legislators from accepting bribes or, to the extent that the public demand for bribes persists, the “going rate” for a bribe will increase. Politicians will increase the amount of bribe requested to induce them to commit any particular corrupt act. Third, if the bidding process is sufficiently open and transparent, and government elections sufficiently competitive, then the prospect of deviating from publicly defensible positions becomes less appealing. If the details of all the competing bids are made public, then government officials that are accountable to the public and face re-election may face pressure to award the contract to the highest (public) bidder. If citizens see that an obviously less favorable bid has been accepted, they may punish the incumbent legislators by voting for other candidates. But to the extent that government officials in other countries demand bribes in return for receiving lucrative government contracts or other business, corporations subject to anti-bribery laws may lose out on business to rival corporations that are not subject to them.

corruption legislation without adequate assurance that other countries will enact similar legislation.

These kinds of structural problems are pervasive in international affairs, and there are at least two models for dealing with them. The first focuses on cooperation and the ability of states to credibly commit to abide by their promises. The second focuses on unilateral provision of public goods. This section will analyze each approach and discuss its application to international corporate bribery.

## 1. International Cooperation

The traditional way of solving collective action problems in international relations is cooperation, either through formal treaties or through informal patterns of behavior.<sup>51</sup> In the case of corporate bribery, this might take the form of an international treaty requiring all countries to prosecute corporations for paying bribes to foreign officials, or it might take the form of a tacit agreement for each country to pass domestic legislation to the same effect. Similar commitments could be made on an informal, non-binding basis. This kind of cooperation is possible as long as (1) the states expect to continue to interact over a sufficiently long time period, (2) the states have adequately low discount rates, in that they care enough about future payoffs to sacrifice some amount of present payoffs, and (3) the payoffs from defection are not so high relative to the payoffs from cooperation that changes in circumstances could derail cooperation.<sup>52</sup> If governments from the relevant states can communicate their intention to cooperate with other governments, then some form of durable and robust cooperation on anti-corruption regulation might develop.

Cooperation, however, requires some credible threat of sanctions for non-cooperation. In other words, if a state faces no punishment for violating the terms of the agreement, then it will have no reason to incur the costs of cooperation and forego the benefits of cheating. Punishment may take the form of tit-for-tat violations—that is, if one state violates the agreement, then other states may reciprocate by doing the same. Punishment may also be more indirect, such as the refusal by other states to cooperate on other matters of

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51. See SCOTT BARRETT, *WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS* 47–48 (2007) (describing the kinds of public goods that can be provided only through cooperation, or so-called “weakest link” goods).

52. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1126–27 (1999).



importance to the non-compliant state.<sup>53</sup>

Direct and indirect sanctions are powerful motivations for cooperation in international relations, but there are reasons to doubt their effectiveness in the context of international anti-corruption regulation. First, it is at least questionable whether one state's non-enforcement of anti-corruption norms would provoke tit-for-tat violations by other states. For example, if China refuses to pass anti-corruption laws, or fails to enforce those laws, it is unclear whether the United States would decide to repeal or under-enforce its own anti-corruption laws. Corruption norms may be sufficiently "sticky" to resist tit-for-tat sanctioning.<sup>54</sup>

Second, the threat of sanctions for non-compliance depends on the ability to *identify* incidents of non-compliance. If states cannot monitor the actions of other states, then violations will go unnoticed and unpunished. The free flow of information, then, is essential to cooperation. But bribery does not lend itself to this kind of open exchange of information. States may be able to monitor the enactment of anti-corruption legislation by other states, but legislation without enforcement is ineffectual. States will find it difficult to determine whether another state is actively enforcing its laws because bribery is by its very nature private. Therefore, violations of bribery norms may be essentially unsanctionable.<sup>55</sup>

Thus, international corruption presents a thorny problem. It is arguably more objectionable from a political standpoint than domestic corruption, and yet it is more difficult to regulate. Each country has an interest in preventing corruption, but the first mover puts itself at a disadvantage in comparison with other countries. International corruption may be a global problem that requires a global solution, but the usual mechanisms for cooperation in international relations are ineffectual in the context of corruption regulation.

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53. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 595–96 (2005); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1870 (2002).

54. See Abbott & Snidal, *supra* note 48, at S142.

55. There are a few metrics for determining whether a state is adequately enforcing its anti-corruption laws, including the number of actions brought against corporations for bribery, the amount of resources devoted to anti-corruption units of public prosecutors and the reports of violations by competitor corporations, but these metrics are rather unsophisticated. See FRITZ HEIMANN, GILLIAN DELL & KELLY MCCARTHY, TRANSPARENCY INT'L, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION (2011), available at [http://files.transparency.org/content/download/102/411/file/2011\\_OECDreport\\_EN.pdf](http://files.transparency.org/content/download/102/411/file/2011_OECDreport_EN.pdf).

## 2. Unilateral Regulation

So far, the discussion has assumed that one state cannot alter the payoffs of other states or other states' corporations. When one country outlaws international corporate bribery, we have assumed that those laws apply solely to that country's corporations and thus that foreign companies are free to bribe without the threat of prosecution by the regulating state. To the extent that corporate bribery laws reduce the payoffs from bribery, unilateral disarmament advantages corporations from jurisdictions not subject to anti-bribery laws.

But what if one state passes an anti-bribery law that has *universal* application? That is, what if one state enacts anti-bribery regulations that purport to reach the activities of both domestic and foreign corporations? If these regulations effectively reduce the payoffs from bribery to all the relevant actors in the international corporate bribery game, both foreign and domestic, then they might avoid the adverse consequences of unilateral disarmament and achieve the beneficial consequences of governmental cooperation, without the need for formal international agreement. Unilateral enforcement can therefore be an effective alternative to multilateral cooperation.

One country's enactment of universally applicable corporate bribery laws can also affect the behavior of other governments. Whereas previously each government had an incentive to refrain from passing anti-bribery legislation in order to give its corporations a competitive advantage, now the passage of such legislation does not significantly harm the country's corporations. Those corporations are already subject to bribery laws under another country's laws, and thus the corporations will likely refrain from bribery regardless of home country regulation.<sup>56</sup> Unilateral regulation, then, may reduce international opposition to anti-bribery laws.

Under this model of international corporate bribery, one state unilaterally provides the public good of corruption regulation without the necessity of multilateral cooperation.<sup>57</sup> This model is largely consistent with the predictions of hegemonic stability theory.<sup>58</sup> Heg-

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56. The passage of home country regulation may make it more *likely* that corporations will refrain from engaging in international bribery. If, for example, the universal regulation does not impose a sufficient disincentive to bribery on corporations, then the possibility of additional prosecution at home might provide the cost necessary to make corporations change their minds.

57. See BARRETT, *supra* note 51, at 22–24 (describing “single best efforts” public goods, which can be provided by one actor acting alone).

58. See Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579 (1986); CHARLES KINDLEBERGER, *THE WORLD IN DEPRESSION, 1929–1939* (1974); Charles

emonic stability theory asserts that, in certain circumstances, a single, strongly dominant actor can unilaterally provide public goods to all states.<sup>59</sup> The important insight of hegemonic stability theory is that if one state is sufficiently large,<sup>60</sup> it will be able to capture enough of the benefits from global public goods so as to offset the costs of unilateral provision of those goods.<sup>61</sup> A hegemonic power might also be

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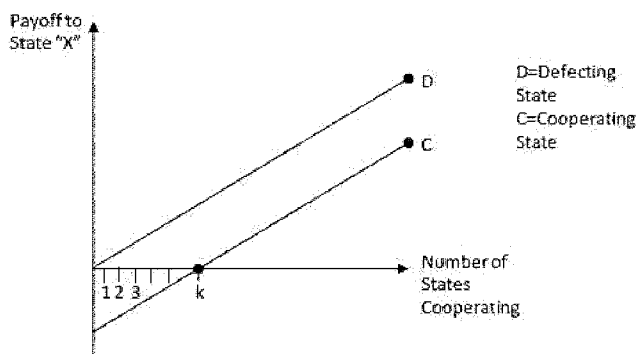
Kindleberger, *Systems of International Economic Organization*, in MONEY AND THE COMING WORLD ORDER (David Calleo, ed., 1976); ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

59. See Snidal, *supra* note 58, at 579.

60. The concept of size in hegemonic stability theory is a complex one, and it is not entirely clear whether size should be determined by relative size compared to other states or absolute size. See Snidal, *supra* note 58, at 585. The important point, though, is that if a state can capture enough of the gains from public goods, they may be willing to provide those public goods, even at significant cost.

61. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). A graphical representation of this concept may prove useful. This model is derived from Duncan Snidal's discussion of size and the problem of international cooperation. *Id.* at 598–602. Figure 1 shows the incentives of states to cooperate or defect in any given issue area. It assumes that cooperation is costly for any particular state but collectively useful. As the figure demonstrates, the benefits of cooperation increase as more states cooperate (the slope of C is rising). Regardless of the number of states cooperating, however, the line D is always higher than the line C, and thus it is always in the interest of any individual state to defect rather than cooperate. If all states follow this logic, they will end up with a payoff of 0. On the other hand, if a group of states equal to or greater than "k" can form a coalition, it may be in the interest of those states to cooperate and provide the public good, as line C crosses the horizontal axis at that point. Those states will do better by cooperating than by not cooperating, even if other defecting states will do even better.

Figure 1

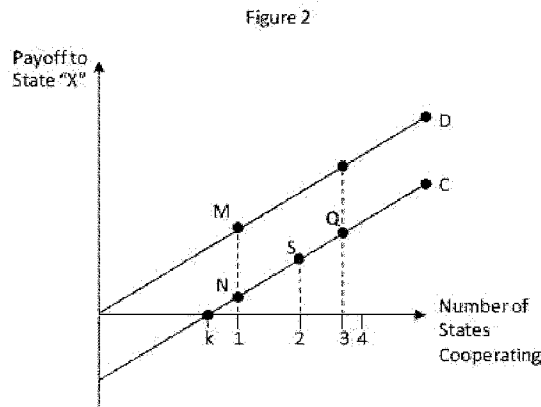


The important insight of hegemonic stability theory is that the relative size of states matters in determining whether states will cooperate. If there is a state that is sufficiently large, then k may be equal to 1.

able to tax other states for its provision of the good.<sup>62</sup>

Two conditions must hold true for the predictions of hegemonic stability theory to apply: first, the hegemonic state must have sufficient incentive to provide the good; and second, the hegemonic state must have the ability to provide the good. A state's willingness to provide a public good unilaterally will be affected by the state's size: if it captures a sufficient portion of the benefits of the public good, relative to the cost of provision, then it will have an incentive to act even without the cooperation of other states. A state's ability to provide the good, on the other hand, depends on the type of good that is being provided.<sup>63</sup> In the context of corruption, it depends on (1) the ability to monitor corporate bribery and (2) the jurisdiction to prosecute and punish corporations that engage in bribery. In other words, only states that can alter the payoffs of foreign corporations will be able to follow the path of unilateral enforcement. Not every state will have these capabilities, but if a state is willing and able to provide the good unilaterally, then the prisoners' dilemma of corpo-

Figure 2 demonstrates that if  $k=1$ , the hegemonic state should be willing to cooperate even if no other states cooperate. If the large state cooperates, it will be able to increase its payoff from 0 to  $N$ . Other states will be able to "free ride" off the hegemon's cooperation and receive even greater payoffs, located at  $M$ . All states are better off by the hegemon's unilateral provision of the public good, assuming that the hegemonic state cannot impose a tax on smaller states to pay for its provision of the good.



If, however, the size of the hegemon declines beneath  $k$ , or if other states believe that  $k$  is greater than 1, then other states, such as states 2 and 3, could potentially be convinced to cooperate with state 1, so as to increase each cooperating state's payoffs to  $S$  or  $Q$  from 0.

62. See ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* 34 (1982).

63. See BARRETT, *supra* note 51, at 20 (categorizing the kinds of public goods and the levels of cooperation required for their provision).

rate bribery might be solved without international cooperation.

## II. THE FCPA AND THE STANDARD ACCOUNT

Despite the strong structural impediments to international corruption regulation, such regulation exists today. The United States acted first, passing the Foreign Corrupt Practices Act (FCPA) in 1977.<sup>64</sup> The FCPA prohibited entities from making payments to foreign officials in return for business.<sup>65</sup> Standard accounts of the FCPA understand the Act as an example of how domestic politics can overcome prisoners' dilemmas and lead to international agreement.<sup>66</sup> The FCPA motivated U.S. corporations to pressure their government to conclude a comprehensive international anti-corruption agreement.<sup>67</sup> This domestic pressure, the story goes, led to negotiation of the OECD Anti-Bribery Convention in 1997, but the Anti-Bribery Convention ultimately did not alter the payoff structure for countries.<sup>68</sup> The standard account thus views the FCPA as a kind of unilateral disarmament. This section will analyze the standard theory of the FCPA and discuss some of the difficulties that the theory faces.

