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Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law. I am grateful to Thomas H. Lee for his guidance, and to Serena Moe for her insights and encouragement. Special thanks as well to my wonderful friends and family.

COMMENT

THE LENGTHENING ANTI-BRIBERY LASSO OF THE UNITED STATES: THE RECENT EXTRATERRITORIAL APPLICATION OF THE U.S. FOREIGN CORRUPT PRACTICES ACT

*Daniel Patrick Ashe**

INTRODUCTION

Imagine the following scenarios:

(1) L is the name partner of the accounting firm KP-L located in the country of Islandia.¹ The firm is approached by a client, Constructo Corp. Inc., another Islandian company, which recently received an assessment from Islandia's tax authority totaling over \$3 million. KP-L meets with Islandia's tax official, who continually demands a bribe of \$80,000. In exchange, the official promises the tax assessment will be decreased by \$2.75 million. L suggests that if Constructo Corp.'s transnational parent company, WorldCo., Inc., based in the country of X, but listing its securities on the New York Stock Exchange, wishes to make the payment, KP-L can do it for them by creating a false invoice.

KP-L communicates the plan to WorldCo.'s controller who authorizes the scheme. KP-L pays the tax official and Constructo receives an assessment of only \$500,000. However, WorldCo.'s compliance counsel discovers the payments and immediately contacts the Securities and Exchange Commission ("SEC"). The SEC, together with the Department of Justice ("DOJ"), demand that both

* J.D. Candidate, 2006, Fordham University School of Law. I am grateful to Thomas H. Lee for his guidance, and to Serena Moe for her insights and encouragement. Special thanks as well to my wonderful friends and family.

1. This example is based on *United States & S.E.C. v. KPMG Siddharta Siddharta & Harsono*, United States & S.E.C. v. KPMG Siddharta Siddharta & Harsono, Accounting and Auditing Enforcement Act Release No. 1446, 75 S.E.C. 1841 (Sept. 12, 2001) [hereinafter SEC's KPMG Release], available at <http://www.sec.gov/litigation/litreleases/lr17127.htm>; see also DOJ & SEC Complaint Against KPMG-SSH, United States & S.E.C. v. KPMG Siddharta Siddharta & Harsono, Accounting and Auditing Enforcement Act Release No. 1446 (Sept. 12, 2001) [hereinafter KPMG Complaint], available at [http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20I\(i\).pdf](http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20I(i).pdf).

L and his firm consent to an order enjoining them from violating, or aiding and abetting the violation of, an anti-bribery statute of the United States. L and his firm comply with the demands of the SEC and the DOJ.

(2) Oil Co., Inc., a subsidiary of Worldwide Corp., is based in Spotland and does business in Norovia, a developing nation plagued by corruption.² Worldwide Corp. is based in the country of Northland but lists securities on the New York Stock Exchange, and has another subsidiary, Petrol Co., based in the U.S. Together, the two subsidiaries, under pressure from state oil officials in Norovia, provide lavish gifts, trips, and large amounts of cash to the officials while bidding for oil rights. All in all, the value of wealth transferred exceeds \$1 million.

Years later, while conducting due diligence in an effort to sell the two subsidiaries, Worldwide discovers the payments and contacts the SEC.³ Though no specific activity on the part of Oil Co. or Worldwide is alleged to have taken place in the United States, the DOJ nonetheless brings criminal charges seeking fines in excess of \$10 million. Oil Co., Petrol Co., and Worldwide plead guilty, disgorge the illicit profits, and pay penalties.⁴

How does American law enforcement bring such legal action to bear against foreign nationals and foreign corporations for conduct taking place abroad?

In 1977 President Jimmy Carter signed the Foreign Corrupt Practices Act ("FCPA")⁵ into law,⁶ curtailing the ability of American corporate interests to bribe foreign officials to secure business. Initially, the FCPA only applied to American domestic concerns; Congress was leery of exercising jurisdiction even over the foreign

2. This scenario is based upon *S.E.C. v. ABB Ltd.* S.E.C. v. Abb Ltd., Accounting and Auditing Enforcement Act Release No. 2049, 83 S.E.C. 849 (July 6, 2004) [hereinafter SEC ABB Release], available at <http://www.sec.gov/litigation/litreleases/lr18775.htm>; see also SEC's Complaint Against ABB, *S.E.C. v. ABB Ltd.*, Accounting and Auditing Enforcement Act Release No. 2049 (July 6, 2004) [hereinafter ABB Complaint], available at <http://www.sec.gov/litigation/complaints/comp18775.pdf>.

3. See Janet K. Kim, Law Update: Extraterritorial Reach of U.S. Anti-Corruption Laws, at <http://www.prime-tass.com/news/show.asp?topicid=76&id=365099> (last visited Apr. 13, 2005).

4. See SEC ABB Release, *supra* note 2.

5. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, amended by Omnibus Trade & Competitiveness Act of 1988, Tit. V, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, §§ 1415-1425, amended by The International Antibribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78m(b)(2), -(3), 78dd-1 to -3, 78ff (2000)).

6. See Pierre Charpié, International Business Transactions: Introduction to the International Anti-Bribery Laws 44 (2003).

subsidiaries of American corporations,⁷ let alone wholly foreign-owned companies, their subsidiaries, and their agents because of the “inherent jurisdictional, enforcement, and diplomatic difficulties.”⁸

Nevertheless, enacting the FCPA evinced Congress’s intention to reach conduct beyond the borders of the United States.⁹ Thus, even when the FCPA only applied to American businesses,¹⁰ the Act was subjected to critiques of moral imperialism and jurisdictional overreaching because it was seen as effectively holding foreign business practices to western ethical standards.¹¹

After more than twenty years, the FCPA, as amended in 1998, has expanded into the international sphere to such an extent that the SEC and the DOJ have jointly levied charges against both foreign business entities,¹² as well as foreign nationals,¹³ for the bribery of public officials in their own country,¹⁴ as well as those of other foreign nations,¹⁵ even when the seemingly material acts have taken place outside the United States.¹⁶ Accordingly, critics continue to fault the FCPA’s broad scope as exceeding the jurisdictional power of the U.S.¹⁷ and, given the culturally sensitive nature of bribery, as becoming, more so than ever, unwisely intrusive.¹⁸ Others, however, find the broad anti-bribery efforts of the United States a necessary ingredient in combating a disturbing global problem that will only worsen if wealthy, exporting nations fail to police the supply-side of international bribery.¹⁹

7. See Claudius O. Sokenu, *Commentary: SEC Expands Foreign Corruption Law Beyond Congressional Intent*, Andrews Derivatives Litig. Rep. 10, Aug. 26, 2002, WL 8 No. 19 ANDERLR 10.

8. 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, 293 n.203 (2001) (quoting from S. Rep. No. 114, at 13 (1977)).

9. See Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 Am. Crim. L. Rev. 325, 332 (1997).

10. See Brown, *supra* note 8, at 259-61.

11. See Stephen R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 Wash. & Lee L. Rev. 229, 275 (1997). “[T]he United States must recognize that foreign practices and policies reflect delicate political balances that a foreign government may be unable or unwilling to disturb.” Patricia I. Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 Yale L.J. 1122, 1128 (1987).

12. See SEC ABB Release, *supra* note 2.

13. See KPMG Complaint, *supra* note 1 (filing a joint action by the SEC and DOJ seeking to enjoin violation of the Foreign Corrupt Practices Act (“FCPA”) by foreign accounting firm and one of that firm’s name partners who enabled bribery scheme involving the foreign subsidiary of an American multinational).

14. See *id.*

15. See ABB Complaint, *supra* note 2.

16. See, e.g., KPMG Complaint, *supra* note 1.

17. See Brown, *supra* note 8, at 359.

18. See Salbu, *supra* note 11, at 283-85.

19. See *infra* Part I.D.2.

The Office of Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention")²⁰ contains an expansive jurisdictional mandate,²¹ the ratification of which required the equally expansive 1998 amendments to the FCPA.²² Accordingly, resolving the appropriateness of recent FCPA enforcement requires an examination of the rationale behind the expansive scope of the OECD Convention, implemented by over thirty nations,²³ and whether the mechanisms that enable the U.S. to enforce the FCPA abroad reasonably limit its enforcement so as to ameliorate criticisms of cultural intrusion upon marginal conduct and undue interference in the affairs of foreign nations.

Part I.A of this Comment details the general provisions of the FCPA, the context of its enactment, and subsequent history. Part I.B discusses the long road to the OECD Convention, including the emerging awareness of the disastrous effects of corruption and how this awareness made anti-bribery efforts on an international level politically possible. Part I.C sets forth common enforcement agreements the U.S. has created with fellow nations which are often employed in FCPA enforcement actions abroad. Part I.D then introduces various arguments for, and critiques of, the FCPA. Part II presents recent FCPA actions which demonstrate the aggressive jurisdiction and renewed anti-bribery vigor on the part of the United States as well as both the relevant concerns raised by, and arguments supportive of, such actions. In Part III, this Comment argues that in spite of the fears of moral imperialism and sovereign infringement, the U.S.'s aggressive enforcement is a necessary and ultimately beneficial engagement with the ill of international public corruption as the cooperative arrangements secured by the U.S. sufficiently offset relevant objections.

I. THE FCPA: THREE DECADES IN THE MAKING

Looked at in isolation, the recent actions on the part of the SEC and the DOJ might appear unwarranted, unexpected, and unduly aggressive. In order to better understand these enforcement actions it is important to provide a fuller domestic and international context.

20. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

21. *Id.* at 10.

22. See Brown, *supra* note 8, at 240.

23. See U.S. Dep't of Commerce Int'l Trade Admin., Addressing the Challenges of International Bribery and Fair Competition 2004, The Sixth Annual Report Under Section 6 of the International Anti-Bribery and Fair Competition Act of 1998, Table 1: Ratification Status of Signatory Countries to the OECD Antibribery Convention 10 (July 2004) [hereinafter Addressing the Challenges], available at <http://www.ita.doc.gov/media/Publications/pdf/bribery2004.pdf>.

Part I.A begins with the arrangement of the FCPA, followed by the Act's background and history. Part I.B then describes how the evolving view of international public corruption made greater international agreement on the subject possible. In Part I.C, this Comment describes how basic information-sharing agreements employed by U.S. law enforcement in the FCPA context create an opportunity for greater extraterritorial enforcement. In response, Part I.D then briefly presents pertinent issues surrounding this extraterritorial expansion of the Act.

A. Structure, Background, and History of the FCPA

1. Structure of the FCPA

The FCPA criminalizes the bribery of foreign officials by U.S. corporations and individuals seeking, or engaging in, business abroad,²⁴ and requires public companies to meet generally accepted accounting practices,²⁵ maintain accurate books and records,²⁶ and implement sufficient internal control mechanisms to guard against illicit payments.²⁷

As originally enacted, the anti-bribery provisions only covered issuers of various securities regulated by the SEC,²⁸ including American Depositary Receipts ("ADRs"),²⁹ and "domestic

24. 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (2000).

25. § 78m(b)(2)(A).