### A. *The Enactment of the FCPA*

The FCPA was an important milestone in the history of international corporate bribery regulation, and the moral significance of its passage should not be overlooked. The FCPA was enacted in the aftermath of the Watergate scandal, and it stood for some time as the only regulation of international bribery by any country in the world.<sup>69</sup> This section will trace the history of the FCPA's enactment and describe its major substantive provisions.

#### 1. The History of the FCPA

The United States might never have passed the FCPA had it

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64. See Yannett, *supra* note 29, at 724.

65. 15 U.S.C. § 78dd-1(a) (2006).

66. See *infra* note 93.

67. See Brewster, *supra* note 14, at 308.

68. *Id.*

69. See Jordan, *supra* note 42, at 42 n.77.

not been for the Watergate scandal. In 1976, when it became widely known that corporations had used slush funds to make illegal political contributions to politicians, Congress and the SEC began to investigate the existence and use of these slush funds.<sup>70</sup> What was uncovered has been described as “the most extensive documentation of business-government corruption ever produced in history.”<sup>71</sup> The main purpose of the corporate slush funds was to pay bribes to foreign officials in order to obtain business in those countries.<sup>72</sup> In one particularly infamous example, Lockheed Corporation paid \$1.8 million in bribes to the Japanese prime minister in order to win a contract for the sale of passenger aircraft.<sup>73</sup> These revelations led to the arrest of the Japanese prime minister and his eventual conviction for securities fraud.<sup>74</sup> By the mid-1970s, over 400 U.S. companies had admitted to paying more than \$300 million in bribes to foreign officials.<sup>75</sup>

In the wake of these disclosures, Congress set out to prevent such behavior in the future. U.S. legislators argued that international corruption had tarnished “the image of American democracy abroad,” impaired “[c]onfidence in the financial integrity of our corporations,” and hampered “[t]he efficient functioning of our capital markets.”<sup>76</sup> They concluded that “[a] strong antibribery law [was] urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business sys-

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70. See Roberta S. Karmel, *Realizing the Dream of William O. Douglas: The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 86–87 (2005).

71. Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT’L L. 345, 350 (2000).

72. The SEC discovered that the large campaign contributions were coming from corporate slush funds that were maintained off the books of the corporations. Corporations would establish the slush funds by making payments to foreign agents or consultants, who would then return the money to the corporation in an off-the-book fund. Only a small portion of these funds went to campaign contributions; the rest went to “questionable payments” to obtain or retain business abroad. Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT’L L. & COMM. 235, 235 (1982). See also David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT’L L. & BUS. 457, 459 (1998).

73. See Daniel Mabrey, *Lockheed Bribing Scandal*, in ENCYCLOPEDIA OF WHITE-COLLAR CRIME 175–76 (Jurg Gerber & Eric L. Jensen, eds. 2007).

74. See James Sterngold, *Kakuei Tanaka, 75, Ex-Premier and Political Force in Japan, Dies*, N.Y. TIMES, Dec. 17, 1993, at B14.

75. See H.R. REP. NO. 95-640, at 4 (1977).

76. S. REP. NO. 95-114, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4101.

tem.”<sup>77</sup>

The Senate and House of Representatives passed the FCPA without a single vote in opposition, making the United States the first country to prohibit its nationals from bribing foreign officials.<sup>78</sup> Notably, when signing the Act into law, President Jimmy Carter also signaled his worries about the potential consequences of being the first mover. Carter encouraged other nations to make progress on the negotiation of a multilateral anti-corruption treaty, stating that the effort to combat corporate bribery overseas “can only be fully successful . . . if other countries and business itself take comparable action.”<sup>79</sup> The emphasis on global cooperation would be a constant refrain over the next twenty years.

## 2. The Structure of the FCPA

The structure of the FCPA is relatively simple. It targets international corporate bribery through two general provisions: first, an anti-bribery provision; and second, an accounting and financial controls provision. Individuals and corporations that violate the provisions are subject to substantial criminal and civil sanctions.<sup>80</sup>

### *i. Anti-Bribery Provisions*

The anti-bribery provisions prohibit U.S. issuers and domestic concerns from making or promising to make payments, either directly or indirectly, of money or anything of value to a foreign official, party or party official or candidate, with corrupt intent, in order to obtain or retain business.<sup>81</sup> An “issuer” is defined as a company that has registered securities or that is required to file reports with the

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77. *Id.* at 4.

78. See Yannett, *supra* note 29, at 724.

79. Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill, 2 PUB. PAPERS 2157 (Dec. 20, 1977).

80. 15 U.S.C. §§ 78dd-2(g)(2), 78ff(c)(2) (2006).

81. 15 U.S.C. § 78dd-1(a). The FCPA notably does not prohibit the *acceptance* of bribes by foreign officials. Thus, it deals solely with the supply-side of bribes, not the demand-side. See *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) (concluding that the government could not “refute the overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes, especially since Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power”).

SEC.<sup>82</sup> A “domestic concern” is defined as a “citizen, national, or resident of the United States” and “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.”<sup>83</sup> In 1998, the FCPA was amended to extend its application to any person, including foreign persons, as long as an act in furtherance of the violation is committed in the United States.<sup>84</sup>

The Act exempts “grease payments,” or payments solely intended to “expedite or secure the performance of a routine governmental action,” from the bribery prohibition.<sup>85</sup> It also includes two affirmative defenses. The first defense applies if the payment was lawful under the laws of the foreign official’s country.<sup>86</sup> The second defense applies if the payment was a “reasonable and bona fide expenditure” directly related either to the promotion and demonstration of products and services or to the execution and performance of a contract with a foreign government.<sup>87</sup>

#### *ii. Accounting Provisions*

The accounting provisions require issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”<sup>88</sup> In effect, this means that corporations must use “generally accepted accounting principles” when they record their transactions.<sup>89</sup> The accounting provisions are animated by a desire to prohibit corporations from disguising inappropriate payments through inaccurate financial reporting, a practice that was quite frequent in the pre-Watergate era.<sup>90</sup> Some commentators have described the

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82. 15 U.S.C. § 78dd-1(a).

83. 15 U.S.C. § 78dd-2(h)(1)(A)–(B).

84. 15 U.S.C. § 78dd-3(a).

85. 15 U.S.C. § 78dd-1(b).

86. 15 U.S.C. § 78dd-1(c)(1).

87. 15 U.S.C. § 78dd-1(c)(2).

88. 15 U.S.C. § 78m(b)(2)(A).

89. S. REP. NO. 95-114, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4105.

90. See Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT’L L. & BUS. 269, 274



reach and impact of the accounting provisions as “extraordinarily potent,” as violations of the accounting provisions are easier to prove than violations of the bribery provisions.<sup>91</sup>

The passage of the FCPA marked a watershed moment in the history of anti-corruption legislation. Before 1976, countries had fought corruption through purely domestic anti-bribery laws: they prohibited individuals from paying bribes to their own government officials. With the FCPA, however, the United States became the first country to adopt an international approach to fighting corruption, one in which they prohibited domestic concerns, and later foreign individuals, from bribing *foreign* officials. U.S. corporations were thereby prohibited from going abroad and engaging in the kinds of corrupt behavior that would be illegal at home. The United States stood largely alone in this effort until a multilateral treaty, the OECD Anti-Bribery Convention, was concluded in 1998.<sup>92</sup>

### *B. Standard Accounts of the FCPA*

Once the FCPA entered into force, an important question arose for international corruption theorists. How did the unilateral enactment of international anti-bribery laws by one state affect the preferences of other states regarding corruption? In other words, now that the United States had indicated that it would prosecute domestic concerns if they bribed foreign officials, how would this impact the incentives of other countries and their corporations with respect to international corruption? Would it create pressure for other countries to follow suit and enact anti-bribery laws, or would it do the opposite, further entrenching opposition to anti-corruption regulation?

The standard account of the FCPA begins with the assertion that the FCPA placed American corporations at a disadvantage in comparison with foreign-based firms.<sup>93</sup> By imposing civil and crim-

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(1998) (“Bribery needs secrecy in order to flourish. Thus, I theorized that requiring the disclosure of all bribes paid would, in effect, foreclose that activity.”).

91. See Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 493 (2006).

92. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998) (entered into force Feb. 13, 1999) [hereinafter OECD Anti-Bribery Convention].

93. See David Chaikin, *Extraterritoriality and the Criminalization of Foreign Bribes*, in CORRUPTION: THE ENEMY WITHIN 285, 289–90 (Barry Rider ed., 1997); Abbott & Snidal,

inal fines on U.S. corporations that make payments to foreign officials in order to obtain or retain business, the FCPA increases the cost of bribery for U.S.-based companies.<sup>94</sup> Foreign competitors, on the other hand, would not face this increased cost and, indeed, in many countries could actually deduct the cost of bribes as a business expense.<sup>95</sup> Thus, to the extent that foreign officials demanded or were swayed by bribes, U.S. corporations faced steep obstacles to winning foreign government contracts when foreign corporations provided competing bids. Under this model, the passage of the FCPA represented unilateral disarmament by the United States.

The competitive constraints that U.S. corporations faced under the FCPA caused U.S. companies to adopt a two-pronged strategy, both prongs of which aimed at leveling the international playing field. First, U.S. companies agitated for the amendment or repeal of the Act, as a way of reducing the increased costs of bribery to domestic companies.<sup>96</sup> With international corruption de-criminalized, U.S. corporations would no longer face higher bribery costs than their foreign rivals and could thus compete more effectively. Second, and in the alternative, they pressured the U.S. government to negotiate a multilateral anti-corruption treaty in order to impose the same additional costs of bribery upon foreign corporations.<sup>97</sup> A multilateral anti-corruption treaty would force all countries to prohibit international corruption, and thus foreign rivals would no longer have lower costs of bribery than U.S. companies.

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*supra* note 48, at S162; Brewster, *supra* note 14, at 303–11; Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634, 635 (2008); Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism*, 67 N.Y.U. ANN. SURV. AM. L. 497, 498 (2012); Leiken, *supra* note 40, at 70; Lucinda A. Low, *Transnational Corruption: New Rules for Old Temptations, New Players To Combat a Perennial Evil*, 92 AM. SOC'Y INT'L L. PROC. 151, 153 (1998); Tarullo, *supra* note 15, at 675–76. It should be noted that the standard account does not represent the *only* account of the FCPA. Practitioners, in particular, have been in the vanguard of identifying and describing the growing trend of foreign prosecutions under the FCPA. See Kimberly A. Parker, *Anti-Corruption Enforcement: Trends and Analysis 2010–2011*, in WHITE COLLAR CRIME 2011: PROSECUTORS AND REGULATORS SPEAK (PLI Corp. L. & Prac., Course Handbook Series No. 28257, 2011).

94. See Low, *supra* note 93, at 152; Paul B. Stephan III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133, 140–41 (1990).

95. In 1997, half of the member states of the OECD allowed corporations to deduct bribes to foreign officials as business expenses. See Leiken, *supra* note 40, at 70; Windsor & Getz, *supra* note 43, at 732.

96. See Brewster, *supra* note 14, at 308.

97. *Id.*

The first prong of attack against the FCPA, that of weakening or repealing the Act, failed to garner Congressional support.<sup>98</sup> Existing literature identifies two key reasons for this failure. First, not all corporations backed the effort to repeal the FCPA.<sup>99</sup> Some corporations believed that an anti-corruption law was actually *good* for business because it forced corporations to operate efficiently and compete honestly.<sup>100</sup> As one observer noted:

there was a concern that U.S. business did not know what was good for itself, and to continue along these lines, relying on bribery, was not in the best interest of U.S. business. We had to develop the strength to compete based on quality of product and not on our ability to make a payment in a black bag.<sup>101</sup>

Without sufficient support from the broader corporate sector, multinational corporations leading the charge to repeal the FCPA failed to exert real pressure on Congress. Second, some scholars have explained the failure of efforts to weaken the FCPA as a triumph of values.<sup>102</sup> Even if the FCPA harmed the interests of U.S. corporations, the anti-corruption norm was sufficiently “sticky” to make repeal an unrealistic option. No legislator would vote in favor of a bill that appeared to encourage corruption abroad.<sup>103</sup>

The second prong of attack, that of negotiating an international treaty, achieved more success. This approach had broad support from the U.S. business community.<sup>104</sup> President Carter himself had

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98. In 1988, Congress amended the FCPA to clarify the meaning of several provisions and, in particular, the meaning of key accounting provisions. These amendments, however, did not significantly alter the statutory framework described above. See Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L L. 755 (1989).