26. The accounting and financial controls only apply to companies whose stock is registered with the SEC, and corporations who are required to file reports with the Securities and Exchange Commission ("SEC"), for example, foreign corporations who file American Depositary Receipts ("ADRs"). § 78c(a)(8). The generally accepted accounting standards ensure that questionable payments cannot be hidden. "It was the SEC Enforcement Director's view that if public corporations were required to keep accurate books and records subject to scrutiny by auditors and others, those corporations would 'think twice' before accurately recording the payment of bribes on their books." Brown, *supra* note 8, at 250-51. "Accordingly, the standard for compliance with the FCPA accounting provisions is not one of materiality, as are other securities law disclosure requirements... [but] one of reasonable accuracy." *Id.* at 251-52.

27. The internal financial controls ensure management's awareness of the disposal of assets, thereby "preventing the creation of off-the-books 'slush funds' or the disbursement of corporate funds as bribes contrary to company policy and management's direction." Brown, *supra* note 8, at 255. Notably, "no proof of intent... is required to establish liability under the accounting and controls provisions... [although] the SEC has stated that only instances of knowing or reckless conduct will be prosecuted." *Id.* at 258. *But see infra* Part II.A (discussing SEC enforcement action which seems to indicate the SEC's willingness to move towards a strict liability theory).

28. § 78dd-1(a).

29. ADRs represent set numbers of shares in a foreign company that are traded on the New York Stock Exchange, the Nasdaq, and the American Stock Exchange requiring registration and compliance with the SEC. *See* Investopedia.com, American

concerns,” that is, all U.S. persons and business entities.³⁰ Jurisdiction lay by use of the mails or means of interstate commerce.³¹ But, after the 1998 amendments, the Act was expanded to cover Americans abroad having no interstate commerce connection, with jurisdiction premised purely by nationality.³² Further, under the 1998 amendments,³³ “any person,” that is, a foreign person, natural or otherwise, who performs an “act in furtherance” of a prohibited bribery scheme while in the territory of the United States is subject to the Act’s strictures.³⁴

The Act defines the prohibited conduct as follows: Directly or through an intermediary, a covered party is not allowed to offer, authorize a payment, or pay anything of value to foreign public officials or candidates for public office in order to secure or retain business.³⁵

Following the 1998 amendments, bribes to officials of international organizations, such as the United Nations, became proscribed, expanding the rubric of “public official.”³⁶ And again, as broadened in 1998, the Act covers illicit payments or gifts given to secure “any improper advantage,”³⁷ not simply to obtain or retain business.

2. Background and History of the FCPA

Following the Watergate scandal,³⁸ federal investigations discovered off-record “slush funds” used by U.S. multinationals to finance

Depository Receipt–ADR, at <http://www.investopedia.com/terms/a/adr.asp> (last visited Mar. 8, 2005).

30. § 78dd-2(a).

[A]ny individual who is 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.

§ 78dd-2(h).

31. § 78dd(a). Actual employment of the U.S. mails need only be a reasonably foreseeable event, not an act carried out by the person accused. *See Brown, supra* note 8, at 310. Moreover, instrumentalities or means of interstate commerce consider telecommunications systems, even if used intrastate, to be part of an interconnected system; it is not necessary for the party to have actually used such, only that such use was reasonably foreseeable. *Id.* at 315.

32. § 78dd-1(g), -2(i).

33. The International Antibribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78m(b)(2)-(3), 78dd-1to -3, 78ff (2000)).

34. § 78dd-3.

35. § 78dd-1(a), -2(a).

36. § 78dd-1(f)(1), -2(h)(2).

37. § 78dd-1(a), -2(a), -3(a).

38. *See* Alejandro Posadas, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int’l L. 345, 348-52 (2000); Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 Am. J. Comp. L. 593, 593-96 (Supp. 2002).

political elections in the United States,³⁹ as well as to bribe officials of foreign governments to procure and sustain lucrative business arrangements.⁴⁰ These investigations “led to *admissions* to the SEC of foreign bribery totaling over \$300 million by over 400 American corporations, of which 177 ranked in the Fortune 500.”⁴¹

In 1977, in a fairly moral rejoinder,⁴² a unanimous Congress enacted the FCPA and initiated its lone fight against corrupt foreign business practices.⁴³ Though the primary goal in enacting the FCPA was only to curb U.S. businesses’ disgraceful conduct, not, per se, to end corporate corruption worldwide, there was the belief that other nations would eagerly follow suit.⁴⁴ Other concerns were the adverse, tarnishing consequences for American business⁴⁵ and U.S. foreign

39. See *Political Contributions to Foreign Governments: Hearings Before the Subcomm. on Multinational Corps. of the Comm. on Foreign Relations*, 94th Cong. 5 (1975), microformed on CIS No. 76-S381-6 (Cong. Info. Serv.).

40. See Schroth, *supra* note 38, at 598-99. Among the more notable bribe recipients, the Prime Minister of Japan received \$4 million from Lockheed Martin. See Tim Weiner, *Lockheed and the Future of Warfare*, N.Y. Times, Nov. 28, 2004, § 3, at 1 (“Without Lockheed, there never would have been a Foreign Corrupt Practices Act,” said Jerome Levinson, who was the staff director of the Senate subcommittee that uncovered the bribery.”).

The Lockheed Company actually bribed the Prime Minister of Japan twice in one day in order to get All Nippon Airways to purchase Lockheed planes. Some of the money was brought in an orange crate by an ex-Argentine Jesuit of Greek descent. Funds were also paid to Franz Joseph Strauss in Germany and the Prince of the Netherlands. Fortunately, the Prince was wise enough to have the money paid to the World Wildlife Foundation. These stories demonstrate that the FCPA resulted from a series of outrageous overseas transactions.

Endy Zemenides et al., *LPIB Roundtable on Global Corruption*, 31 Law & Pol’y Int’l Bus. 195, 197 (1999) (comments of Pat Head).

41. Schroth, *supra* note 38, at 595.

42. See Charpié, *supra* note 6, at 7-8; Posadas, *supra* note 38, at 352-57.

By dealing with the foreign payments issue in the aftermath of Watergate, Congress strengthened its commitment to transparency as the best means to address conduct that, if not clearly illegal, was surely reprehensible. Because the foreign payments hearings revealed numerous international illicit practices rather than a small number of isolated cases, Congress ultimately chose to criminalize foreign bribery on moral grounds.

Id. at 357.

43. See Charpié, *supra* note 6, at 7-8; Posadas, *supra* note 38, at 352-57.

44. See Zemenides et al., *supra* note 40, at 210 (comments of Eleanor Roberts Lewis). “It seems sort of humorous now, but when the United States passed the Foreign Corrupt Practices Act in the late 1970’s, we actually thought that other countries would immediately want to run around and pass similar statutes.” *Id.*

45. See Charpié, *supra* note 6, at 45 (citing *Business Accounting and Foreign Trade Simplification Act: Hearings on S. 430 Before the Subcomm. on Int’l Fin. and Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., and Urban Affairs*, 99th Cong., 2d Sess. 20-21 (1986); H.R. Rep. No. 95-640, at 5 (1977)). Charpié states that:

Congress believed that the bribery of foreign officials by some American companies created a shadow on all U.S. companies. From a foreign policy perspective, the American legislature felt that corporate bribery created severe problems for the United States, as the revelation of bribe payments

policy.⁴⁶ Conversely, Congress believed that as globalization accelerated, American business would benefit from the goodwill associated with upright commercial practices.⁴⁷ Moreover, Congress perceived that pervasive bribery distorted market forces as efficiency and quality yielded to illicit inducements, contrary to American ideals of free-market efficiency.⁴⁸ It was also thought that such unsuitable behavior deteriorates both the integrity as well as the skill of American business as it competes unlawfully rather than meritoriously.⁴⁹

However, “[s]ince the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty. Such bribery is estimated to affect overseas procurements valued in the billions of dollars each year.”⁵⁰

invariably tended to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lent credence to the suspicion sown by America's foreign opponents that US companies exerted corrupt influences on the political processes of their countries.

Id. at 45 n.17 (citations omitted).

46. *See id.* at 44.

47. *Cf. Posadas, supra* note 38, at 355-56 (noting that the SEC believed that in the long run, investigations into corrupt corporate activity would “help to improve the system, as they would lead to the strengthening of corporate management and public confidence in business”).

48. *See Charpié, supra* note 6, at 46.

49. *See Daniel K. Tarullo, The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 Va. J. Int'l L. 665, 675 n.29 (2004).

The most frequently mentioned reason for the shift in position of some American multinationals is that they had come to see overseas bribery as corrosive of their corporate culture at home. If company employees believed that bribery in developing countries was tolerated, they might be disposed towards bribery or other illegal activities at home. It also seems likely that many business lobbyists had concluded that they were very unlikely to get significant modifications of the FCPA: If the 1988 changes were all they could extract during a business-responsive Reagan administration, repeal was just not in the cards. Finally, there were occasional hints—albeit circumspectly stated ones—that American businesses had found the “going rate” for bribes to have risen substantially, thereby reducing to near-zero the rents from bribing. If true, this fact could have provided further incentive to American companies to give greater international prominence to the issue, even at the risk of provoking more assertive investigation by U.S. authorities of possible illicit payments by American companies.

Id.; *cf. Zemenides et al., supra* note 40, at 200 (comments of Fritz Ermath) (noting that in Russia, rampant corruption turns otherwise honest people corrupt in order to participate commercially because “that is the way the system works”).

50. Comm. on Banking, Hous., and Urban Affairs, *The International Anti-Bribery Act of 1998*, S. Rep. No. 105-277, at 2 (1998). Some critics argue the real effects of the FCPA on U.S. business are negligible. *See, e.g.*, 131 Cong. Rec. 32,763 (1985) (statement of Sen. Danforth) (discussing the Trade Enhancement Act and arguing that the FCPA was not truly hampering U.S. exporters); Mark Romaneski, *The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Future*, 5 B.C. Int'l & Comp. L. Rev. 405, 429-30 (1982) (pointing out that in regards to the

Thus, from the beginning, the unilateral burden⁵¹ placed upon American business motivated the U.S. government to seek an international accord on corporate bribery that had yet to materialize.⁵²

Complicating the one-sided nature of the Act, the FCPA has long been, and is still,⁵³ considered overly vague,⁵⁴ making the prospect of

SEC's request for information from business interests as to the impact of the FCPA, "the SEC received only a modicum of response . . . indicat[ing] that corporate boardrooms are not suffering from any inability to compete due to the FCPA"). Others, however, disagree, and view the FCPA as the "harshest, most comprehensive effort" to combat corrupt payments to foreign public officials. Bruce Seymour, *Illicit Payments in International Business: National Legislation, International Codes of Conduct, and the Proposed United Nations Convention*, in *Legal Problems of Codes of Conduct for Multinational Enterprises* 3, 223 (Norbert Horn ed., 1980); see, e.g., Robert James Gareis & William Joseph Linklaetter, *The Foreign Corrupt Practices Act: A Pragmatic Analysis*, in *International Trade: Avoiding Criminal Risks* § 13-9 to -10 (W.M. Hannay ed., 1991); Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. Times, Apr. 12, 1996, at A10 ("Large American companies, including General Electric and Boeing, have openly complained that they have difficulty competing for contracts with European rivals who are free to use bribes.").