99. See Brewster, *supra* note 14, at 308.

100. See Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393, 427 (2011); Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 442–46 (1997).

101. Timmeny, *supra* note 72, at 238.

102. See Abbott & Snidal, *supra* note 48, at S162.

103. It should be noted that the values dynamic at play here is not necessarily acting directly on legislators. As Abbott and Snidal explain it, “[v]alues (whether held by the legislators themselves or by value actors in their constituencies) proved an insurmountable constraint.” *Id.*

104. See Tarullo, *supra* note 15, at 675; Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 GLOBAL

remarked when signing the FCPA that the Act would be ineffectual without multilateral cooperation.<sup>105</sup> Legislators recognized that without reciprocal anti-corruption laws in other countries, bribery might simply shift abroad, where countries continued to condone the payment of bribes to foreign officials. The prospect of leveling the playing field for U.S. corporations by raising the standards of honesty and fair dealing in other countries, rather than lowering them in the United States, was more palatable to U.S. government officials and the business community.<sup>106</sup>

This confluence of values-based and interest-based motivations led the U.S. government to attempt to conclude an international agreement regulating transnational bribery.<sup>107</sup> These efforts were largely unsuccessful for two decades. The standard account attributes the failure of these efforts to the competitive advantage that the FCPA had given to foreign corporations.<sup>108</sup> The U.S. government had unilaterally disarmed by adopting the FCPA, and its subsequent behavior demonstrated that the FCPA would not be repealed.<sup>109</sup> At the same time, governments abroad faced pressure to maintain the comparative advantage of their corporations: European officials openly acknowledged that their corporations “needed a competitive edge over their more efficient U.S. competitors.”<sup>110</sup> As mentioned above, unilateral disarmament increases the payoffs from bribery for other parties, and higher payoffs from non-cooperative behavior lower the prospects for cooperation. Therefore, the United States had less leverage to negotiate an international agreement, and foreign governments faced pressure to maintain the competitive advantage of their corporations.

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GOVERNANCE 25, 41 (2001).

105. See Statement on Signing, *supra* note 79, at 2157.

106. In the 1988 amendments to the FCPA, Congress noted the importance of concluding an international agreement. The amendments included a provision stating that:

[i]t is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section.

Section 5003(d) of the Foreign Corrupt Practices Act Amendments of 1988, Section 5003(d), PUB. L. NO. 100-418, 102 STAT. 1415. See also Abbott & Snidal, *supra* note 48, at S162; Tarullo, *supra* note 15, at 676 n.31.

107. See Abbott & Snidal, *supra* note 48, at S162.

108. See Brewster, *supra* note 14, at 308–09.

109. Tarullo, *supra* note 15, at 677.

110. *Id.* at 674 n.26.

By the mid-1990s, however, international opposition to an anti-bribery treaty weakened, and negotiations at the OECD made progress.<sup>111</sup> Scholars have identified a number of reasons for this shift. First, the U.S. government began to link the conclusion of an international agreement to other issues, communicating to its partners that progress on issues of importance to other countries would stall until a treaty was concluded.<sup>112</sup> Second, a series of national corruption scandals in Europe contributed to a shift in public opinion regarding international corruption, forcing or at least encouraging European governments to act on this issue.<sup>113</sup> Third, the rise of globalization increased the economic and social costs of corruption for developing countries, and developing countries themselves began to press for an international agreement.<sup>114</sup> Fourth, the cost of adopting anti-corruption legislation decreased, as the fall of the Soviet Union and the opening of formerly Communist countries to the free market increased competition for capital from international financial institutions, institutions with robust anti-corruption compliance programs that already prohibited the payment of bribes.<sup>115</sup>

These changes in interests and values led to the eventual conclusion of the OECD Anti-Bribery Convention, a multilateral agreement requiring its members to criminalize the making of payments to foreign officials in order to obtain or retain business or other improper advantages.<sup>116</sup> By its terms, the agreement should have solved the prisoner's dilemma of international corruption: all the members collectively agreed to prohibit their nationals from making bribes abroad, and thus no country needed to worry about foreign corporations gaining the upper hand by bribing foreign officials.<sup>117</sup> Presum-

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111. *Id.* at 677–78.

112. *Id.*

113. *Id.* at 678–79; Brewster, *supra* note 14, at 309; Abbott & Snidal, *supra* note 48, at S164; Patrick Glynn, Stephen J. Kobrin & Moises Naim, *The Globalization of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 7, 21 (Kimberly Ann Elliott ed., 1997); Benjamin W. Heineman, Jr. & Fritz Heimann, *Arrested Development: The Fight Against International Corporate Bribery*, 92 NAT'L INTEREST 80, 81 (2007).

114. See Tarullo, *supra* note 15, at 679; Wang & Rosenau, *supra* note 104, at 34–35; GEORGE MOODY-STUART, GRAND CORRUPTION: HOW BUSINESS BRIBES DAMAGE DEVELOPING COUNTRIES 41 (3d ed. 1997).

115. See Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 17 (1999).

116. OECD Anti-Bribery Convention, *supra* note 92, art. 8.

117. See generally *id.*

ably, U.S. corporations would no longer be at a competitive disadvantage.

The Anti-Bribery Convention, however, has suffered from severe under-enforcement by its member-states.<sup>118</sup> Treaty members lacked either the desire or the ability to prosecute their own nationals in a robust way.<sup>119</sup> Without a credible commitment by the home countries of multinational corporations to prosecute incidents of bribery abroad, these companies had no reason to alter their behavior.

For current scholars, the passage of the Anti-Bribery Convention did not change the overall interests of governments because the compliance pull of the Anti-Bribery Treaty was low. Some explain the weakness of the Convention as merely another example of the weakness of international law: states make rational decisions and compliance with international law, in the absence of the threat of credible sanctions for non-compliance, has little value for them.<sup>120</sup> Others point to the structural weaknesses in the treaty itself: compliance with the treaty is difficult to monitor, as corruption is by its very nature a secretive enterprise.<sup>121</sup> If other countries cannot identify and punish violations of the Convention, then absent some change in the payoff structure, the treaty is unlikely to force countries to change their behavior.<sup>122</sup> As long as countries fail to enforce their interna-

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118. See Brewster, *supra* note 14, at 309; Tarullo, *supra* note 15, at 680–90; David L. Heifetz, *Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective Than the U.S. Foreign Corrupt Practices Act*, 11 PAC. RIM L. & POL'Y J. 209 (2002); Daniel Patrick Ashe, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2915–16 (2005). From 2000 to 2010, the United States brought more than 3.5 times more foreign bribery enforcement actions than all other countries combined. See TRACE, GLOBAL ENFORCEMENT REPORT 4 (2011), available at <http://www.ibe.org.uk/userfiles/globalenforcementreport2011.pdf>.

119. See Brewster, *supra* note 14, at 309; Tarullo, *supra* note 15, at 683. According to Transparency International, the major enforcement-related problems that countries face include inadequate resources, decentralized or uncoordinated enforcement, lack of coordination between investigation and prosecution, lack of specialized training, and inadequate complaints systems and/or whistle-blower protections. See Heimann, Dell & McCarthy, *supra* note 55, at 10–11.

120. *Id.*

121. Tarullo, *supra* note 15, at 689.

122. *Id.* This argument assumes that the act of promising to abide by international legal norms does not carry with it an inherent compliance pull. This assumption is not universally accepted, and a number of scholars from across the political spectrum have identified mechanisms by which international law may exert pressure on countries to comply. See Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113 (2003); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW

tional anti-corruption laws, corporations from those countries will not see a rise in the cost of bribing foreign officials and will continue to bribe at rates similar to those seen before the conclusion of the Anti-Bribery Convention.

The premise of the standard account is that the FCPA put American corporations at a disadvantage in international business transactions because it made it impossible, or at least highly risky, for them to bribe foreign officials, while competitors abroad could continue to engage in these practices without fear of prosecution. This situation, however, caused U.S. corporations to change their behavior. By putting American corporations at a disadvantage, the FCPA had also created a strong interest group within the United States in favor of an international agreement: if U.S. corporations could not repeal the FCPA in order to create a level playing field, they wanted to make sure that their foreign competitors faced similar restrictions. The U.S. government responded to this interest group pressure by negotiating the OECD Anti-Bribery Convention, which committed its signatories to outlawing the bribery of foreign officials. As explained above, however, the Convention failed to change the payoff structure of other countries. Other countries continued to tacitly permit the bribery of foreign officials, while the United States continued to engage in aggressive anti-bribery efforts. This situation left U.S. corporations, in an important sense, in the same position: they still faced a competitive disadvantage in the effort to win lucrative government business and contracts abroad.

### *C. Criticisms of the Standard Account*

This story about the FCPA and its effects on international corporate bribery has intuitive appeal and is, in many ways, quite convincing. Domestic regulations can and do impose costs on business, and these costs can affect the competitiveness of those businesses internationally. But the standard account raises a number of questions that it fails to answer, and these questions create the suspicion that some important explanatory factor has been overlooked.

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WORKS: A RATIONAL CHOICE THEORY (2008); Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT'L ECON. L. 81 (2006); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT'L L. 839 (2012).

## 1. Lack of Empirical Evidence

First, current theory relies on the assumption that the enactment of the FCPA in fact put U.S. corporations at a competitive disadvantage with respect to foreign competitors in the market for international business transactions.<sup>123</sup> U.S. corporations have complained for years that they face severe impediments to securing international business deals because they face FCPA liability.<sup>124</sup> Given the nearly universal acceptance by scholars and companies of this proposition, one might expect that there would be strong empirical evidence for this claim. But the opposite is true. Empirical studies of the effect of the FCPA on U.S. business have been decidedly mixed.<sup>125</sup> If the FCPA places U.S. corporations at a significant disadvantage, then why have empirical studies had such a difficult time finding an effect on U.S. business?

One response might be that U.S. corporations are so much

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123. See Brewster, *supra* note 14, at 307 (“After the passage of the FCPA, American firms faced a significant disadvantage when competing for international contracts.”); Tarullo, *supra* note 15, at 667 (describing the “systematic disadvantages of U.S. multinationals”); Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT’L & COMP. L. 289 (1994).

124. See Glynn, Korbin & Naim, *supra* note 113, at 18; Glenn A. Pitman & James P. Sanford, *The Foreign Corrupt Practices Act Revisited: Attempting to Regulate Ethical Bribes in Global Business*, 30 INT’L J. PURCHASING & MATERIALS MGMT. 15 (1994); JYOTI N. PRASAD, IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977 ON U.S. EXPORTS (1993).

125. Some find that the FCPA has had no competitive effect on U.S. business. See John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. INT’L BUS. STUD. 107 (1984) (finding no evidence that the U.S. share of exports to bribery-prone countries had declined after the FCPA was enacted); Shang-Jin Wei, *How Taxing Is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1 (2000) (finding that U.S. investors are not significantly less likely to invest in corrupt countries than other investors); Beata Smarzynska & Shang-Jin Wei, *Corruption and Composition of Foreign Direct Investment: Firm-Level Evidence* (Nat’l Bureau of Econ. Research, Working Paper No. 7969, 2000), available at <http://www.nber.org/papers/w7969> (finding that US investors are not more sensitive than other investors to corruption in the host country). Others find that the FCPA has hurt the United States in certain markets but not others. See Paul J. Beck, Michael W. Maher & Adrian E. Tschoegl, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL & DECISION ECON. 295 (1991) (finding that the FCPA had no effect on U.S. exports to Latin America, but a negative effect on U.S. exports to non-Latin American countries). Others find that the FCPA has negatively affected the competitiveness of U.S. business. See James R. Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977* (Nat’l Bureau of Econ. Research, Working Paper No. 5266, 1995), available at <http://www.nber.org/papers/w5266.pdf> (finding that the FCPA caused U.S. business activities in bribe-prone countries to decline).



more competitive than their foreign rivals that, even with the increased costs of bribery and the structural disadvantage that imposes on U.S. corporations, they still win international contracts. But the mechanisms by which this might work have not been fully worked out. If a U.S. company offers to build a highway for \$500 million and fails to bribe, while a foreign company offers to build a highway for \$600 million and pays bribes of \$50 million, it is unclear what would induce a bribe-prone official to award the contract to the U.S. company. Even if the U.S. company became more efficient and could build the highway for \$250 million, it would likely still be in the official's interest to take the \$50 million bribe from the foreign company. Unless there is some method of public oversight and domestic pressure, increased competitiveness would not overcome the effects of the FCPA.