51. See Seymour, *supra* note 50, at 219, 221; see also Gareis & Linklaetter, *supra* note 50 § 13-9 to -10. But see 131 Cong. Rec. 32,763 (1985) (statement of Sen. Danforth) (discussing the Trade Enhancement Act and suggesting the FCPA was not truly hampering U.S. exporters).

52. See Charpié, *supra* note 6, at 22.

53. See Zemenides et al., *supra* note 40, at 198 (comments of Pat Head).

The most difficult issue is how to handle a borderline violation . . . For example, a borderline violation might occur when you have an agent who receives a fifteen percent rather than a five percent commission. In this situation, you have to look at the agent and see if there is anything unusual. Another borderline violation might occur when children of foreign officials are hired. The question then becomes whether it was a legitimate hiring or not. The legality of other situations remains uncertain. For example, bringing people from foreign governments to inspect your equipment might not be legal in some situations. One area of controversy is the so-called grease or facilitating payments. Most major corporations currently have internal panels that review grease payments. The rule of thumb is that any amount under \$5,000 is deemed legal. However, there may be an accumulation of payments that equals or exceeds \$5,000. These payments are usually made to get something done that normally should be done for you. For example, your return is on the bottom of the pile with the local internal revenue agency. Another example is when you are testing a product that you are trying to sell, and your product might not get tested if people do not get taken care of in a minor way. Most companies have a clearinghouse for the issuance of grease payments, so this is usually resolved in an acceptable manner.

Id.

54. See 134 Cong. Rec. S2589-90 (daily ed. Mar. 18, 1988) (statement of Sen. Heinz). Senator Heinz stated as follows: "The burden of the U.S. trade deficit has enormous negative effects on the American economy, and it is clear that we have to do a better job of clearing away obstacles to export performance improvements, including ambiguities in the FCPA that discourage our exporters."

Id.

enforcement a difficult issue to gauge.⁵⁵ To address both the unilateral application as well as the scope of the Act, Congress first amended the FCPA in 1988.⁵⁶

a. *Narrowing the FCPA and Calling for a Level Playing Field: The 1988 Amendments*

Under sustained pressure by critics blaming Congress for unduly harming American business,⁵⁷ "Congress amended the FCPA in 1988, [making] its views explicit concerning the necessity of an international response to foreign bribery."⁵⁸ Part of the aptly named Omnibus Trade and Competitiveness Act of 1988,⁵⁹ the amendment formally called upon the President to pursue an international agreement whereby other nations would enact statutes similar to the FCPA.⁶⁰

Addressing the scope of the Act, the 1988 amendment created exceptions for so-called "grease payments":⁶¹ small disbursements for routine government actions such as licensing, obtaining permits or official documents, and processing papers such as visas or work orders.⁶² Moreover, the amendment allowed an affirmative defense if the payment to the foreign public official was lawful in the jurisdiction of the bribe recipient.⁶³ The 1988 amendments also created an affirmative defense for reasonable expenses directly related to legitimate promotional activities.⁶⁴

55. See Alan Swan & John Murphy, Cases and Materials on the Regulation of International Business and Economic Relations, 263-73, 277-84 (1991 documentary supplement); Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 Cal. L. Rev. 185, 195 (1994) ("Without clearly defined terms and requirements, the FCPA proves ineffective in providing guidance for U.S. corporations.").

56. See *infra* Part I.A.2.a.

57. See Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, 20 Vand. J. Transnat'l L. 431 (1987).

58. Brown, *supra* note 8, at 264.

59. Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. 78dd-1, dd-2, dd-3 (2000)).

60. See Charpié, *supra* note 6, at 22-23 (noting that the amendment requires the President to report to Congress on the state of negotiations, as well as other possibilities for cooperation to combat international public bribery).

61. § 78dd-1, -2(b).

62. See Alan Cohen, *Foreign Corrupt Practices Act*, 1176 Practising L. Inst. 475, 490 (2000), available at WL 1176 PLI/Corp 475.

63. § 78dd-1(c)(1), -2(c)(1). "There have been no cases or Opinion Releases that explicitly addressed this defense, nor has it been raised in any FCPA prosecution of which we are aware." U.S. Dep't of Justice, Response of the U.S.: Questions Concerning Phase 2, § 4.1(c), at <http://www.usdoj.gov/criminal/fraud/fcpa/PhaseII.htm> (last visited Mar. 8, 2005). This may indicate that minimal actions have not been targeted by FCPA enforcement. See *infra* note 274 and accompanying text.

64. § 78dd-1(c)(2), -2(c)(2).

b. *Post-1988 Amendments—Continuing to Seek an International Anti-Bribery Agreement*

While the FCPA's success in curbing American corporate bribery during this period is arguable,⁶⁵ nevertheless the anti-bribery statute "unequivocally entered the business culture of American companies operating internationally"⁶⁶ as evidenced by "[t]he American business community's strong interest in extending FCPA disciplines abroad."⁶⁷ Thus, it seems the FCPA was able to deter and alter, to a greater or lesser degree, American business interests abroad.⁶⁸

On the international front, however, reluctance continued on the part of fellow exporting nations to combat global bribery.⁶⁹ European nations proved particularly problematic,⁷⁰ some even continuing to encourage corrupt practices by making foreign bribery a tax-deductible business expense.⁷¹

65. See Zemenides et al., *supra* note 40, at 198-99 (comments of Pat Head).

66. Posadas, *supra* note 38, at 358.

67. *Id.* at 358-59.

68. *Id.*

On balance, the Act has done a lot of good because business will not often police itself unless there is some established standard. I think the Act has accomplished that. Has it really stopped bribery around the world by U.S. companies? I doubt it. The competition from others, up until the OECD agreement, was too extensive. The OECD agreement is changing the spectrum. Still, the point I have made to senior executives is that bribery is a dangerous and criminal act. Even if the corporation is only caught a few times, it is the reputation of the corporation that is hurt, and the individuals involved can be destroyed.

Zemenides et al., *supra* note 40, at 199 (comments of Pat Head).

69. See Mark J. Murphy, Note, *International Bribery: An Example of an Unfair Trade Practice?*, 21 Brook. J. Int'l L. 385, 393-97 (1995); see also Charpié, *supra* note 6, at 8.

The Europeans' initial reaction to the American FCPA was bemused incredulity. They were skeptical of the law and regarded it as a quaint outbreak of Puritanism and naiveté on the part of the United States. Therefore, in essence, America had little support for its solitary war against international bribery after it enacted the law.

Id.; see also Brown, *supra* note 8, at 261-62 (stating that when Congress directed the Special Representative for Trade Negotiations at the General Agreement on Tariffs and Trade ("GATT") in the late 1970's to initiate negotiations on anti-bribery, the proposal was met with "polite silence").

70. See Seymour Rubin, *International Aspects of the Control of Illicit Payments*, 9 Syracuse J. Int'l L. & Com. 315, 321 (1982).

71. See Joseph F. Savage et al., *New Amendments to the Foreign Corrupt Practices Act Broaden Its Scope as Enforcement Increases*, White-Collar Crime Rep. July-Aug. 1999, at 5 n.10 (citing David Ivanovich, *Cutting Off Corruption's Supply Side: More Nations Join U.S. War on Bribery*, Houston Chron., Oct. 30, 1998, at Business 1). Indeed:

As recently as 1996, fourteen of the twenty-nine members of the OECD allowed companies to declare bribes a business expense. Companies in Germany, for example, were declaring more than \$5 billion in expenses for payoffs. Meanwhile, since 1994, allegations of bribery by foreign companies have been raised regarding 240 international commercial contracts worth

Accordingly, during the period of quickening globalization of the late 1980s and 1990s, without an international agreement in place, U.S. interests were suffering significantly despite the 1988 amendments,⁷² especially in emerging markets.⁷³ U.S. efforts to get the international community on board continued through the 1990s.⁷⁴

B. The Evolving View of Public Corruption: Greater International Agreement on Anti-Bribery Legislation and the 1998 Amendments to the FCPA

As early as 1975, the United Nations General Assembly passed a resolution condemning corrupt practices,⁷⁵ but its action lacked force and was largely ineffectual.⁷⁶ At that time, there had not yet developed public support for aggressive anti-bribery efforts.⁷⁷

Later, the United States' proposal that the United Nations Economic and Social Council adopt a code banning bribery in international business was met with "deafening silence."⁷⁸ Despite the Economic and Social Council's creation of an Ad Hoc Inter-Governmental Working Group on Corrupt Practices, the proposal that that group subsequently produced was rejected because the

\$108 billion. . .

. . . [n]ot only are bribery payments a cost of doing business, but a rising cost as well. In Italy, for example, payoffs to political parties have risen from five to 15% of a contract's value.

Id. (citations omitted). Despite bribery's rising cost, competitors of U.S. businesses who bribe still tend to succeed over U.S. interests in bidding for foreign contracts:

According to the U.S. Department of Commerce officials, of 61 contracts it examined, U.S. companies lost 13 of them, worth \$3 billion, due to bribes by foreign companies. Some government officials believe the value lost each year is \$20 billion to \$30 billion. They assert that companies providing bribes win the contract 90% of the time.

Id. at 2.

72. See, e.g., *Continued Official U.S. Pressure Called Key to Winning Kuwait Reconstruction Contracts*, 8 Int'l Trade Rep. 472 (1991) (stating that U.S. companies are disadvantaged because the Middle East business climate favors bribes); Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. Times, Apr. 12, 1996, at A10 (stating that U.S. Trade Representative Michael Kantor believed that, based on a 1995 report, losses for that year were \$45 billion in contracts alone).

73. See Ann Elizabeth Mayer, *Introduction*, 18 U. Pa. J. Int'l Econ. L. 1153, 1157 (1997).

74. See *Addressing the Challenges*, *supra* note 23, at 4.

75. See *Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved*, G.A. Res. 3514, U.N. GAOR, 30th Sess., 2441st plen. mtg. (1975), U.N. Doc. A/10034, *reprinted in* 15 United Nations Resolutions (1974-1976), at 509-10 (Dusan J. Djonovich ed., 1984).

76. See Charpié, *supra* note 6, at 16 (citing Stephen Muffler, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act Is Not the Answer*, 1 ILSA J. Int'l & Comp. L. 1, 10-11 (1995)).

77. *Id.*

78. See Rubin, *supra* note 70, at 319-20.

United States was unable to garner support from its European allies.⁷⁹ Efforts in the OECD had proved equally unavailing.⁸⁰

However, the rapidly-evolving global environment of the 1990s bolstered U.S. efforts. With the Cold War coming to an end, democratic governments with greater transparency were spreading across the globe, rendering corruption more visible.⁸¹ Concomitantly, the expectation of enhanced government accountability followed the international expansion of freedom of the press⁸² and more independent prosecutors and judges.⁸³ These fundamental changes set the stage for a shift in how the international audience perceived bribery.⁸⁴

1. The Changed Perception of Corruption

The view that corruption was a mere externality “necessary” to achieve growth⁸⁵ eventually gave way to the view that corruption was ruinous.⁸⁶ Early commentators had posited that corrupt channels

79. *See id.* at 321.