Thus, empirical research on the FCPA undermines the assertion that the FCPA puts U.S. corporations at a disadvantage, an assertion on which many corruption theorists rely. Without strong empirical evidence of the FCPA's anti-competitive effect, there are reasons to be skeptical about the standard account.

## 2. Lack of Sanctions for Non-Compliance

Current theory also fails to explain why the non-compliance of treaty partners with the obligations of the OECD Anti-Bribery Convention has not led to a change in behavior by the United States. Many scholars have noted that the signatories of the Anti-Bribery Convention have under-enforced the criminal prohibition on international corruption.<sup>126</sup> Indeed, prosecutions have been few and far between: by 2004, only one country (other than the United States) had

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126. See Brewster, *supra* note 14, at 309 (“Compliance with the OECD treaty is lacking because governments see an advantage to cheating on the agreement.”); Tarullo, *supra* note 15, at 680–90 (“The obvious explanation for the lack of prosecutions [for international bribery] is that OECD members lack either the will or the capacity to meet their obligations.”); Heifetz, *supra* note 118, at 209 (“[T]he Japanese legislative efforts [to enforce the OECD Anti-Bribery Convention] to date are not in keeping with the spirit of the OECD Convention and are probably insufficient to meet the Convention’s standards.”). *But see* Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT’L BUS. STUD. 807 (2006) (finding that signatories of the Anti-Bribery Convention invest less in countries with high levels of corruption than do non-signatories). For a description of the tradeoffs between form and substance of international agreements, and the rationales for weak monitoring of international commitments, see Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 582 (2005) (arguing that “the widespread preference for contracts often unduly weakens the substance and structure of multilateral agreements when states are uncertain about compliance costs”).

initiated a prosecution for overseas bribery.<sup>127</sup> By 2012, enforcement has improved slightly, but Transparency International has concluded that 21 of the 37 member states have little or no enforcement of the Convention's obligations.<sup>128</sup> The United States, on the other hand, continues to actively enforce the FCPA's prohibitions and has actually ramped up prosecutions in recent years.<sup>129</sup> But why has the failure by other countries to live up to their obligations under the Anti-Bribery Convention not led to a reaction by the United States? Basic game theory asserts that violations of cooperative agreements can be deterred by a tit-for-tat strategy.<sup>130</sup> Thus, one might expect the United States to react to continued non-compliance by its treaty partners with a non-cooperative move, such as relaxed enforcement.<sup>131</sup> Instead, it has done the opposite.

One explanation is that the United States would *like* to respond to the non-cooperation of its treaty partners with reciprocal non-cooperation, but that it simply does not have that option. The executive branch is not in the business of telling its prosecutors to ignore the law.<sup>132</sup> More importantly, anti-corruption norms are sufficiently "sticky" to make under-enforcement of those norms deeply problematic, both morally and politically.<sup>133</sup> No administration

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127. And that prosecution was brought by Canada against a Canadian company for bribing a U.S. customs official in order to gain advantage over another Canadian company. See Robert Remington, *Alberta Oilfield Firm Faces Bribery Charges*, NAT'L POST (Toronto), July 3, 2002, at A8.

128. See Heimann, Dell & McCarthy, *supra* note 55, at 5.

129. See Ivonne Mena King, Alexander J. Kramer & Lori A. Rubin, *Ever Expanding FCPA Enforcement: Lindsey and Tenaris*, in WHITE COLLAR CRIME 2011: PROSECUTORS AND REGULATORS SPEAK 371 (PLI Corp. L. & Prac., Course Handbook Series No. 28257, 2011); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010).

130. A tit-for-tat strategy is one in which an actor begins with a cooperative move and then does whatever the other actor did on the previous move. Thus, if the other actor cheats on one move, then the actor will cheat on the next move. See Richard Axelrod, *The Evolution of Strategies in the Iterated Prisoner's Dilemma*, in GENETIC ALGORITHMS AND SIMULATED ANNEALING (Lawrence Davis ed., 1987).

131. *But see* Guzman, *supra* note 53, at 588–89 (arguing that direct sanctions for violations of international agreements are rare and that reputational sanctions are more common). See also Guzman, *A Compliance-Based Theory of International Law*, *supra* note 53, at 1823.

132. *But see* David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES, Oct. 20, 2009, at A1 (describing the Department of Justice's decision to refrain from prosecuting people who use marijuana for medical purposes and medical marijuana distributors in states that have legalized medical marijuana use).

133. See Abbott & Snidal, *supra* note 48, at S142. In addition, a report by the

would want to defend a policy allowing corporations to bribe governments around the world. Another response is that international corruption's importance as a political issue has waned since the Anti-Bribery Convention's conclusion. Domestic interest groups lobbied the U.S. government to negotiate an international agreement, and the agreement's conclusion may have been enough to diffuse that pressure. Enforcement efforts are less visible and thus may not motivate the same kinds of political coalitions that international negotiations do.<sup>134</sup> These explanations, however, are inconsistent. The first claims that international corruption is too important to ignore, while the other asserts that it is too trivial to monitor. Similarly, they both presume that the United States has not actually sanctioned states for violations, a curious assumption that will be explored further in the following section.

### III. THE FCPA AS A UNILATERAL ENFORCEMENT MECHANISM

The conventional model of the FCPA as unilateral disarmament by the United States has one fatal flaw: it fundamentally misunderstands the international anti-corruption game because it fails to grasp the extraterritorial elements of the FCPA. The FCPA's ambitiously extraterritorial jurisdictional provisions extend the Act's prohibitions to any corporation that issues stock on a U.S. stock exchange, has American depository receipts trading in the United States, engages in any part of the bribery transaction in the United States or utilizes U.S. banks to facilitate any bribery transaction.<sup>135</sup>

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Committee on International Business Transactions of the New York City Bar has suggested that the intensified enforcement of the FCPA may be explained by the personal incentives of U.S. prosecutors eager to "perform." Committee on International Business Transactions, *The FCPA and Its Impact on International Business Transactions: Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?* 17–18 (Dec. 2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf> [hereinafter IBT Report].

134. See Tarullo, *supra* note 15, at 689–90.

135. See H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239 (2001). Formally, the prosecutions of foreign corporations under the FCPA are not "extraterritorial" because they are based on the presence of the corporation in the United States. However, they involve actions that occur primarily abroad and actors that are located primarily abroad, and thus their effects are extraterritorial. See Minodora D. Vancea, *Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?*, 53 DUKE L.J. 833, 833 (2003) (defining extraterritorial jurisdiction as the regulation of activities "where (1) the

Thus, the FCPA's jurisdictional reach is wide and attaches to many foreign corporations. Just as importantly, the United States has increasingly used these broad jurisdictional provisions to aggressively prosecute foreign corporations for foreign bribery, even when the bribery has little or no tie to the United States.<sup>136</sup>

This facet of the FCPA has been largely overlooked in existing literature, and it fundamentally changes the strategic situation of the actors in the system. This section develops a revised model of the international anti-corruption regime incorporating the extraterritoriality feature of the FCPA. Under this model, contrary to the standard account, the FCPA acts as a unilateral enforcement mechanism for international corporate bribery norms.

### *A. Extraterritorial Reach of the FCPA*

The U.S. capacity to regulate international corporate bribery unilaterally depends crucially on the extraterritorial application of U.S. law. If corporations could easily evade U.S. laws by moving their conduct offshore, then the FCPA might well have a limited effect on overall bribery rates. In order to avoid this dynamic, U.S. regulators have attempted to extend the FCPA's prohibitions to corporations operating abroad. But extraterritorial enforcement of the FCPA against foreign corporations is limited by restrictions imposed under both international and domestic law. By examining the extraterritorial application of the FCPA, this section will demonstrate the long reach of U.S. law and the consequent constraints faced by foreign corporations.

#### 1. Bases of Jurisdiction Under International Law

Under customary international law, states may exercise legislative jurisdiction under either territoriality-based or nationality-

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conduct at issue occurs within the U.S., but its effects take place abroad; (2) the conduct occurs abroad, but its effects take place in the U.S.; or (3) both the conduct and its effects occur abroad"). These kinds of assertions of jurisdiction have, thus, been referred to as "extraterritorial territoriality." See Chris Brummer, *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 U. CIN. L. REV. 499, 504–06 (2010).

136. See Garrett, *supra* note 17, at 1800. One might contrast this state of affairs with the Supreme Court's decision in *Morrison*, which significantly cut back on the extraterritorial application of U.S. securities laws. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869, 2878 (2010).

based grounds.<sup>137</sup> It is widely accepted that a state, under territorial jurisdiction, may regulate events taking place in or persons located in its own territory.<sup>138</sup> The full extent of territorial jurisdiction, including the question of whether a state may regulate acts taking place outside its territory but causing effects inside its territory, is debated, but the basic elements of territoriality are well-established and serve as the primary basis for jurisdiction in international law.<sup>139</sup> Nationality-based jurisdiction, on the other hand, gives a state the power to regulate the activity of its own citizens abroad.<sup>140</sup> Even if a prohibited action occurs in another state's territory, a state may prohibit the action if it was perpetrated by a citizen.<sup>141</sup> Another important basis for jurisdiction is the "passive personality" principle, under which a state may exercise jurisdiction over extraterritorial actions that affect

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137. Territorial jurisdiction and nationality jurisdiction are the most widely used bases for prescriptive jurisdiction. Other forms of jurisdiction include universal jurisdiction, passive personality jurisdiction, and protective principle jurisdiction. See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 355–61 (2010). But see *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7) (suggesting that states need no jurisdictional basis for legislative jurisdiction and that, in the absence of explicit limits, they may extend their jurisdiction to any acts anywhere). Universal jurisdiction refers to a state's power to prosecute certain crimes of universal concern wherever they occur. Examples include piracy, the slave trade and the hijacking of airplanes. Although universal jurisdiction is a powerful prosecutorial tool, it is limited to certain specified offenses and judges are reluctant to extend it to new ones. See Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168 (Stephan Macedo, ed., 2004). My focus here will be on prescriptive jurisdiction, that is, the state's power to make its law applicable to particular persons, not enforcement jurisdiction, which refers to the state's power to enforce its laws. Enforcement jurisdiction may also be problematic when prosecuting foreign corporations because foreign corporations may not have sufficient "minimum contacts" with the forum state to justify *in personam* jurisdiction. See Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 447 (2009).

138. See INT'L BAR ASS'N, *Report of the Task Force on Extraterritorial Jurisdiction* 11 (2009), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E> [hereinafter IBA Report] ("The starting point for jurisdiction is that all states have competence over events occurring and persons . . . present in their territory. This principle, known as the 'principle of territoriality,' is the most common and least controversial basis for jurisdiction.").

139. See OPPENHEIM'S INTERNATIONAL LAW § 143, at 485 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); IBA Report, *supra* note 138, at 12.

140. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

141. *Id.*

their nationals.<sup>142</sup> The most common example of this basis for extra-territorial jurisdiction is in response to terrorist acts abroad injuring or killing a state's citizens.<sup>143</sup>

Customary international law places certain limits on a state's ability to exercise jurisdiction. As the *Restatement (Third) of Foreign Relations Law* states, "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."<sup>144</sup> Whether an exercise of jurisdiction is "reasonable" depends on a number of factors, including the link of the activity to the territory of the regulating state, the connections between the regulating state and the person responsible for the regulated activity, the character of the activity to be regulated and the interest of other states in the activity.<sup>145</sup>

## 2. Statutory Basis for Extraterritoriality Under the FCPA

The FCPA asserts jurisdiction over corporations based both

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142. *Id.*, § 402 cmt. G. See also IBA Report, *supra* note 138, at 146–49 (describing the controversial nature of the passive personality principle).