80. *See* Murphy, *supra* note 69, at 387-88.

81. *See OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions: Hearings Before the Senate Comm. on Foreign Relations*, 105th Cong. 55 (1998) [hereinafter *Heimann Testimony*] (testimony of Fritz F. Heimann, Chairman, Transparency International USA).

82. For example, critical press coverage played a significant role in bringing to an end the corrupt Suharto dictatorship in Indonesia. *See* Zemenides et al., *supra* note 40, at 205-07 (comments of Joseph Onek).

83. *See Heimann Testimony*, *supra* note 81, at 55.

84. *See id.*

Political corruption became one of the “hot” foreign policy topics of the 1990s, in contrast to the period before 1990 when political corruption appeared of little concern to the international community. Robert McNamara, former President of the World Bank, asserted in the early-1990s that “the subject of corruption could not have been discussed [in international forums] 20, 15, or even 5 years ago” In the post-Cold War 1990s, the democratization trends in Asia, Africa, Latin America, and the former Soviet bloc, combined with advances toward global free trade, brought the efficiencies of state political and economic systems under world microscopes—revealing the underlying web of corruption pervading developing states.

Michael W. Collier, Explaining Political Corruption (Colum. Int’l Aff. Online, Working Paper, 1999) (citations omitted), at <http://www.ciaonet.org/isa/com01/>.

85. This school of thought adhered to the view that “the definitions of corruption and bribery varied with societal values and inherited cultural and religious traditions, and . . . an increase in the incidence of corruption and bribery was a necessary and inevitable part of the modernization process.” Padideh Ala’i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 Vand. J. Transnat’l L. 877, 897 (2000). Some posited that, because “corruption” was contextually based, what Westerners perceived as corrupt might simply be “their traditional way of doing things.” *Id.* at 898; *see also* Gerald E. Caiden & Naomi J. Caiden, *Administrative Corruption*, 37 Pub. Admin. Rev. 301, 304 (1977).

86. *See* Tarullo, *supra* note 49, at 675 (“Instead of regarding bribery as a means for getting things done in rigid bureaucracies, by the 1990s, development economists

could in fact be beneficial as they allowed companies and individuals to circumvent inefficient and onerous regulatory burdens and taxes.⁸⁷ Considerable attention and research,⁸⁸ however, challenged this view.⁸⁹ Studies published in the late 1990s found empirical evidence that corruption severely affected GDP and foreign investment,⁹⁰ diverting monies destined for socially valuable products or infrastructure into the pockets of officials.⁹¹ Gradually, the effects of global corruption⁹² came to be perceived as more than mere unfortunate by-products, and instead as more akin to “an international epidemic, similar in impact to disease and terrorism.”⁹³

The evidence reflecting the greater than expected harm wrought by corruption was not the only catalyst for the changing perspective on international corruption. Perhaps most significantly, highly publicized bribery scandals in nations like Italy, Japan, Korea, Spain, France, and Belgium garnered support for the OECD Convention effort⁹⁴ by removing “the common excuse for inaction,”⁹⁵ namely, “that

were characterizing corruption as one of the principle impediments to both economic growth and democratic accountability.”); see also Susan Rose-Ackerman, *The Political Economy of Corruption*, in *Corruption and the Global Economy* 31, 33 (Kimberly Ann Elliott ed., 1997) (arguing that toleration of corruption in a growing economy leads to higher percentages of wealth going to bribery and greater inequality between haves and have-nots).

87. See Rose-Ackerman, *supra* note 86, at 55-56.

88. See Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. Pa. J. Int'l. Econ. L. 863, 864 (2001); Schroth, *supra* note 38, at 619.

89. See Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, in *Corruption and the Global Economy*, *supra* note 86, at 186-87.

90. See Schroth, *supra* note 38, at 619-20 (citations omitted).

91. See Collier, *supra* note 84. Michael W. Collier goes on to summarize recent research on corruption's effects:

When it is pervasive and uncontrolled, corruption thwarts economic development and undermines political legitimacy. Less pervasive variants result in wasted resources, increased inequity in resource distribution, less political competition and greater distrust of government. Creating and exploiting opportunities for bribery at high levels of government also increases the cost of government, distorts the allocation of government spending, and may dangerously lower the quality of infrastructure. Even relative petty or routine corruption can rob government of revenues, distort economic decision making, and impose negative externalities on society, such as dirtier air and water or unsafe buildings.

Id. (citations omitted).

92. See generally Poverty Reduction and Econ. Mgmt., World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* 5 (1997) (pointing out bribery's long-term economic costs and the more severe harm to political legitimacy); Rose-Ackerman, *supra* note 86; Konyin Ajayi, *On the Trail of a Spectre—Destabilisation of Developing and Transitional Economies: A Case Study of Corruption in Nigeria*, 15 Dick. J. Int'l L. 545 (1997).

93. Zemenides et al., *supra* note 40, at 195 (comments of Endy Zemenides).

94. See Heimann *Testimony*, *supra* note 81, at 55; see also Nichols, *supra* note 88, at 896-97.

95. Heimann *Testimony*, *supra* note 81, at 55.

corruption is a serious problem only in developing countries.”⁹⁶ Global leaders began to recognize “that a global economy requires common rules, and that these rules must be morally defensible.”⁹⁷

In sum, “[t]hese factors . . . produced a tidal change in public perceptions around the world.”⁹⁸ In terms of implementing this new viewpoint, the explosive growth of the 1990s did more than reveal corruption’s pervasiveness. Escalating interconnectivity also made agreements⁹⁹ more pragmatically possible as the globe shrunk through technology and trade.¹⁰⁰

2. International Anti-Bribery Agreements Begin to Emerge

In the early 1990s the OECD began to investigate potential cooperative actions that could be taken to outlaw transnational bribery.¹⁰¹ The Clinton administration provided additional motivation, demanding that the world community come to agreement on foreign bribery.¹⁰²

But OECD Convention member states remained hesitant.¹⁰³ As the beginning stages of the OECD Convention got underway, Japan, Germany, France, and Britain sought to block the treaty,¹⁰⁴ insisting that bribery should be policed in its home state,¹⁰⁵ on the demand side,

96. *Id.*

97. *Id.*

98. *Id.*; see also Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 *Ariz. J. Int’l & Comp. L.* 793, 805 (2001). Others believe the global change in attitude was the result of the “hegemon United States [bullying] the rest of the world into adopting legislation similar to [the FCPA].” Nichols, *supra* note 88, at 893-94 (questioning the validity of this view because the OAS treaty is considered “the result of efforts by Latin America,” because “the European Union does not get ‘bullied’ by the United States over commercial issues” such as the OECD Convention, and because the heavily influential anti-bribery organization Transparency International “was founded by a German national who left the World Bank, because he was not satisfied with that organization’s [anti-bribery] efforts”).

99. See Henning, *supra* note 98, at 806; see also Frank Vogl, *The Supply Side of Global Bribery*, *Fin. & Dev.*, June 1998, at 30, 31 (noting the media’s role in raising corruption issues).

100. See Henning, *supra* note 98, at 806.

101. See Brown, *supra* note 8, at 265-68.

102. See Murphy, *supra* note 69, at 388 n.19. In June 1994, then-Secretary of State Warren Christopher addressed the OECD Ministerial Meeting in Paris to reaffirm the “‘vital objective’ concerning the U.S. effort ‘to build an international consensus against the bribery of foreign officials in international business transactions.’” *Id.* at 388 n.19 (citing Warren Christopher, *Toward a More Integrated World*, Dep’t St. Dispatch, June 20, 1994, at 393, 395 (statement at the Organization for Economic Cooperation and Development, Ministerial Meeting, Paris, France, June 8, 1994)); see also *U.S. to seek Foreign Acceptance of Anti-Corruption Laws, Practices*, 12 *Int’l Trade Rep. (BNA)*, No. 17, at 714 (Apr. 26, 1995).

103. See Charpié, *supra* note 6, at 25.

104. See Muffler, *supra* note 76, at 13-14; Edmund L. Andrews, *29 Nations Agree to Outlaw Bribing Foreign Officials*, *N.Y. Times*, Nov. 21, 1997, at A1.

105. See Salbu, *supra* note 11, at 286.

not the supply-side out of respect for the affairs of fellow nations. Perhaps entwined in this sentiment was the notion that

many OECD members were satisfied with the status quo, in which U.S. companies were forbidden by their domestic laws from bribing foreign officials but European and other countries were not. There is little doubt that these other governments would gladly have allowed the issue to fade into obscurity, but for the persistence of the United States and the links drawn between domestic and foreign bribery in journalistic and public discourse.¹⁰⁶

The OECD was not the only outlet for U.S. efforts, however. Propelled by changed perspectives on public corruption, the Organization of American States ("OAS"), comprised of thirty-four countries of North, South, and Central America, called for "a hemispheric approach to acts of corruption in both the public and private sectors that would include extradition and prosecution of individuals so charged."¹⁰⁷ Notably, the anti-bribery issue was high on the agenda for southern nations, who went so far as to "suggest that governments of developed countries . . . by failing to act against foreign bribery by their own multinationals, [are] complicit in that bribery."¹⁰⁸

Undoubtedly, this sentiment must have been "vexing to many other OECD member governments"¹⁰⁹ such as Japan, Germany, France, and Britain who had cited respect for sovereignty in opposing anti-bribery legislation.¹¹⁰ But, for anti-bribery advocates, this "new and vocal position of democratically elected governments in developing countries . . . removed [that] prior justification for inaction—that an anti-bribery arrangement was an inappropriate imposition of the values of advanced industrialized democracies upon the rest of the world."¹¹¹

106. Tarullo, *supra* note 49, at 680.

[T]he plausibility of the non-mercantile justifications [e.g., sovereign infringement] for resisting international prohibitions on bribery was progressively eroded in the late 1980s and early 1990s. Yet resistance to an OECD agreement remained strong, a fact that lends credibility to the mercantile explanation [whereby states align themselves with their industries]. In 1994, one European official told me with disarming candor that his country's companies needed a competitive edge over their more efficient U.S. competitors.

Id. at 674 n.26.

107. Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808, 818-19.

108. Tarullo, *supra* note 49, at 679.

109. *Id.*

110. See *supra* note 105 and accompanying text.

111. Tarullo, *supra* note 49, at 679 n.38.

The United States proposed provisions in the draft that substantially tracked the FCPA,¹¹² and in 1996, delegates adopted the Inter-American Convention Against Corruption.¹¹³

Thus, with depleting excuses for inaction, unfavorable empirical evidence, gathering public momentum, and “diplomatic skill, forcefulness, and above all perseverance”¹¹⁴ by the United States, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was brought into being in 1997.¹¹⁵

The Convention significantly follows the original FCPA and yet goes further. It tracks the FCPA’s exception for conduct that is legal in the jurisdiction in which the payment took place,¹¹⁶ as well as exempting “facilitation payments.”¹¹⁷ Likewise, the internal controls and accounting provisions both substantially parallel the FCPA.¹¹⁸ But the Convention went further by defining “public official” as not only “any person holding a legislative, administrative or judicial office

112. See Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 92 Am. J. Int’l L. 491, 492 (1998) (stating that “one of the objectives of the Convention [was] to have the rest of the nations of the hemisphere develop a body of laws on corruption comparable to that which exists in the United States”).