143. See Vaughan Lowe, *Jurisdiction*, in INTERNATIONAL LAW 351 (Malcolm D. Evans ed., 2006).

144. RESTATEMENT, *supra* note 140, § 403(1).

145. The Restatement lists eight factors:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

*Id.* at § 403(2).

on territoriality and nationality: if any portion of a prohibited transaction takes place in the United States *or* if any participant in a prohibited transaction is a U.S. resident, then the U.S. government has jurisdiction to prosecute.<sup>146</sup> Originally, the statutory language applied the Act only to (i) issuers and (ii) domestic concerns.<sup>147</sup> An “issuer” is defined as a company that has registered securities or that is required to file reports with the SEC.<sup>148</sup> A “domestic concern” is defined as a “citizen, national, or resident of the United States” and “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.”<sup>149</sup> The FCPA’s jurisdictional reach was broadened in 1998 in order to comply with the OECD Anti-Bribery Convention, which directed signatories to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory.”<sup>150</sup> Thus, the FCPA now also applies to a third category: any person, including foreign persons, if an act in furtherance of the violation is committed in the United States.<sup>151</sup>

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146. See Brown, *supra* note 135, at 278–79.

147. See *id.* at 258–59.

148. 15 U.S.C. § 78dd-1(a) (2006).

149. 15 U.S.C. § 78dd-2(h)(1)(A)–(B).

150. OECD Anti-Bribery Convention, *supra* note 92, art. 4.

151. Section 78dd-3(a) provides that:

[i]t shall be unlawful for any person other than an issuer that is subject to section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to [a foreign official] . . . in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

The “act in furtherance” requirement is quite minimal. A sufficient nexus between the prohibited activity and the United States can be established from the use of the mails or means of interstate commerce. 15 U.S.C. § 78dd-3(a). The “means of interstate commerce” can include travel within the country, the inter-bank clearance of checks, or the use of interstate telecommunications. See Brown, *supra* note 135, at 303–17. Given that much of the world’s internet and phone traffic is routed through the United States, many transactions fall within these definitions. See Ryan Singel, *NSA’s Lucky Break: How the U.S. Became Switchboard to the World*, WIRED (Oct. 10, 2007), <http://www.wired.com/>

The FCPA's assertion of jurisdiction over foreign nationals has been controversial, even within the United States. In 1977, when Congress was drafting the FCPA, one major issue was whether the Act should apply to foreign entities owned or controlled by U.S. corporations.<sup>152</sup> Legislators were aware that international bribes had been financed through offshore entities and foreign subsidiaries, but they also harbored concerns about the implications of extending the FCPA's prohibitions to foreign companies.<sup>153</sup> The original House bill applied the Act to foreign subsidiaries, but the Senate bill did not.<sup>154</sup> Eventually, the Senate bill won out, after legislators recognized the "inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill."<sup>155</sup> It should be noted, however, that the FCPA contains broad third-party payment provisions, under which liability may attach to domestic parent companies if they transfer funds to a foreign subsidiary "while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to a foreign official."<sup>156</sup> Indeed, many FCPA enforcement actions are based on payments to third parties abroad who themselves engage in the prohibited bribery.<sup>157</sup>

The FCPA arguably extends its jurisdictional reach to the full extent permitted under customary international law.<sup>158</sup> Under the nationality principle, if a U.S. national or a U.S.-based corporation bribes a foreign official anywhere in the world, the FCPA asserts jurisdiction over the transaction.<sup>159</sup> Similarly, under the territoriality principle, if a foreign national or foreign-based corporation bribes a

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politics/security/news/2007/10/domestic\_taps. The broad reach of this provision was intentional. The House Report on the 1998 Amendments stated that "the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." H.R. REP. NO. 105-802, at 22 (1998).

152. See *Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities in Government of the Joint Economic Comm.*, 94th Cong. 91 (1976) (statement of Ralph Nader, Consumer Advocate).

153. See *id.*

154. See Brown, *supra* note 135, at 292.

155. H.R. REP. NO. 95-831, at 13-14 (1977).

156. 15 U.S.C. §§ 78 dd-1(a)(3), 78 dd-2(a)(3).

157. See *Securities & Exch. Comm'n v. Schering-Plough Corp.*, Litigation Release No. 18740, 82 S.E.C. Docket No. 3732 (June 9, 2004) (holding Schering-Plough, a U.S. company, liable for a bribe paid by its Polish subsidiary to a Polish governmental official).

158. See Gantz, *supra* note 72, at 466.

159. 15 U.S.C. § 78dd-2.



foreign official anywhere in the world, and any act in furtherance of the violation takes place in the United States, the FCPA asserts jurisdiction over the transaction.<sup>160</sup> The nexus requirement is truly minimal: a “telephone call to the United States, a letter mailed to the United States, the use of air or road travel, or the clearing of a check or wire transfer of funds through a financial institution in the United States” are sufficient to establish jurisdiction.<sup>161</sup> Some scholars have even asserted that the FCPA’s jurisdictional provisions go beyond the limits permitted by international law.<sup>162</sup>

Thus, despite the assertions of some scholars that the FCPA is distinguished from other bribery regulations by the fact that “international competitors are not subject to the FCPA regulation,”<sup>163</sup> the FCPA in fact applies broadly to foreign nationals as long as some minimal nexus to the United States exists.<sup>164</sup> Of course, the statutory reach of the FCPA might be less important than how (and where) it is enforced in practice. The following section will discuss the practice of the SEC and DOJ in enforcing the FCPA extraterritorially.

### 3. Extraterritorial Enforcement Practices of the United States

In recent years, the United States has ramped up its extraterritorial enforcement of the FCPA against foreign corporations.<sup>165</sup> In

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160. 15 U.S.C. § 78dd-3.

161. See Brown, *supra* note 135, at 359.

162. *Id.* at 320–21.

163. See Beck, Maher & Tschoegl, *supra* note 125, at 296. They note that “[s]ince other countries do not penalize their own firms for paying bribes internationally, the anti-bribery regulation does not apply uniformly to all bribe payers and, thus, could affect U.S. firms’ relative profitability and bribepaying abilities.” *Id.*

164. It should be noted that the U.K. Anti-Bribery Act also has strong extraterritorial provisions. However, the U.K.’s Justice Ministry has issued guidance stating that “the Government would not expect . . . the mere fact that a company’s securities have been admitted to the UK Listing Authority’s Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK,” and therefore falling within the scope of the Act. *Guidance for Bribery Act 2010*, U.K. MINISTRY OF JUSTICE, 15–16 (Mar. 2011), <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>. For a table illustrating the various extraterritorial provisions of international anti-corruption laws, see T. Markus Funk & M. Bridget Minder, *The FCPA in 2011 and Beyond: Is Targeted FCPA Reform Really the “Wrong Thing at the Wrong Time”?*, BLOOMBERG L. REP. 7, Dec. 29, 2011.

165. In 2010, the SEC created a specialized FCPA Unit in order to increase its ability to initiate and conduct FCPA investigations, and increasing resources are devoted to the unit. See Roger M. Witten et al., *Anti-Corruption Enforcement Developments: 2010 Year in Review and 2011 Preview*, in THE FOREIGN CORRUPT PRACTICES ACT 2011 63, 65 (PLI Corp.

what appears to be an intentional decision by the DOJ and the SEC to rein in non-U.S. companies, the United States has brought a number of high-profile cases against large foreign companies. As Assistant Attorney General Alice Fisher stated in 2006, the DOJ was “working in the context of the OECD Convention to ensure that the major foreign competitors to U.S. companies are subject to the same stringent rules—and the same penalties for violating those rules—as U.S. companies.”<sup>166</sup> The extraterritorial enforcement of the FCPA goes hand in hand with a broader trend of global corporate prosecutions by U.S. authorities.<sup>167</sup>

The impact of the FCPA on foreign corporations is undeniable. Foreign corporations account for many of the largest FCPA settlements in history. Non-U.S. companies have paid nine of the ten largest DOJ/SEC settlements by combined civil and criminal fine amount.<sup>168</sup> The largest fine in history, an \$800 million settlement with the DOJ and the SEC, was paid by Siemens, a German company.<sup>169</sup> In 2010, non-U.S. corporations accounted for 94% of the total penalties paid by corporations for FCPA violations.<sup>170</sup> In 2011, for-

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L. & Prac., Course Handbook Series No. B-1883, 2011). The DOJ also devotes significant resources to FCPA investigations, which are conducted by the Fraud Section of the department. In 2010, the DOJ’s foreign corruption unit collected almost half of the entire Criminal Division’s \$2 billion in penalties. See Christopher M. Matthews & Joe Palazzolo, *Jury Clears Two Businessmen in “Sting” Case on Bribery*, WALL ST. J., Jan. 31, 2012, at B3.

166. Alice S. Fisher, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), [http://www.usdoj.gov/criminal/fraud/docs/reports/speech/2006/10-16-06AAGFCPA\\_Speech.pdf](http://www.usdoj.gov/criminal/fraud/docs/reports/speech/2006/10-16-06AAGFCPA_Speech.pdf).

167. See Brown, *supra* note 135.

168. The largest settlements are: (1) Siemens (Germany) (\$800 million); (2) KBR/Halliburton (U.S.) (\$579 million); (3) BAE Systems (U.K.) (\$400 million); (4) Snamprogetti Netherlands B.V./ENI S.p.A. (Holland/Italy) (\$365 million); (5) Technip S.A. (France) (\$338 million); (6) JGC Corporation (Japan) (\$218.8 million); (7) Daimler AG (Germany) (\$185 million); (8) Alcatel-Lucent S.A. (France) (\$137 million); (9) Magyar Telekom/Deutsche Telekom (Hungary/Germany) (\$95 million); and (10) Panalpina (Switzerland) (\$81.8 million). See Richard L. Cassin, *Who Will Crack The Top Ten?*, THE FCPA BLOG (Aug. 3, 2012, 11:18 AM), <http://www.fcpcbog.com/blog/2012/8/3/who-will-crack-the-top-ten.html>.

169. Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), available at <http://www.usdoj.gov/opa/pr/2008/December/08-erm-1105.html>; Press Release, Securities and Exchange Commission Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), <http://www.sec.gov/news/press/2008/2008-294.htm>.

170. See *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign*

foreign corporations and individuals paid \$458 million of the \$504 million in total fines collected by the DOJ in FCPA enforcement actions.<sup>171</sup> In addition, it appears that foreign firms tend to pay higher fines than comparable domestic firms in criminal prosecutions.<sup>172</sup> One study has found that foreign firms receive fines that are on average twenty-two times larger than the fines of domestic firms.<sup>173</sup>

Furthermore, the SEC and the DOJ are using the broad jurisdictional provisions of the FCPA to reach transactions that have only minimal contacts with the United States. A recent enforcement action by the SEC and the DOJ demonstrates the aggressively extraterritorial reach of the United States's anti-corruption regulation. In 2011, JGC Corp., a Japanese engineering company, agreed to pay a \$218.8 million fine for bribing Nigerian government officials in order to obtain construction contracts for liquefied natural gas facilities on Bonny Island near the Niger Delta.<sup>174</sup> The contracts were estimated to be worth \$6 billion.<sup>175</sup> JGC used sophisticated deal tactics to conceal the payments, including the use of a joint venture, independent consultants and offshore intermediary companies.<sup>176</sup> The DOJ asserted jurisdiction over JGC, an entity that was neither a U.S. domestic concern nor an issuer, based partially on the fact that JGC aided and abetted its partner in causing U.S. dollar-denominated wire transfers to pass from an account in Amsterdam to an account in Switzer-

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*Officials under the Foreign Corrupt Practices Act of 1977*, SHEARMAN & STERLING LLP, (Jan. 20, 2011), <http://www.shearman.com/files/upload/FCPA-Digest-Jan-2011.pdf>.

171. See DOJ *Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 11, 2012), <http://www.fcprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-2>.

172. See Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, (NYU Sch. of Law Pub. L. & Legal Theory Research Paper Series, Working Paper No. 12-35, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2116487](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487).

173. See Garrett, *supra* note 17, at 1780. These findings raise the question of whether U.S. laws are being enforced against foreign corporations in an even-handed manner. These are precisely the kinds of worries that have dominated discussions of unilateralism in antitrust and trade law. See Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 395–97 (2007); Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 369 (2003).

174. Press Release, U.S. Dep't Justice, Office of Public Affairs, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), available at <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>.

175. *Id.*

176. *Id.*

land via correspondent bank accounts in New York.<sup>177</sup> In essence, the corrupt payments cleared through U.S. banks before reaching their final destination. This jurisdictional basis was strikingly minimal, and JGC initially challenged it. When JGC eventually decided to cooperate with the DOJ, the DOJ reduced JGC's cooperation credit due to its jurisdictional objections.<sup>178</sup> To be sure, the trend of basing jurisdiction on the clearing of transactions through correspondent bank accounts is not formally "extraterritorial," as the predicate act is deemed to have occurred *within* the territory of the United States. The key point, though, is that the vast majority of the actions took place outside the United States and all the participants were non-U.S. companies, calling into question the United States's basis for jurisdiction under customary international law.

Another well-known example of the FCPA's enforcement against foreign corporations involves BAE Systems, the British military contractor.<sup>179</sup> As mentioned above, in 2010, BAE paid \$400 million in criminal fines to the United States for its failure to disclose hundreds of millions of dollars in commission payments it made to foreign officials in order to secure arms sales.<sup>180</sup> Among other things, it was alleged that BAE provided high-ranking Saudi officials with chartered aircraft, luxury limousines, exotic vacations and the resolution of Saudi officials' gambling debts in return for an \$85 billion fighter jet contract.<sup>181</sup> BAE set up elaborate payment systems using shell companies and Swiss bank accounts to avoid detection by

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177. See Complaint ¶ 22, *United States v. JGC Corp.*, No. 11-CR-260, (S.D. Tex. Apr. 6, 2011).

178. See Palmina M. Fava, *Strategies for Staying in Compliance with the FCPA and Other International Anti-Corruption Laws*, ASPATORE (Dec. 2011), 2011 WL 6740780. In another important case in 2010, Alcatel-Lucent, a French telecommunications company, settled charges by the SEC and DOJ for violations of the FCPA by paying \$137 million in fines. Alcatel-Lucent had used local consultants to pay bribes to Costa Rican and Honduran government officials in exchange for telecommunications contracts. Although Alcatel-Lucent was an "issuer" because it had ADRs trading on the New York Stock Exchange until 2006, its foreign subsidiaries were not. The DOJ asserted jurisdiction over the foreign subsidiaries by citing meetings, e-mails and phone calls with individuals in Miami, Florida, along with wire payments routed through U.S. correspondent accounts. See Plea Agreement ¶¶ 84–170, *United States v. Alcatel-Lucent France*, Case No. 10-CR-20906, (S.D. Fla. Dec. 27, 2010).

179. See Leigh & Evans, *supra* note 2.

180. Press Release, U.S. Dep't of Justice, Office of Public Affairs, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html> [hereinafter, BAE Press Release].

181. See Sue Reisinger, *Mission Critical*, in CORPORATE COUNSEL 90 (Dec. 1, 2008).

the authorities.<sup>182</sup> The United States prosecuted BAE despite the fact that BAE was not a U.S. corporation,<sup>183</sup> its stock was not listed on a U.S. exchange and the majority of the questionable payments were made outside the United States.<sup>184</sup> The DOJ rested its claim of jurisdiction primarily on the fact that BAE had previously made undertakings to the U.S. Department of Defense that it would comply with the FCPA.<sup>185</sup>

These examples illustrate just how aggressively the U.S. government has enforced the FCPA against foreign corporations. Many of the largest FCPA fines in history have been paid by foreign corporations, and the suspect transactions have often had minimal ties to the United States. Thus, despite assertions by some commenters that the FCPA does not apply, or applies in only limited circumstances, to foreign competitors, extraterritorial enforcement of the FCPA against foreign corporations appears to be an important part of the U.S. government's international anti-corruption efforts.

### *B. FCPA as Unilateral Enforcement Mechanism*

The broad jurisdictional reach of the FCPA and its extraterritorial enforcement by the SEC and the DOJ may require some changes in the way that we understand international anti-corruption efforts. The standard account views international corporate bribery as a kind of large-*n* prisoners' dilemma.<sup>186</sup> Together, countries have an interest in cooperating to prevent corporations from bribing government officials, but separately, each country has an incentive to cheat and give its corporations the advantages that bribes can entail. The U.S. passage of the FCPA was, in a certain sense, a cooperative move by the United States, demonstrating to other countries that it would pro-

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182. See Amy Wilson & Lawrie Holmes, *BAE Still Advised by Architect of Controversial Saudi Tornados Deal*, SUNDAY TELEGRAPH, Feb. 7, 2010, at 1.

183. Although BAE Systems PLC has a U.S. subsidiary, BAE Systems Inc., none of the criminal conduct involved the actions of the subsidiary. See BAE Press Release, *supra* note 180.

184. The one exception appears to be "substantial benefits" given to "one [Saudi] official . . . through various payment mechanisms both in the territorial jurisdiction of the U.S. and elsewhere." Information ¶ 43, *United States v. BAE Sys.*, No. 10-CR-00035 (D.D.C. Feb. 4, 2010) [hereinafter BAE Complaint]. See also Steven A. Tyrrell, *DOJ Prosecution of BAE Heralds Continued Aggressive FCPA Enforcement Environment* (Feb. 8, 2010), <http://www.weil.com/news/pubdetail.aspx?pub=9725>.

185. See BAE Complaint, *supra* note 184, ¶ 3.

186. For a more complete explanation of how a large-*n* prisoners' dilemma might function, see ELINOR OSTROM, *GOVERNING THE COMMONS* 3–5 (1990).

hibit its corporations from bribing. This cooperative move, however, was not reciprocated by other countries, as they cheated and continued to allow their corporations to bribe foreign officials. By raising the cost of bribery for U.S. companies, the conventional story goes, the FCPA disadvantaged American corporations with respect to their foreign competitors. In effect, the FCPA created a unilateral disarmament game in which foreign corporations and government had strong incentives to engage in or tacitly allow bribery.<sup>187</sup>

This story relies on the assumption that the FCPA does not apply to foreign corporations, an assumption that has now been amply disproved. The United States has shown the ability and the will to prosecute foreign corporations for bribery, even when the bribery takes place in other countries and has minimal ties to the United States.<sup>188</sup> Thus, the standard theory is mistaken when it describes international corruption as a prisoners' dilemma. The United States in fact has the ability to prevent bribery by corporations from other countries, or at least raise the costs of engaging in it.

The standard unilateral disarmament account of the FCPA is flawed, as it fails to take into account the effect of the FCPA on foreign corporations. Through strong extraterritorial enforcement efforts, the United States is able to achieve the benefits of cooperation without requiring any cooperation at all from foreign governments. This model replicates the payoffs of global cooperation, but it is accomplished without international agreement. The United States, through extraterritorial measures, can impose costs on non-U.S. companies that bribe foreign officials. In effect, the United States is providing the public good of anti-bribery regulation unilaterally through the FCPA.

The United States's ability to regulate international corporate bribery through unilateral action depends to a great extent on its ability to impose costs on foreign corporations. If prosecutors cannot assert jurisdiction over a foreign company or its actions, they will find it difficult to change the payoff structure for those companies. In this context, the United States possesses a unique ability to regulate the actions of non-U.S. companies. Many multinational companies have ties to U.S. financial markets, either by listing stock or ADRs on the New York Stock Exchange, or by using U.S. financial institutions for payment services.<sup>189</sup> Few countries have such comprehensive market

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187. See Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689, 689 (2000).

188. See *supra* Section III.A.

189. In 2001, the domestic market capitalization of the New York Stock Exchange and

power.<sup>190</sup> The United States, thus, can force other countries and their corporations not to cheat by conditioning market access on compliance with the FCPA. The FCPA, then, serves as a sort of international enforcement mechanism, but one that is enforced unilaterally without the requirement of global cooperation.<sup>191</sup>

This understanding of the FCPA as a unilateral international enforcement mechanism helps explain some of the puzzles that modern corruption theory has struggled with in recent years. First, it goes some way to explaining why economists who have studied the problem have not consistently found a negative impact of the FCPA on U.S. business.<sup>192</sup> If the FCPA had been enforced solely against U.S. businesses, then empirical studies would likely have been more clear-cut.<sup>193</sup> Assuming that the ability to bribe is an advantage to a corporation, and that foreign corporations are reasonably competitive with U.S. corporations, then the prohibition of bribery by U.S. companies should have diverted some international business to foreign companies. But if the U.S. government enforces, or threatens to enforce, the FCPA's prohibitions on foreign corporations, then the competi-

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NASDAQ constituted more than half of the capitalization of the entire World Federation of Exchanges, and the U.S. share of the value of global stock trading was 58%. See COMM. ON CAPITAL MKTS. REGULATION, *U.S. Competitiveness Measures*, <http://www.capmktreg.org/competitiveness/category-IV.html>. In 2005, there were 2,087 foreign firms with cross-listings in the United States, and foreign listings on the three major exchanges in New York accounted for 30% of total global foreign listings. See Craig Doidge, G. Andrew Karolyi & René M. Stulz, *Has New York Become Less Competitive Than London in Global Markets? Evaluating Foreign Listing Choices Over Time*, 91 J. FIN. ECON. 253, 253–77 (2009). U.S. banks account for almost 40% of all global SWIFT traffic for international payments. BANK FOR INT'L SETTLEMENTS, STATISTICS ON PAYMENT, CLEARING AND SETTLEMENT SYSTEMS IN THE CPSS COUNTRIES: FIGURES FOR 2010, at 405, available at <http://www.bis.org/publ/cpss99.pdf>.

190. The preeminence of U.S. capital markets is, however, on the wane. The competitiveness of U.S. stock exchanges is falling on a number of metrics. See COMM. ON CAPITAL MKTS. REGULATION, *The Competitive Position of the U.S. Public Equity Market 1* (2007), <http://capmktreg.org/2007/12/the-competitiveness-position-of-the-u-s-public-equity-market/>.

191. Although, of course, international cooperation is helpful in FCPA prosecutions. Indeed, there seems to be a growing trend toward cross-border cooperation in international bribery prosecutions. See Lawrence S. Makow, *Current Perspectives and Recommendations Regarding Governance, Compliance and Ethics in a Time of Change—The Role and Responsibility of Counsel*, in A GUIDE TO FINANCIAL INSTITUTIONS 2011: NAVIGATING THE NEW LANDSCAPE 1067, 1126–27 (PLI Corp. L. & Prac., Course Handbook Series No. 28327, 2011).

192. See Graham, *supra* note 125; Beck, Maher & Tschoegl, *supra* note 125; Hines, *supra* note 125.

193. Instead, empirical studies have been mixed. See *supra* note 125.

tive advantage of being located abroad might disappear. U.S. corporations and their competitors would face the same competitive constraints, and foreign governments might not shift business away from U.S. companies.

Second, the extraterritorial enforcement of the FCPA explains why we have not seen a decline in U.S. prosecutions as a response to lackadaisical anti-bribery enforcement by foreign governments. Many scholars have noted that other countries have failed fully to implement or enforce their anti-bribery laws even after OECD Anti-Bribery Convention's conclusion,<sup>194</sup> but few have explained the U.S. response to this non-enforcement by other signatories.<sup>195</sup> The United States has ramped up, not scaled down, its enforcement of the FCPA, at the same time that its treaty partners remain stubbornly non-compliant with, or at least not similarly committed to, the Anti-Bribery Convention. But the active enforcement of the FCPA is partially explained by its extraterritorial reach. Aggressive prosecutions of foreign corporations are especially important when other countries are failing to investigate their own companies. Absent some credible threat of prosecution for paying bribes, foreign corporations may be unwilling to change their ways and implement robust compliance programs to prevent bribery in other countries. If their home countries have proved unable to provide this credible threat, then it may be necessary for the United States to step in and provide it. And in some respects, aggressive U.S. enforcement of the FCPA against foreign corporations is a welcome and even expected development. One of the stated purposes of the OECD Anti-Bribery Convention was to "ensure that companies face substantially similar rules and penalties for international bribery, no matter what their own country of origin, and that the network of laws forged by the combined effort will permit effective enforcement and mutual legal assistance."<sup>196</sup> In order to fulfill these purposes, the treaty explicitly encouraged countries to

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194. See Brewster, *supra* note 14, at 309; Tarullo, *supra* note 15, at 680–90.

195. One survey of employees of European companies found that 68% of respondents believed that their regulators were either unwilling to pursue convictions for bribery and corruption offenses or were ineffective in doing so. Ernst and Young LLP, *European Fraud Survey 2011: Recovery, Regulation and Integrity*, 3, <http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/European-fraud-survey-2011--recovery--regulation-and-integrity>.