113. See Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39, 35 I.L.M. 724 (entered into force by the United States on October 29, 2000); David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 Nw. J. Int’l L. & Bus. 457, 478 (1998).

114. *Heimann Testimony*, *supra* note 81, at 55.

115. See OECD Convention, *supra* note 20, 37 I.L.M. at 1. The Convention entered into force February 15, 1999 upon the ratification of eighteen countries. By the end of 2001, the OECD Convention was in force for all thirty OECD member countries except Ireland, plus five non-member countries—Argentina, Brazil, Bulgaria, Chile, and Slovenia. Lisa M. Landmeier et al., *Anti-Corruption International Legal Developments*, 36 Int’l Law. 589, 591 (2002). Regarding the subtle arm-twisting employed by the United States while advocating the Convention, Daniel K. Tarullo stated as follows:

One U.S. move was to communicate to its OECD negotiating partners the message that progress on matters of interest to them would be less likely absent progress on the anti-bribery effort. Although no issue linkage or reciprocity was ever articulated explicitly, the message was conveyed by the very prominence of the issue in meetings involving senior officials of the State Department, Treasury Department, Commerce Department, and Office of the U.S. Trade Representative. In effect, U.S. officials were saying, “We care a lot about this issue, your government has been obstructionist, and we are not going to be very helpful on some issues of interest to you until progress is made at the OECD.”

Tarullo, *supra* note 49, at 677-78. A slightly different view of the same conduct: “European Commission officials describe the zeal of U.S. Trade Representative Mickey Kantor in his fight against international bribery as ‘sanctimonious.’” Salbu, *supra* note 11, at 283 n.351 (citation omitted).

116. See OECD Convention, *supra* note 20, cmt. 8, 37 I.L.M. at 9.

117. *Id.* cmt. 9, 37 I.L.M. at 9.

118. See *id.* art. 8(1), 37 I.L.M. at 9; see also 15 U.S.C. § 78m(b)(2)(A) (2000).

of a foreign country," but also as officials or agents of "a public international organization."¹¹⁹ Importantly, the territorial and national jurisdiction¹²⁰ that the Convention calls for far exceeds the scope of the original FCPA.

a. *Jurisdiction Under the OECD Convention*

As to territorial jurisdiction, OECD Convention Members are to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."¹²¹ Contrary to general assumptions of territorial jurisdiction, which require conduct wholly or substantially to take place in the territory of the prosecuting sovereign,¹²² the Convention called for the jurisdictional provision to be "interpreted broadly [enough] so that an extensive physical connection to the bribery act is not required."¹²³ The FCPA, as amended, unquestionably follows this mandate.¹²⁴

b. *Maximum Cooperation Among OECD Convention Members*

The Convention likewise obligates parties "to the fullest extent possible under its laws and relevant treaties and arrangements, to provide prompt and effective legal assistance to another Party."¹²⁵ Thus, for the purposes of sharing information, "[t]he requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance."¹²⁶ Moreover, as for prosecutions, the Convention requires prohibited conduct to be considered an extraditable offense with the Convention itself serving the function of an extradition treaty if such is not in existence between the parties already.¹²⁷

119. See OECD Convention, *supra* note 20, art. 1(4)(a), 37 I.L.M. at 4.

120. See *id.* art. 4(1)-(4), 37 I.L.M. at 4; *id.* art. 4(1)-(4) cmts. 25-26., 37 I.L.M. at 10. Nationality jurisdiction finds its basis upon the domicile, the residence, and the nationality or national character of the person, natural or non-natural, committing the offense. See Restatement (Third) of Foreign Relations Law of the United States § 402 cmt. e (1987).

121. See OECD Convention, *supra* note 20, art. 4(1), 37 I.L.M. at 5.

122. See Restatement, *supra* note 120, § 402.

123. OECD Convention, *supra* note 20, cmt. 25, 37 I.L.M. at 10.

124. See *infra* Parts II.A-B (discussing recent FCPA enforcement actions).

125. OECD Convention, *supra* note 20, art. 9(1), 37 I.L.M. at 6.

126. *Id.*

127. *Id.* art 10(2), 37 I.L.M. at 6 If extradition was denied, the party denying it would be obligated to prosecute the individual instead. *Id.* "In theory at least, the adoption of the OECD Convention [also] empowers U.S. firms to present evidence of competitor bribery directly to the authorities in the relevant countries rather than the pointless diplomatic and media protests of the past." Savage et al., *supra* note 71, at 4.

c. *The Tax Deductibility of Bribes Under the OECD Convention*

Initially, the Convention did not cover the tax deductibility of bribes.¹²⁸ However, after a reinforced recommendation by the OECD Council, all thirty-five parties to the Convention have affirmed that bribes paid to foreign public officials are not tax deductible.¹²⁹

3. A Lack of Non-U.S. Anti-Bribery Enforcement Under the OECD Convention

With the exception of the United States, only two other OECD Convention Members have carried out successful prosecutions under their anti-bribery statutes enacted pursuant to the Convention.¹³⁰ And only four other parties have even initiated investigations or legal proceedings: Canada,¹³¹ France, Italy, and Norway.¹³²

Unfortunately, though perhaps not unexpected because of the lack of enforcement,¹³³ various evidence shows that corruption continues to affect contracts worth billions of dollars.¹³⁴ In fact, the incidence of bribery is increasing:¹³⁵ “U.S. firms are known to have lost at least eight of the contracts, worth \$3 billion” in just a recent one year period.¹³⁶

128. H. Lowell Brown writes:

[I]n a May 1997 report to the OECD Ministerial Council, the OECD Committee on Fiscal Affairs noted that bribes to foreign officials were tax deductible as a business expense under the laws of Australia, Austria, Belgium, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, New Zealand, Portugal, and Switzerland. On April 28, 1998, the Committee on Fiscal Affairs reported that Denmark, France, Germany, Netherlands, and Portugal had adopted or were in the process of adopting legislation that would deny tax deductibility to foreign bribes. In addition, Australia, Belgium, Luxembourg, New Zealand, Sweden, and Switzerland were considering similar legislation.

Brown, *supra* note 8, at 260 n.61 (citations omitted).

129. See Addressing the Challenges, *supra* note 23, at 34. Yet, “[d]espite the important positive steps taken by parties to the convention, the U.S. government remains concerned that tax systems that permit tax deductibility of bribes to foreign public officials may still continue.” *Id.* This is due, in part, to the fact that the legislative frameworks may not adequately capture all types of bribes or bribes by all types of companies. See *id.* Moreover, difficulties result from insufficient training, unfamiliarity with the law denying tax deductibility, protections of confidentiality for the taxpayer, and restrictions on sharing of information with prosecutors. *Id.* at 34-35.

130. See *id.* at 23 (Sweden and South Korea).

131. The prosecution in Canada was for domestic bribery carried out by a Canadian firm: “This is not exactly the kind of overseas bribery that was foremost in the minds of advocates of an OECD Convention.” Tarullo, *supra* note 49, at 683.

132. See Addressing the Challenges, *supra* note 23, at vi.

133. See *infra* Part III.B.

134. Addressing the Challenges, *supra* note 23, at vi.

135. See *id.*

136. *Id.*

In its Sixth Annual Report on International Bribery, the United States expressed disappointment over the lack of enforcement.¹³⁷ In particular, the report cited fellow leading exporters who showed the greatest reluctance in addressing the problem,¹³⁸ and called on “all parties to the convention [to] apply resources to the task of building capacity to launch investigations, bring prosecutions, and obtain convictions under their laws.”¹³⁹

C. Mechanisms of Enforcement: Bilateral Information-Sharing Agreements

Gathering the evidence necessary to carry out an investigation abroad is exceedingly difficult.¹⁴⁰ Indeed, if the United States was unable to elicit cooperation from local agencies and officials, “[s]ecuring . . . proof [of official bribery] in a foreign country would be practically impossible.”¹⁴¹ Though the OECD Convention contains provisions for information sharing and cooperative law enforcement obligations,¹⁴² not all nations from which the United States requires assistance in foreign bribery prosecutions are parties. As a result, the United States also employs less formal agreements while seeking cooperation in FCPA enforcement.¹⁴³

In an effort to ensure a degree of integrity and accountability in the burgeoning world financial system in general, the SEC has cemented over thirty bilateral information-sharing agreements with regulators from various nations,¹⁴⁴ which have also been successfully employed in the FCPA context.¹⁴⁵

Pragmatic and non-binding, such instruments do not create obligations under international law¹⁴⁶ and so do not require the time and expense of a ratification process. Every agreement is, however, specifically negotiated with each nation in order to fit the unique

137. See Landmeier et al., *supra* note 115, at 589 (“Despite these recent efforts, there have not been any significant international enforcement actions other than by the U.S. government . . .”).

138. See Addressing the Challenges, *supra* note 23, at 22.

139. *Id.*

140. See Neil H. Jacoby et al., *Bribery and Extortion in World Business: A Study of Corporate Political Payments Abroad* 218 (1977).

141. *Id.*; see also U.S. Dep’t of Justice, *supra* note 63, § 9.2.

142. See OECD Convention, *supra* note 20, art.9, 37 I.L.M. at 6.

143. See Gregory S. Bruch, *Recent SEC Foreign Payments Cases and the Road Ahead Under the New SEC Leadership*, A.B.A. Center for Continuing Legal Educ., Nat’l Inst., Mar. 21-22, 2002, available at WL N02FCPB ABA-LGLED B-151.

144. See Office of Int’l Affairs, SEC, *The SEC Speaks in 2004*, at 543, 552 (2004), WL 1413 PLI/Corp 543.

145. See Bruch, *supra* note 143.

146. See Office of Int’l Affairs, SEC, *The SEC Speaks in 1996*, at 125, 165 (1996), WL 927 PLI/Corp 125.

conditions of that market.¹⁴⁷ Generally these agreements require: (1) the exchange, upon request, of information contained in the files of the foreign regulator; (2) the taking of testimony under oath by the foreign regulator on behalf of the SEC; (3) inspections of regulated persons by the foreign regulator; and (4) the sharing with the SEC of the information and reports generated by those inspections.¹⁴⁸

Thus, while conducting discovery for foreign anti-bribery enforcement remains onerous, it is now possible.¹⁴⁹ Consequently, the SEC relies more and more¹⁵⁰ upon such negotiated arrangements in FCPA actions,¹⁵¹ a practice which is likely to expand the SEC's international efforts and keep both formal and informal cooperation continually growing.¹⁵²

D. *International Issues of Law and Policy Raised by the Extraterritorial Reach of the FCPA*

Until amended in 1998, the FCPA had reflected Congress's sensitivity to "possible conflicts with principles of international law and comity that could result from the assertion of U.S. jurisdiction over foreign nationals outside the territorial United States."¹⁵³ Thus, it has been said that "the enlargement of the extraterritorial effect of the [FCPA's] antibribery provisions may prove to be the most significant and challenging foray by the United States into the regulation of international business"¹⁵⁴ as nearly any contact with the United States "will subject a foreign national to prosecution in a U.S. court."¹⁵⁵

Indeed, the 1998 amendments create vicarious liability for "foreign nationals whose employees or agents commit acts in the United States that are in furtherance of a corrupt payment to a foreign official."¹⁵⁶ This provision would apply for subsidiaries even if they are not wholly

147. See Christine T. Jarmer, Comment, *International Internet Securities Fraud and SEC Enforcement Efforts: An Update*, 73 Tul. L. Rev. 2121, 2136 (1999).