196. Review of the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalization of Bribery of Foreign Officials, OECD Committee on International Investment and Multinational Enterprises (CIME) to the OECD Council at the Ministerial Level, § IIIA (May 26, 1997), *cited in* Brown, *supra* note 135, at 266–67.



assert broad jurisdictional powers over foreign bribes.<sup>197</sup> The United States has escalated FCPA prosecutions in large part by escalating prosecutions of *foreign* corporations, and this enforcement may well be a response to the lack of enforcement by other countries.<sup>198</sup>

### C. *The Anti-Competitive Effect of the FCPA?*

Extraterritorial enforcement of the FCPA mitigates one of the central concerns of scholars, legislators and corporate executives: that the FCPA puts U.S. corporations at a competitive disadvantage with respect to foreign corporations.<sup>199</sup> Many scholars have argued that the FCPA distorts international competition by imposing competitive constraints on U.S. companies that it does not impose on foreign companies.<sup>200</sup> This argument relies on the faulty premise that the FCPA's provisions apply *only* to U.S. corporations, and not foreign ones. As described in the previous section, not only has the FCPA granted broad extraterritorial jurisdiction to the SEC and the DOJ to prosecute foreign corporations for bribery, the SEC and the DOJ have in fact used this jurisdiction to impose hefty fines on foreign corporations.<sup>201</sup>

The FCPA has led to significant changes in the way that foreign corporations do business. Foreign corporations have devoted increasing amounts of resources and attention to complying with the FCPA, and many multinational corporations have adopted anti-corruption compliance programs.<sup>202</sup> As a result of FCPA settlements, several large foreign corporations have retained independent compliance monitors who evaluate and oversee internal ethics and compliance programs.<sup>203</sup> Surveys have shown a growing sense in the pri-

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197. OECD Anti-Bribery Convention, *supra* note 92, art. 4.

198. See *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226, 1285–89 (2011).

199. See *supra* note 93.

200. See Brewster, *supra* note 14, at 307; Tarullo, *supra* note 15, at 667.

201. See *supra* Section III.A–B.

202. See Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and Effects of International Standards*, in THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 716 (PLI Corp. L. & Prac., Course Handbook Series No. 13908, 2008). For an example of a multinational corporation's anti-corruption compliance program, see Statoil, *Anti-Corruption Compliance Program*, available at <http://www.statoil.com/no/About/Ethics/Values/Downloads/Anti-corruption%20compliance%20program.pdf>.

203. See Witten et al., *supra* note 165, at 78–79; F. Joseph Wain, Michael S. Diamant &

vate sector abroad that corruption is bad for business.<sup>204</sup> Many foreign businesses are now in support of greater anti-corruption supervision by governments.<sup>205</sup> Foreign corporations have been forced to pay large fines to the U.S. government, and U.S. investigations of foreign companies have instigated home-country prosecution as well.<sup>206</sup>

Extraterritorial enforcement of the FCPA, then, should help to blunt the longstanding criticism of the Act as “anti-American.”<sup>207</sup> By imposing the FCPA’s disciplines on foreign corporations in a rigorous way, the United States has reduced the competitive disadvantage that domestic corporations might otherwise have faced under domestic legislation prohibiting international bribery. The FCPA raises the cost of bribery to both U.S. and foreign corporations, and thus imposes similar (if not identical) competitive constraints on both groups.

Of course, one might respond that, true, the FCPA hits many foreign corporations, but it also *does not* hit many other foreign corporations. The FCPA only reaches foreign corporations that either have equity securities trading on a U.S. exchange or commit acts in furtherance of a bribe within the United States. In practice, this has meant the FCPA’s reach is limited to large corporations with multinational operations.<sup>208</sup> Thus, its effect on foreign business is not

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Veronica S. Root, *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 PENN. J. BUS. L. 321 (2011).

204. *European Fraud Survey 2011: Recovery, Regulation and Integrity*, ERNST & YOUNG LLP (2011), <http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/European-fraud-survey-2011--recovery--regulation-and-integrity> (finding that two-thirds of respondents at European companies believed that having a strong reputation for ethical behavior was a commercial advantage for companies).

205. *Id.*

206. See Bruce E. Yannett & David M. Fuhr, *Juggling Criminal, Civil and Multinational Investigations*, in 43RD ANNUAL INSTITUTE ON SECURITIES REGULATION 505, 528 (PLI Corp. L. & Prac., Course Handbook Series No. B-1918, 2011).

207. There is an alternative argument that robust anti-corruption laws may actually be *good* for businesses subject to them. The existence of the FCPA allows U.S. companies to credibly commit to open and honest business practices. This commitment might shelter subject corporations from unnecessary demands for bribes from foreign officials. Scholars have found some empirical evidence to support this view. One study found that firms that pay more bribes also face more bureaucratic intrusion, in effect, red tape. See Daniel Kaufmann & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?*, (Nat’l Bureau of Econ. Research, Working Paper No. 7093, 1999), available at <http://www.nber.org/papers/w7093>.

208. See Garrett, *supra* note 17, at 1780 (“Convicted foreign firms are also disproportionately public firms and large firms.”).

equivalent to its effect on domestic business.

This observation is certainly accurate: the FCPA does not, and cannot, reach every foreign corporation, and there are many businesses that engage in bribery that the United States has no chance of prosecuting. Customary international law and U.S. constitutional law establish limits on what kinds of acts the United States may criminalize and what kinds of persons the United States may prosecute.<sup>209</sup> The assertion of this Article, though, is that the FCPA's extraterritorial enforcement lessens anti-competitive concerns, not that it eliminates them. By enforcing the FCPA against foreign corporations, we impose *some* of the competitive constraints that U.S. corporations face on their foreign competitors as well. This should raise the cost of bribery for foreign corporations—they too now face the risk of prosecution and added compliance costs—even if it does not raise the cost as high as it raises the cost for U.S. companies. As long as the payoffs from bribery are sufficiently low, foreign corporations may cease to engage in it.

Moreover, while it is true that the FCPA is principally enforced against foreign companies that are large and that have multinational operations, so too is the FCPA principally enforced against *domestic* corporations that are large and that have multinational operations.<sup>210</sup> And these domestic corporations are largely competing against other multinational corporations, precisely the subset of actors that are most likely to have ties to the United States.<sup>211</sup> Thus, the FCPA's effect is not nearly as skewed against U.S. companies as some scholars suggest, since foreign competitors are often subject to the same restrictions. This dynamic is reinforced by the SEC's use of so-called "industry sweeps," in which the SEC initiates broad, industry-wide probes of international corruption.<sup>212</sup> These investigations—targeting the pharmaceutical industry, the arms industry, the oil and gas industry and, most recently, the financial services industry for sovereign wealth funds—look into corrupt practices by U.S. and

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209. See Knox, *supra* note 137; IBA Report, *supra* note 138; Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 241–42 (2010).

210. See N. Adele Hogan, *SEC Launches FCPA Probe of Financial Services Industry's Interactions With Sovereign Wealth Funds*, in UNDERSTANDING THE SECURITIES LAWS SUMMER 2011 865, 867–68 (PLI Corp. L. & Prac., Course Handbook Series No. B-1898, 2011).

211. See W. Chan Kim & Peter Hwang, *Global Strategy and Multinationals' Entry Mode Choice*, 23 J. INT'L BUS. STUD. 29, 32–35 (1992).

212. See Witten et al., *supra* note 165, at 72–74.

non-U.S. companies alike.<sup>213</sup> They reduce the concern that U.S. companies will be disadvantaged by zealous enforcement efforts.<sup>214</sup>

One might also ask why so many U.S. corporations complain about the FCPA if it does not harm them. The FCPA does in fact impose substantial costs upon U.S. corporations, costs that reduce corporate profits.<sup>215</sup> It can lead to a number of transaction costs, including the implementation of compliance programs, internal audits, accounting changes and legal costs.<sup>216</sup> But this is not the same as saying that it puts domestic companies at a disadvantage with respect to other corporations. As long as it puts equal costs on foreign competitors, it will not create an unequal playing field. One can level the playing field either by lowering the costs for all equally or by raising the costs for all equally. But as long as these costs are borne equally by all players, it will not benefit one at the cost of another.

Finally, there is growing evidence that U.S. corporations are using the FCPA as an offensive legal weapon against their foreign competitors. By strategically reporting on violations of the FCPA by foreign rivals, U.S. companies can impose costs on foreign companies while simultaneously receiving leniency from U.S. prosecutors. In a recent case, Johnson & Johnson and Pfizer, Inc., two U.S.-based pharmaceutical companies, voluntarily disclosed to the DOJ and the SEC that they had discovered potentially improper payments by its employees to foreign officials abroad.<sup>217</sup> Johnson & Johnson, for example, had paid bribes to Greek doctors who chose the company's surgical implants as well as to doctors in Poland and Romania in return for agreements to prescribe the company's drugs.<sup>218</sup> Pfizer eventually paid around \$60 million in fines, and Johnson & Johnson paid \$70 million.<sup>219</sup> These amounts, however, represented reduced fines due to the companies' "substantial assistance in the prosecution

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213. *See id.*

214. *See id.*

215. *See* IBT Report, *supra* note 133, at 10 (noting that "for large multinational companies, the FCPA component of compliance costs is in the high tens of millions of dollars per year").

216. *Id.*

217. *See* Christopher Matthews & Joe Palazzolo, *Pfizer Near Settlement on Bribery*, WALL ST. J., Nov. 21, 2011, at B1.

218. *Id.* The doctors at issue worked for government-run hospitals and therefore constituted "foreign officials" under the FCPA. *See* 15 U.S.C. § 78dd-1(f) (2006) (defining a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof").

219. *See* Matthews & Palazzolo, *supra* note 217, at B1.

of others.”<sup>220</sup> In other words, Pfizer and Johnson & Johnson voluntarily came forward to the U.S. government to disclose their own violations, but at the same time provided information about violations by their rivals. This information assisted the U.S. government in launching investigations of Merck (Germany), Astrazeneca (U.K.) and GlaxoSmithKline (U.K.).<sup>221</sup> The Pfizer case demonstrates how U.S. corporations are actively using the FCPA as an offensive tactic to impose litigation costs on their foreign competitors.<sup>222</sup> The offensive use of the FCPA against foreign competitors could be sharpened even further by the recently proposed “Foreign Business Bribery Prohibition Act,” which would grant U.S. companies a private right of action against foreign companies that violate the FCPA.<sup>223</sup>

#### IV. THE PERILS OF UNILATERAL ENFORCEMENT

As the previous section demonstrates, extraterritorial enforcement of the FCPA lessens some of the most problematic concerns about the Act’s effects on U.S. corporations, just as it helps to explain some of the puzzles of international corruption theory. At the same time, unilateral enforcement of corporate bribery regulations raises different and potentially equally problematic concerns. This section will focus on three of these concerns: biased enforcement, over-enforcement and system stability.

##### *A. Biased Enforcement*

Extraterritorial enforcement of the FCPA raises the possibility of biased enforcement by U.S. authorities. Prosecutors may decide to pursue foreign corporations more than they pursue domestic corporations in order to give domestic corporations an advantage. They may require foreign corporations to pay larger fines than domestic corporations. Both of these possibilities find some support in empirical studies of FCPA enforcement actions.<sup>224</sup> Biased enforcement might

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220. *Id.*

221. *Id.*

222. Of course, there is nothing to stop foreign companies from coming forward and informing on their U.S. competitors as well. But this kind of race-to-the-top, whereby each corporation has an incentive to be the first to confess and rat out its competitors, could be a powerful tool for global anti-corruption efforts.

223. Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. (2011).

224. Foreign companies have paid eight of the ten largest FCPA settlements in history. *See Parker, supra* note 93, at 390. In criminal prosecutions, foreign companies receive fines

serve to encourage other countries to enforce actively their own international corruption laws,<sup>225</sup> but it might also be used to favor American corporations.<sup>226</sup> If other countries perceive the United States to be using the FCPA as an economic tool to harm foreign competitors, other countries may follow suit and attempt to apply their own international anti-corruption laws against U.S. corporations.<sup>227</sup> This so-called “boomerang” effect is particularly strong if the system contains other strong actors capable of resisting unilateralism.<sup>228</sup>

Biased enforcement inverts the unilateral disarmament situation. In the most extreme case, the FCPA might be enforced *solely* against foreign corporations. In this case, foreign corporations would face steep costs for engaging in bribery, while U.S. corporations would face none. Biased enforcement of the FCPA would grant U.S. corporations a competitive advantage in international business. They would be able to bribe foreign officials and they could be assured that foreign corporations would refrain from doing so. Lucrative transactions and government contracts would be diverted to U.S. companies away from equally competitive foreign ones.

Biased enforcement is problematic because it calls into question whether the United States is truly providing the public good in question: corporate bribery regulation. If the FCPA is largely a tool for imposing costs on foreign companies, then the Act seems much

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that are on average twenty-two times larger than the fines of domestic firms. See Garrett, *supra* note 17, at 1780.