148. *Id.* (citing Charles R. Mills et al., *International Enforcement: Enforcement Actions in the Global Market*, in *The Securities Enforcement Manual: Tactics and Strategies* 501 (Richard M. Phillips ed., 1997)).

149. See Bruch, *supra* note 143.

150. See *The SEC Speaks in 2004*, *supra* note 144, at 552. "In fiscal year 2003, the SEC made 309 requests to foreign authorities for enforcement assistance and responded to 344 requests from abroad." *Id.* at 553.

151. See Cohen, *supra* note 62, at 503.

152. See Bruch, *supra* note 143.

153. Brown, *supra* note 8, at 292-93.

154. *Id.* at 240.

155. *Id.* at 296.

156. *Id.* at 349 (citing 15 U.S.C. § 78dd-3(a)(3) (2000)). "[U]nder the common law principles of agency, when a natural person acting on behalf of a foreign company, that is an officer, director, employee, stockholder or agent, engages in a corrupt act having contact with the United States, that foreign company may be liable for that agent's conduct." Savage et al., *supra* note 71, at 3.

owned by the parent if they acted as the agent of the parent.¹⁵⁷ Moreover, the United States has taken the position that the level of conduct that may trigger liability under the act "includes everything except 'merely conceiv[ing] the idea of paying a bribe without undertaking to do so.'"¹⁵⁸

1. Morally Imperious and Unwisely Intrusive? Arguments Against the FCPA

This aggressive stance is in stark contrast to critics who see such far-flung jurisdiction as contrary to international law and only appropriate if the "actions taken within United States territory directly and substantially further a violation of the FCPA."¹⁵⁹ While there is no constitutional problem,¹⁶⁰ it is presumed that the United States conforms to basic principles of international law.¹⁶¹ Thus, some commentators question the reasonableness of prosecution where the link between the illicit conduct and United States' territory is dangerously attenuated,¹⁶² such as cases where a foreign party pays a bribe to a foreign official in a foreign jurisdiction.¹⁶³ In cases like these, it is contended, the potential for political clashes is impermissibly great.¹⁶⁴

157. See Brown, *supra* note 8, at 355.

158. Lucinda A. Low & Timothy P. Trenkle, *U.S. Antibribery Law Goes Global*, Bus. L. Today, July-Aug. 1999, at 18 ("How broadly enforcement officials will attempt to construe this provision will be an issue to watch closely over the next few years.").

159. Brown, *supra* note 8, at 334.

160. See *id.* at 297.

161. See *id.* at 320.

162. See *id.* at 302.

163. See *id.* at 359. One could even argue that when an American entity bribes abroad, if it were not for the FCPA, the actual effect upon the United States is slight, and perhaps not even adverse:

The FCPA's foreign payments prohibition has always stood out insofar as investors tend to benefit (at least in the short run) from the illegal payments to foreign government officials. And while foreign governments may be harmed by illicit payments from US public companies, they would not typically be considered as "other corporate constituencies."

Bruch, *supra* note 143. But see Tarullo, *supra* note 49, at 675 n.29 (stating that corrupt practices negatively affect corporate culture as employees engage in illegal activity).

164. See Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 Yale J. Int'l L. 223, 254 (1999) [hereinafter Salbu, *Premature Evocation*].

[R]egardless of how many countries eventually sign on to the present multilateralization efforts, the attempts of one sovereign to moderate activity within the borders of another will always pose the risk of disagreements, resentments, and conflict. Should all the world's nations enact extraterritorial anti-bribery legislation, the result will increase the pool of potential international relations minefields.

Stephen Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 Mich. J. Int'l L. 419, 445 (1999) [hereinafter Salbu, *Threat to Global Harmony*].

2. A Responsible Approach to a Global Problem? Arguments in Favor of the FCPA

Other commentators take a different view of the international anti-bribery efforts advanced by the United States. In support of FCPA enforcement, proponents point to the dangers of failing to effectively police the supply-side of corruption,¹⁶⁵ given the interconnected nature of the world's financial system whose effects easily circle the globe,¹⁶⁶ as well as America's interest in ensuring fidelity to its laws by closing loopholes which would allow corrupt practices to be carried out simply by delegating the bribery to foreign third parties.¹⁶⁷

Under this view, rather than a vehicle for moral imperialism, the provisions of the FCPA are viewed as "catalytic" in changing "international attitudes" and providing "a functioning model" worth replicating.¹⁶⁸

Proponents of extraterritorial anti-bribery legislation take exception to characterizations of U.S. efforts as fruitless attempts to elevate "all countries to the FCPA's lofty moral climate," believing this is "unrealistic" because "[b]ribery is an intransigent global reality that is unlikely to disappear any time soon."¹⁶⁹ Proponents counter that no matter how rampant corruption may be, it is unlikely to be well-received by the state's citizenry.¹⁷⁰

Examining recent applications of the FCPA, the subject Part II, illustrates these issues and is useful for analyzing the Act as it presently stands.

165. See Philip M. Nichols, *Increasing Global Security by Controlling Transnational Bribery*, 20 Mich. J. Int'l L. 451, 451-52 (1999).

166. See *id.* at 451-54.

167. See *The Short Arm of the Law*, Economist, Mar. 2, 2002, at 63. The article criticizes the FCPA for loopholes that "are big enough for a half-blind elephant to blunder through," allowing foreign subsidiaries to do the dirty work of multinationals in jurisdictions where the host government has not signed the OECD Convention, but notes that the KPMG-SSH enforcement action "could push the extraterritorial ambitions of the American authorities a bit further" and thus close these openings. *Id.* at 63-64.

168. See Barbara Crutchfield George et al., *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, 47 (1999).

169. Salbu, *supra* note 11, at 262.

170. See Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 Cornell Int'l L.J. 689, 705-06 (2000).

Repeal of the FCPA is not a realistic proposition. If repeal were placed on the congressional agenda, one could only imagine opposition from all points of the globe. If the largest and most aggressive economic competitor in the world economy sanctioned bribery and "leveled the playing field" by allowing bribe payments to be deducted as legitimate business expenses, the protests would be unbridled; in fact, they would be heard in the halls of U.S. academia.

Id. at 709.

II. FCPA ENFORCEMENT: JUSTIFIED OR MISGUIDED?

So far, only two cases have invoked the expanded jurisdictional provision of the FCPA, which covers foreign persons who carry out an activity in the territory of the United States in furtherance of a corrupt act.¹⁷¹ Both of these actions highlight the jurisdictionally aggressive joint enforcement by the DOJ and the SEC against foreign persons in FCPA cases¹⁷² and are therefore valuable in approaching the appropriateness of recent American enforcement of the FCPA.

The first action, settled in 2002, was brought against an Indonesian accounting firm and one of its partners, a native Indonesian, for bribing an Indonesian tax official for the benefit of an Indonesian subsidiary of Baker Hughes.¹⁷³ Here, American law enforcement levied charges against foreign persons, natural and otherwise, for the bribery of foreign officials in their own country.¹⁷⁴

The second action, settled in 2004, was brought against a Swiss parent corporation and two of its subsidiaries, one of which was based in America, for the bribery of oil officials in Nigeria and elsewhere.¹⁷⁵ As in the first case, the degree of contact with the territory of the United States in regards to the parent corporation and the foreign subsidiary appears minimal, at best.¹⁷⁶

This part begins with a fuller discussion of both cases then proceeds to address in more detail the difficult questions of international policy surrounding the extraterritorial application of the FCPA.¹⁷⁷

171. See Press Release, Dep't of Justice, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (July 6, 2004) (stating that the action against ABB Vetco Gray Inc. was only the second time charges have been brought under 15 U.S.C. § 78dd-3 (2000)), available at http://www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm; see also *ABB Units Plead Guilty to Bribery*, Corp. Crime Rep. No. 28(1), July 6, 2004, available at <http://www.corporatecrimereporter.com/abb070604.htm>.

172. See Landmeier et al., *supra* note 115, at 594.

173. See *infra* Part II.A.

174. See *infra* Part II.A.

175. See *infra* Part II.B.

176. In the *KPMG-SSH* action,

[under] the facts in the public record, both the Indonesian accounting firm and its individual partner appear to have acted entirely outside the jurisdiction of the United States in connection with their work for Baker Hughes. Additionally, in two instances cited in the complaint against the company, involving payments to third-party intermediaries, the language of the pleadings suggest that the government may have imposed something close to strict liability for third-party actions.

Landmeier et al., *supra* note 115, at 595. In the later *ABB* action, "the DOJ's allegations against Vetco UK [did] not suggest that Vetco UK employees undertook any activities in the United States. Rather, the DOJ action appear[ed] to be based on an assertion that certain Vetco US employees were acting as 'agents' for Vetco UK." *International Client Alert: ABB Affiliates Plead Guilty to Bribing Nigerian Officials*, Mondaq Bus. Briefing, Aug. 16, 2004 [hereinafter *Affiliates Plead Guilty*], at <http://www.mondaq.com/article.asp?articleid=27889&searchresults=1>.

177. See *supra* Part I.C.

A. SEC v. KPMG Siddharta Siddharta & Harsono¹⁷⁸

The complaint against the Indonesian accounting firm KPMG Siddharta Siddharta & Harsono (“KPMG-SSH”) and senior partner Sonny Harsono alleged the following facts: Indonesia’s tax authority notified the Indonesian subsidiary of Baker Hughes, PT Eastman Christensen (“PTEC”), of a \$3.2 million tax liability. PTEC selected KPMG-SSH to represent it before the authority.¹⁷⁹ KPMG-SSH concurred in PTEC’s view that the official’s tax determination was incorrect, believing instead that PTEC was due a tax refund.¹⁸⁰

KPMG-SSH met with the Directorate General of the Indonesian tax authority to discuss the merits of the assessment.¹⁸¹ The tax official demanded a payment of \$200,000 in exchange for a reduction in the assessment.¹⁸²

KPMG-SSH communicated the situation to Baker Hughes’s Asia-Pacific Tax Manager¹⁸³ (“BH Tax Manager”), who told them not to pay the bribe, but to lawfully challenge the tax bill.¹⁸⁴ However, the official would not relent, though he did lower his request to \$75,000.¹⁸⁵ Senior KPMG-SSH partner Sonny Harsono devised a plan whereby, if Baker Hughes was willing, KPMG-SSH would pay the tax official and conceal the payment with a false invoice for professional services rendered.¹⁸⁶ KPMG-SSH candidly laid out the only two available options to PTEC: Either contest the \$3.2 million tax assessment, which would require immediate payment of the full amount and could take as long as two years to resolve, or pay the bribe.¹⁸⁷

The BH Tax Manager relayed the details of the situation to Baker Hughes’s Vice President and Controller in Houston and to Baker Hughes’s FCPA Compliance Advisor in Washington, D.C., alerting them that the tax official had given PTEC only forty-eight hours to respond before he issued the \$3.2 million tax assessment.¹⁸⁸ The FCPA advisor informed both the Controller and the Tax Manager that such a payment would violate the FCPA and that KPMG-SSH should provide written assurances that it would take no such actions.¹⁸⁹

The Controller then related the situation to the General Counsel (“GC”) of Baker Hughes, and to Baker Hughes’s Chief Financial

178. See KPMG Complaint, *supra* note 1.

179. *Id.* para. 15.

180. *Id.*

181. *Id.* paras. 16-17.

182. *Id.* para. 17.

183. *Id.* para. 18.

184. *Id.*

185. *Id.* para. 22.

186. *Id.*

187. *Id.* para. 23.

188. *Id.* para. 24.

189. *Id.* para. 25.

Officer ("CFO"). The GC pointed out obvious FCPA issues and instructed the CFO and the Controller not to carry out the scheme.¹⁹⁰

Disregarding the instructions, the CFO and the Controller authorized the illicit scheme. The tax assessment dropped to approximately \$270,000.¹⁹¹

Baker Hughes's GC discovered what had transpired and quickly took corrective action.¹⁹² He attempted to stop the payment from going forward, alerted the SEC and the DOJ, disclosed the matter to its outside auditors, corrected the improper accounting, fired KPMG-SSH, obtained the resignation of the responsible employees, and paid the Indonesian government what it believed to be the correct tax assessment: \$2.1 million.¹⁹³

In the fall of 2001, the SEC and DOJ for the first time jointly filed a civil action alleging violations of the FCPA,¹⁹⁴ and aggressively sought jurisdiction over Harsono and KPMG-SSH.¹⁹⁵ While the DOJ and the SEC have concurrent jurisdiction over issuers, only the DOJ can prosecute non-issuer related activity.¹⁹⁶ Thus, the charges brought against Harsono and KPMG-SSH may be divided into two parts: issuer and non-issuer related charges.

Regarding jurisdiction which extends to the conduct of issuers and their agents, the complaint alleged Harsono violated 15 U.S.C. § 78dd-1(a),¹⁹⁷ and that KPMG-SSH and Harsono both aided and abetted Baker Hughes's violations of the books-and-records provisions of the FCPA,¹⁹⁸ as well as Baker Hughes's failure to devise or maintain an effective system of internal controls as required to prevent or detect such violations.¹⁹⁹

Bringing such charges against a foreign corporation for aiding and abetting a U.S. company's FCPA violation was an unprecedented

190. *Id.* para. 27.

191. *Id.* para. 29.

192. *Id.* para. 30.

193. *Id.* Baker Hughes cooperated extensively with the investigation, going so far as "declining to assert attorney-client privilege with regard to its communications during the period of the Indonesian transaction." Landmeier et al., *supra* note 115, at 596.

194. *See* Bruch, *supra* note 143.

195. *See* Landmeier et al., *supra* note 115, at 597.

196. Gregory S. Bruch writes:

The FCPA divides enforcement responsibility between the [DOJ] and the [SEC]. [The DOJ] is responsible for criminal investigations and prosecution, as well as for civil investigation and prosecution of violations by corporations or other business entities that are not public companies. The SEC is responsible for civil investigation and prosecution of violations by publicly owned companies and their agents.

Bruch, *supra* note 143.

197. *See* KPMG Complaint, *supra* note 1, para. 32(a).

198. *Id.*; *see* 15 U.S.C. § 78m(b)(2)(A) (2000).

199. *Id.*; *see* § 78m(b)(2)(B).

move for the SEC.²⁰⁰ Presumably, if the issue had been litigated, the foreseeable use of the means or instrumentalities of interstate commerce, in violation of § 78dd-1(a), would have been the basis of the suit as KPMG-SSH had insisted that Baker Hughes, based in Houston, Texas, “represent[] directly to KPMG-SSH, not through PTEC, that it wanted KPMG-SSH to make the illicit payment.”²⁰¹ Interestingly, however, the complaint did not point to any specific facts, only that Harsono and KPMG-SSH directly or indirectly used such instrumentalities.²⁰²

With respect to the non-issuer allegations, jurisdiction may be exercised, after the 1998 amendments, over “any person . . . [who] while in the territory of the United States, corruptly . . . [does] any . . . act in furtherance”²⁰³ of a bribe. The complaint alleged that KPMG-SSH and Harsono violated this provision,²⁰⁴ the first alleged violation of this section of the FCPA.²⁰⁵ And yet, significantly, no facts indicate that Harsono or any KPMG-SSH employee conducted any activity within U.S. territory. Even taking the generous legal position identified above, where the level of conduct “includes everything except ‘merely conceiv[ing] the idea of paying a bribe without undertaking to do so,’”²⁰⁶ neither Harsono nor any KPMG-SSH employee acted inside U.S. territory.

Perhaps, if litigated, the government may have relied upon an agency theory, alleging that KPMG-SSH and Harsono’s conduct made the BH Tax Manager their agent²⁰⁷ who employed interstate communications in phoning and emailing Houston. Or, it is possible

200. See Sokenu, *supra* note 7, at 1.

201. KPMG Complaint, *supra* note 1, para. 21. Recall that “use of the mail need not have been made by the person accused,” but must only have been “reasonably foreseeable.” Brown, *supra* note 8, at 310.

202. See KPMG Complaint, *supra* note 1, para. 8.

203. § 78dd-3(a).

204. See KPMG Complaint, *supra* note 1, para. 2.

205. See *supra* note 171 and accompanying text.

206. Low & Trenkle, *supra* note 158, at 18.

207. See Dep’t of Justice, USA: Phase 2, Questions Related to Phase 1, at <http://www.usdoj.gov/criminal/fraud/fcpa/PhIIResp.htm> (last visited Mar. 2, 2005).

The FCPA provides, “It shall be unlawful for any [issuer, domestic concern, or other person] to make use of the mails or any other means or instrumentality of interstate commerce . . .” . . . This, however, does not require that each individual defendant personally use an interstate facility or even authorize one to be used. Under generally applicable principles of U.S. criminal law, a person may be held liable as a principal if he “aids, abets, counsels, commands, induces or procures [an offense’s] commission.”

Although we are not aware of any case in which a court addressed this issue with respect to the FCPA, the courts have held that the government was not required to prove knowledge of the use of an interstate instrumentality in cases brought under other statutes that include the use of an interstate instrumentality as a jurisdictional element.

Id. (citation omitted). Moreover, “[t]he FCPA requires only that the use of an interstate facility be ‘in furtherance’ of the unlawful payment.” *Id.*

that the DOJ was attempting to interpret a territorial effects-based rationale into § 78dd-3.²⁰⁸ However, the FCPA has never been based upon an effects doctrine and contains no effects-based language.²⁰⁹ Moreover, the OECD Convention, though it did require Congress to greatly expand the FCPA,²¹⁰ expressly relied only upon territoriality and nationality jurisdiction.²¹¹

It may be that Harsono and KPMG-SSH could have successfully defended themselves,²¹² but “their consent to jurisdiction ensured a quick settlement without risking financial or criminal penalties or a protracted legal struggle,”²¹³ instead only coming away with a cease-and-desist order.²¹⁴

While such a settlement has no controlling value as precedent, *per se*, it shows the scope of the Act as it is likely to be applied going forward and demonstrates the SEC’s intention to advance all plausible legal theories in vigorously applying the FCPA.²¹⁵ Evidently, this action shows that American law enforcement is taking a rather stringent approach to FCPA enforcement, even against foreign nationals.²¹⁶ Furthermore, because the SEC continues to advance its cooperative arrangements with foreign regulators through

208. Miller & Chevalier, International Client Alert, Baker Hughes, Related Cases Set Aggressive Precedents Under FCPA, Oct. 22, 2001 (on file with author).

209. See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

210. See USA: Phase 2, Questions Related to Phase 1 Evaluation, *supra* note 207, (noting that “the inclusion of the ‘foreign nexus’ in all three sections of the FCPA, coupled with its explicit extraterritorial application to U.S. nationals and companies, makes it clear that the Congress, in enacting and amending the FCPA, intended for it to have the broadest possible scope”).

211. “The United States has not yet brought any prosecution invoking the nationality jurisdiction established by the 1998 amendments to the FCPA.” Response of the U.S.: Questions Relating to Phase 2, *supra* note 63, § 8.2.

212. See Sokenu, *supra* note 7, at 3. Claudius O. Sokenu states:

Presumably, . . . the settlement relates to the DOJ’s jurisdiction to institute injunctive proceedings against “any person” violating the antibribery provisions of the FCPA. However, that provision clearly limits the DOJ’s jurisdiction to acts committed “while in the territory of the United States.” Given that the complaint did not include any allegations that KPMG-SSH acted “while in the territory of the United States,” it is doubtful whether the DOJ would have been able to make out a *prima facie* case against KPMG-SSH.

Id. (citations omitted). Interestingly, the author of the preceding quotation was a former senior attorney with the SEC, Division of Enforcement, and was the SEC’s lead counsel in the Baker Hughes Incorporated investigation. See *id.* at 1 n.*.

213. Landmeier et al., *supra* note 115, at 598.

214. While such an injunction “stains the [party’s] name and raises the stakes for any future violations,” it results in no fine or jail time. Bruch, *supra* note 143.

215. See Sokenu, *supra* note 7, at 1; see also Landmeier et al., *supra* note 115, at 600-01 (describing renewed enforcement vigor for FCPA violations apparent in an action where, for the first time, criminal liability was asserted against a foreign national under 15 U.S.C. § 78dd-2(a) (2000) and the expanded penalty provisions of § 78dd-2(g)).