225. See *Developments in the Law—Extraterritoriality*, *supra* note 198, at 1288 (arguing that “extraterritorial FCPA enforcement encourages signatories to launch their own prosecutions in accordance with the OECD Convention”); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1, 87 (2001) (arguing that unilateral economic sanctions imposed by the United States on human rights abusers can promote norm internalization by “formally provok[ing] numerous interactions between the United States and foreign governments in which global norms are raised and clarified”).

226. Biased enforcement is one of the major worries of hegemonic stability theorists. In a world of unilateral enforcement, the hegemon may be able to impose a form of “tax” on other countries for the provision of the good. A charitable interpretation of this imposition of costs on other countries is that the tax is a tool to help defray the cost of monitoring and enforcement. But it may also be seen as coercion. See Snidal, *supra* note 58, at 587–88.

227. The United States has an inherent jurisdictional advantage because many more companies have minimum contacts with the United States. Thus, the United States can assert jurisdiction over a wide array of foreign companies, while many other countries do not have this option.

228. See Nico Krisch, *From Consent to Consultation: International Law in an Age of Global Public Goods* (unpublished manuscript) (on file with author).

less like an altruistic or praiseworthy regulation, and much more like a power play by the United States. If states perceive the FCPA as a non-cooperative move by the United States, then they may be less likely to support and maintain the regime in the future.<sup>229</sup>

### *B. Over-Enforcement*

Even if unilateral enforcement of corporate anti-bribery laws can somehow be accomplished in an even-handed and unbiased manner, it may lead to over-enforcement of corruption laws.<sup>230</sup> The worry here is that national regulators, acting alone and without coordination with other national regulators, might deter beneficial corporate behavior or encourage wasteful corporate behavior. Through unilateral action, countries could end up creating overlapping, duplicative or even conflicting regulations that create unnecessary costs for companies operating in international business settings.<sup>231</sup>

It is noteworthy that unilateral corporate regulation inverts the concerns that unilateral disarmament raises. Previously, the worry was largely about under-regulation. When domestic action against international corporate bribery was generally understood as unilateral disarmament, the main concern was that, in the absence of multilateral cooperation, we would have too little regulation of corporate bribery worldwide.<sup>232</sup> Under this model, no single state acting alone had sufficient incentive to regulate globally and thus regulation went lacking.<sup>233</sup>

But with unilateral corporate regulation an increasingly prevalent phenomenon, the concern changes from under-enforcement to over-enforcement. The United States has demonstrated a strong willingness to punish foreign companies for bribery abroad.<sup>234</sup> The U.K. has enacted its own international anti-bribery law with even

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229. See Snidal, *supra* note 58, at 579.

230. There is some dispute in the literature about what precisely over-enforcement should mean. Some have argued that over-enforcement occurs whenever the total sanction suffered by the violator of a legal rule exceeds the amount optimal for deterrence. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1744 (2005).

231. See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002) (setting forth a system for more efficient regulation of cross-border activity to avoid these kinds of problems).

232. See Abbott & Snidal, *supra* note 48, at S162; Tarullo, *supra* note 15, at 675–76; Brewster, *supra* note 14, at 303–11; Cuervo-Cazurra, *supra* note 93, at 635.

233. *Id.*

234. See *supra* Section III.A-B.

more stringent provisions.<sup>235</sup> If multiple countries begin to enforce their bribery laws simultaneously and without coordination, companies could be subject to overlapping or even conflicting regulations. Of course, it might be that the optimal level of corruption is zero, and the multiple punishments doled out for the same crime might merely serve to ensure that there is no incentive to bribe at all. But corruption laws also bring along transaction costs, such as reporting requirements and compliance programs. If multiple governments adopt unilateral corporate regulations without regard to the efforts of other countries, they may impose unnecessary costs on corporations. Furthermore, if biased enforcement *is* a reality, then over-enforcement becomes even more problematic. In response to overzealous enforcement by the United States, other states might begin to prosecute foreign companies for non-problematic behavior for the sole purpose of benefiting local companies.<sup>236</sup>

In some cases, U.S. prosecutions of foreign companies have in fact conflicted with the decisions of foreign governments. The United States has prosecuted companies after their home country governments have completed investigations and reached final settlements, in what appears to be an effort to register dissatisfaction with the resolution of the matter by home countries, either because the punishment was insufficient or the investigation was inadequately thorough.<sup>237</sup> Multiple prosecutions create costs for companies that might be eliminated if regulators worked in a coordinated manner.

If over-enforcement is the worry, it may seem odd that U.S. companies have often argued that foreign countries should adopt

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235. See Victoria Makarova, *Anti-Corruption Practices Survey 2011—Cloudy with a Chance of Prosecution?*, in CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2012, at 559, 564 (PLI Corp. L. & Prac., Course Handbook Series No. 35502, 2012).

236. Accusations of biased enforcement have recently arisen with regard to sanctions-dodging by financial institutions. When New York prosecutors unveiled allegations that the U.K.-based bank Standard Chartered had illegally concealed more than \$250 billion of transactions with Iran, U.K. politicians publicly complained about the “increasingly anti-British bias” by U.S. regulators, which had “start[ed] to shade into protectionism.” See Max Colchester, Liz Rappaport & Damian Paletta, *In U.K., A Backlash Over Standard Chartered Probe*, WALL ST. J. (Aug. 9, 2012, 11:19 AM), <http://online.wsj.com/article/SB10000872396390443991704577577154126976234.html>.

237. The SEC and the DOJ charged Statoil, a Norwegian state-owned oil company, with bribing an Iranian official in order to obtain oil and gas development contracts, after Norwegian authorities had fined the company for the same behavior. The Norwegian settlement required the payment of a small fine and no acknowledgment of wrongdoing. See Philip Urofsky, *It Doesn't Take Much: Expansive Jurisdiction in FCPA Matters*, in CONDUCTING DUE DILIGENCE IN M&A AND SECURITIES OFFERINGS 2007, at 619, 626–27 (PLI Corp. L. & Prac., Course Handbook Series No. 19203, 2009).



FCPA-like corporate bribery laws. In other words, if companies believe that unilateral bribery regulations will lead to too much regulation, they would likely want fewer, not more, countries to have such laws. But it appears that the opposite is the case.<sup>238</sup> This fact might suggest that over-enforcement is not a particularly salient worry with unilateral bribery regulation, either because the current regime still generally under-deters bribery or because there are pockets of international business that remain immune to U.S. prosecution. If the current level of deterrence achieved under unilateral regulation is below the optimal level, companies might favor the spread of bribery laws to other countries. Furthermore, the harms associated with a slight level of over-enforcement might be less pronounced than the harms from under-enforcement. All these factors, thus, could explain why U.S. companies often argue that foreign countries should adopt FCPA-like international bribery laws.<sup>239</sup>

### *C. System Stability*

A further concern raised by the FCPA's aggressive extraterritoriality is that the unilateral approach may not provide a stable solution to the problem, that is, it may not be sustainable over the long-term. The continued effectiveness of U.S. anti-corruption regulation depends on the extraterritorial reach of the FCPA. Jurisdiction, however, can only extend so far. The dominance of American financial markets has made it possible for the United States to assert jurisdiction over a wide array of corporations operating in markets around the world. In the future, however, this may not be the case. There is increasing evidence that the competitiveness and desirability of U.S. capital markets have declined in recent years.<sup>240</sup> Part of this decline is attributable to the increasingly burdensome corporate regulations applicable to U.S. companies.<sup>241</sup> Companies incorporated in the

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238. See Tarullo, *supra* note 15, at 675.

239. An alternative explanation is that managers at times take positions at odds with the general interest of the companies that they run, either because of diverging interests or lack of information. So, managers might publicly espouse the benefits of the spread of corporate bribery laws to other countries, even if this phenomenon would lead to over-enforcement of bribery norms and harm their companies. Managers might well pay closer attention to the domestic effects of bribery norms than the foreign effects. They might also be more attuned to the obligations of corruption laws than their enforcement patterns.

240. In the 1990s, U.S. IPOs accounted for 26.7% of all global IPOs. Since 2000, that share has dropped to 11.7%. See IBT Report, *supra* note 133, at 21.

241. See Steven M. Davidoff, *The Benefits of Incorporating Abroad in an Age of Globalization*, N.Y. TIMES (Dec. 20, 2011, 3:53 PM), <http://dealbook.nytimes.com/2011/12/>

United States are subject to a slew of governance and reporting requirements that impose a significant cost on business.<sup>242</sup> Just as importantly, corporate tax rates in the United States are higher than in many countries, and these taxes apply to worldwide income, rather than just income earned within the country.<sup>243</sup> Similarly, the ease of raising capital abroad has increased. Large pools of capital have accumulated in foreign markets and investors can more readily invest abroad today.<sup>244</sup>

The enforcement of the FCPA's rigorous anti-bribery and accounting provisions against foreign corporations may exacerbate the problem by increasing the costs and decreasing the benefits of listing securities in the United States. In the past, non-U.S. companies in need of capital infusions might have had little choice about whether to offer securities in the United States because its markets provided access to capital in a way that other countries' markets could not.<sup>245</sup> Now, companies in need of capital have a variety of attractive options beyond the United States.<sup>246</sup> A number of companies, in fact, have delisted their securities from U.S. stock exchanges to avoid the high regulatory costs associated with the listing.<sup>247</sup> At least four companies (Siemens, Daimler, Volvo and ABB) delisted their securities from the New York Stock Exchange shortly after being prosecuted for FCPA violations.<sup>248</sup> While dollar-denominated transactions, another basis for jurisdiction, remain a powerful source driving prosecutions, their prevalence may also decline in response to FCPA

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20/the-benefits-of-incorporating-abroad-in-an-age-of-globalization/.

242. See *U.S. Competitiveness Measures*, *supra* note 189.

243. Corporations incorporated within the United States need only pay taxes on their worldwide income when they repatriate the income into the United States. This has led to a troublesome situation, where U.S. companies hold an estimated \$1.375 trillion in cash abroad in foreign subsidiaries. See *id.*

244. See N. Adele Hogan, *Interim Report of the Committee on Capital Markets Regulation*, in *CONDUCTING DUE DILIGENCE IN M&A AND SECURITIES OFFERINGS 2007*, at 229, 242 (PLI Corp. L. & Prac., Course Handbook Series No. 10830, 2007).

245. See Luigi Zingales, *Is the U.S. Capital Market Losing its Competitive Edge?*, (ECGI Working Paper No. 192, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1028701](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028701).

246. *Id.*

247. Between 2007 and 2011, at least sixty companies have delisted securities from U.S. exchanges and explained that their reason was the high administrative, regulatory and other costs. See *IBT Report*, *supra* note 133, at 21.

248. See Thomas Gorman & William McGrath, *The New Era of FCPA Enforcement: Focus on Individuals and Calls for Reform*, SEC ACTIONS BLOG (Aug. 31, 2011, 9:00 PM), <http://www.secactions.com/?p=3570>.

prosecutions.<sup>249</sup>

In sum, unilateralism is only feasible for as long as one country has the power to force foreign actors to comply with its regulations. The United States has long relied on this approach, conditioning market access on compliance with regulatory regimes. As alternative markets arise, the United States may progressively lose its unilateral power to regulate international corporate bribery, and multilateral cooperation may become necessary.

## CONCLUSION

This Article has argued that international corporate bribery scholarship has been sidetracked by a reliance on the prisoners' dilemma model of corruption regulation. By focusing on how the FCPA has disadvantaged U.S. corporations in international business, the standard account has lost track of the important extraterritorial dimensions of the FCPA's enforcement. Unilateral enforcement of international corruption norms resolves many of the problems traditionally associated with corruption regulation, including worries about self-imposed costs and the difficulties of achieving multilateral cooperation. But unilateral enforcement raises a new set of problems, ones that have not been addressed sufficiently in the scholarly literature. This Article has attempted to sketch out some of these new concerns in order to start a larger discussion about the promises and perils of unilateral regulation.

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249. More than 35% of international financial transactions are denominated in dollars. The use of U.S. dollars in international commerce has greatly expanded the territorial reach of U.S. law, as most dollar-denominated transactions must "clear" through a U.S. bank. *See Dollar Power*, THE ECONOMIST, June 23, 2012, at 75. While companies can structure their transactions in other currencies, the United States has used the power of the dollar to affect financial institutions. For example, in attempting to sanction Iran's oil trade, the United States has enacted a law that denies access to the American banking system to any financial institution that facilitates trades with the Central Bank of Iran. *See id.*