216. See Bruch, *supra* note 143.

information sharing and collaborative prosecutions,²¹⁷ this type of enforcement is likely to become more prevalent.²¹⁸

As a result, it seems that foreign nationals may have to begin taking the FCPA more seriously when conducting business outside the United States or even inside their own borders.²¹⁹

B. United States v. ABB Vetco Gray, Inc.²²⁰

In late October 2003, global construction and technology giant ABB Ltd. ("ABB"), a foreign corporation based in Zurich, Switzerland,²²¹ made public a preliminary agreement²²² to sell two of its upstream oil, gas, and petrochemicals subsidiaries, Vetco Gray UK, Ltd. ("Vetco UK"), based in Aberdeen, Scotland, and Vetco Gray, Inc. ("Vetco US"), based in Houston, Texas.²²³

During the ensuing months of necessary due diligence, questionable payments, totaling more than \$1.1 million, were found to be made by the subsidiaries to officials in connection with large-scale engineering projects in Nigeria, Angola, and Kazakhstan.²²⁴ The findings were voluntarily turned over to the SEC and the DOJ.²²⁵ The complaint alleged that ABB subsidiaries, Vetco US and Vetco UK, offered and made illicit payments to government officials in these countries for the purpose of securing and retaining business.²²⁶ The complaint stated that at least \$865,726 of such payments were made after April 2001,²²⁷ when ABB listed its American Depositary Shares, thereby becoming a reporting company in the United States.²²⁸

On July 6, 2004, the two subsidiaries pled guilty to criminal and civil violations of the anti-bribery provisions of the FCPA.²²⁹ Thus, beyond the civil and criminal charges brought against the parent company,

217. See *supra* Part I.C.

218. See Bruch, *supra* note 143.

219. See Sokenu, *supra* note 7, at 1.

220. See ABB Complaint, *supra* note 2.

221. Switzerland is an OECD Convention member. See Homer Moyer, *The Role of Law in Combating Official Corruption*, 98 Am. Soc'y Int'l L. Proc. 169, 175 (2004).

222. See Press Release, ABB Asea Brown Boveri Ltd., ABB Concludes Compliance Review of Upstream Oil, Gas and Petrochemicals Business (July 7, 2004), available at <http://www.abb.com>.

223. See ABB Complaint, *supra* note 2, para. 4.

224. See *id.* para. 1.

225. See Kim, *supra* note 3; Law Update: Extraterritorial Reach of U.S. Anti-Corruption Laws, at <http://www.prime-tass.com/news/show.asp?topicid=76&id=365099> (last visited Apr. 13, 2005).

226. See ABB Complaint, *supra* note 2, para. 1.

227. *Id.*

228. Foreign companies with ADRs are subject to the SEC's jurisdiction because they are required to register with the Commission prior to offering ADRs on the national exchanges. Officers, directors, stockholders, employees, and agents of issuers are subject to the SEC's jurisdiction, regardless of nationality. See 15 U.S.C. § 78dd-1 (2000).

229. See Press Release, *supra* note 171.

which listed its securities in the United States, or the American subsidiary, U.S. criminal charges were brought against a foreign subsidiary of a foreign corporation for the bribing of foreign officials abroad.

This represents the only other time since the *KPMG-SSH* action that charges have been brought under the jurisdictional hook added in the 1998 amendments to the FCPA.²³⁰ Interestingly, no specific “act in furtherance” was alleged in the complaint in regards to the actions of the foreign subsidiary, Vetco UK.²³¹ Instead, the action presumably was premised on the argument that Vetco US served as an agent for Vetco UK in the bribery violations.²³²

Further, the complaint did not allege that ABB, the parent corporation, authorized or even knew about the illicit activity of its subsidiaries. This is noteworthy because the SEC has indicated in the past that it will only prosecute parent corporations for knowing or reckless violations;²³³ yet ABB was penalized for violating the books-and-records provisions of the FCPA,²³⁴ as well as for failing to devise or maintain an effective system of internal controls to prevent or detect these violations.²³⁵ While the SEC has used a strict liability theory to go after domestic U.S. corporations under the books-and-records and the internal-accounting-controls provisions of the FCPA for the conduct of their foreign subsidiaries,²³⁶ this is the first time the SEC has gone after a foreign issuer in this manner.²³⁷

Additionally, the parent corporation was charged with criminally violating the anti-bribery provisions “through certain of its United

230. See *supra* note 171 and accompanying text.

231. See ABB Complaint, *supra* note 2.

232. See *Affiliates Plead Guilty*, *supra* note 176.

233. See Chairman Harold M. Williams, The Accounting Provisions of the Foreign Corrupt Practices Act: An Analysis, Address Before the SEC Developments Conference of the American Institute of Certified Public Accountants (Jan. 13, 1981), in 46 Fed. Reg. 11,544, 11,547 (Feb. 9, 1981) (stating that the FCPA’s “principal purpose is to reach knowing or reckless misconduct”).

234. See 15 U.S.C. § 78m(b)(2)(A) (2000).

235. § 78m(b)(2)(B).

236. For example, in the following actions, it was alleged that internal controls were insufficient and that illicit payments, if undetected, should have been detected by more appropriate procedures. SEC v. Schering-Plough Corp., No. 1:04CV00945 (D.D.C. June 9, 2004), available at <http://www.sec.gov/litigation/litreleases/lr18740.htm>; SEC v. BellSouth Corp., No. 1:02-CV-0113 (N.D. Ga. Jan. 15, 2002), available at <http://www.sec.gov/litigation/litreleases/lr17310.htm>; SEC v. Chiquita Brands Int’l, Inc., No. 1:01CV02079 (D.D.C. Oct. 3, 2001), available at <http://www.sec.gov/litigation/litreleases/lr17169.htm>; SEC v. Int’l Bus. Machines Corp., No. 1:00CV03040 (D.D.C. Dec. 21, 2000), available at <http://www.sec.gov/litigation/litreleases/lr16839.htm>.

237. See Memorandum from Margret M. Ayres & Carlos M. Pelayo, Davis, Polk & Wardwell, to Interested Persons (July 14, 2004) [hereinafter Davis, Polk Memorandum] (on file with author).

States subsidiaries.”²³⁸ The SEC has never before held a foreign issuer criminally liable for the anti-bribery provisions absent some assertion of scienter.²³⁹

This action, similar to the *KPMG-SSH* action, may well mean that foreign corporations listing securities in the U.S. may have to pay greater heed to FCPA strictures even in regard to their foreign subsidiaries acting abroad.²⁴⁰

C. Is the FCPA Too Broad?

For critics of the FCPA who caution that the U.S. should be hesitant of unduly interfering in foreign affairs without a clear U.S. connection, the expansion of the Act represented in the cases described above illustrates potential tensions created by extraterritorial anti-bribery legislation.²⁴¹

To critics of the 1998 amendments, “the assertion of subject matter jurisdiction over a foreign national under the FCPA [should only be applied] if: (1) the action was more than mere preparation; (2) the action was material to the perpetration of the violation; and (3) it could fairly be said that the action directly caused the violation.”²⁴² Otherwise, even if FCPA enforcement does not, per se, violate international rules, aggressive jurisdiction may quickly incur “international hostility”²⁴³ as U.S. action will be perceived as improperly dictating the internal business affairs of foreign nations.

Viewing the two cases in this light, it does not appear that the *ABB* action, nor the *KPMG-SSH* action, allege sufficient facts to meet that criteria.²⁴⁴ Indeed, specific conduct within the territory of the United States was not alleged in either action, let alone material conduct that could fairly be said to have caused the violation.

238. See *ABB Complaint*, *supra* note 2, para. 1.

239. See Davis, Polk Memorandum, *supra* note 237.

240. See Letter from Wilmer, Cutler, Pickering, Hale & Dorr, to Citigroup (July 27, 2004) (on file with author).

241. See Salbu, *Premature Evocation*, *supra* note 164, at 254.

242. Brown, *supra* note 8, at 328.

243. *Id.* at 321 (citing Restatement, *supra* note 120, § 403, pt. IV, ch. 1, subch. A, introductory note. This note states that “attempts by some states—notably the United States—to apply their law on the basis of very broad conceptions of territoriality or nationality bred resentment and brought forth conflicting assertions of the rules of international law”); see also Salbu, *supra* note 11, at 285. Salbu writes:

The . . . presumptuous approach of the FCPA is paternalistic, invasive, and insulting toward other nations that should be free to monitor business transactions within their own borders. As one business consultant in London observes, the FCPA’s intrusiveness engenders “a great deal of resentment in Europe and other places as well about U.S. efforts to externalize U.S. law.”

Id. at 283-84 (citing John Kimelman, *The Lonely Boy Scout*, Fin. World, Aug. 16, 1994, at 50 (stating that bribes paid by British companies are “a matter for the country that the British company is in at the time to deal with”)).

244. See *supra* Parts II.A-B.

Moreover, it is worth noting that, even if the conduct in the territorial U.S. was material, one could question the interest of the United States in foreign bribery generally. If it were not for the potential liability the Act creates, equity holders of corporations listing stock in the U.S. tend, at least in the short-term, to benefit from foreign corrupt actions.²⁴⁵ While the U.S. has an interest in not providing a safe haven for corrupt actors,²⁴⁶ this interest does not seem to be implicated by minute, transient contact with U.S. territory, let alone no contact at all.²⁴⁷ For the defendants in *KPMG-SSH*,²⁴⁸ as well as for the foreign subsidiary in *ABB*,²⁴⁹ it seems doubtful that sufficient minimum contacts existed to warrant personal jurisdiction.²⁵⁰

If one argues that the FCPA is respectful of foreign governments since the public official receiving the bribe is not covered under the Act, and, moreover, that defenses are available for payors whose actions were legal in the jurisdiction where the payment was made,²⁵¹ the critique still may not be easily ameliorated. From a vantage point suspicious of extraterritorial legislation, the tension created is not merely that the U.S. projects civil and criminal penalties upon conduct outside the U.S., but that the U.S. is monitoring and seeking to control sensitive affairs host countries would prefer to govern themselves.²⁵² For instance, in the *KPMG-SSH* case, while the tax official would face no penalty under the FCPA, the class of interactions between Indonesia's tax authority and its clients, whether American or native, must conform to the FCPA's standards or they risk further public exposure and, at least on the bribe-payor's side, penalties.²⁵³

Beyond the potential intrusion upon a fellow nation's sovereignty, some critics assert a culturally based critique, stating that "any form of extraterritorial anti-bribery legislation, even the most perfectly conceived, must be considered imprudent under the global

245. See Bruch, *supra* note 143 ("And while foreign governments may be harmed by illicit payments from US public companies, they would not typically be considered as 'other corporate constituencies.'").

246. See Brown, *supra* note 8, at 324.

247. See *id.* at 326-28.

248. See *supra* note 202 and accompanying text.

249. See *supra* notes 231-32 and accompanying text.

250. See, e.g., Landmeier et al., *supra* note 115, at 598 (noting the strength of the defendants' arguments against personal jurisdiction in the *KPMG-SSH* action).

251. See 15 U.S.C. § 78dd-1(c)(1), -2(c)(1) (2000).

252. See Salbu, *Premature Evocation*, *supra* note 164, at 253. Salbu argues that regardless of how many countries eventually sign on to the present multilateralization efforts, the attempts of one sovereign to moderate activity within the borders of another will always pose the risk of disagreements, resentments, and conflict. Should all the world's nations enact extraterritorial anti-bribery legislation, the result will increase the pool of potential international relations mine fields.

Salbu, *Threat to Global Harmony*, *supra* note 164, at 445.

253. See *supra* Part II.A.

conditions” of cultural variance in which we now live,²⁵⁴ “particularly given the countervailing social functions of some gratuities in one culture that would be considered unacceptable in another.”²⁵⁵ Because the line between acceptable “networking” and corruption cannot be drawn from an external vantage point,²⁵⁶ the FCPA cannot help but fail.²⁵⁷ Broad international efforts “cannot avoid cultural imperialism simply by virtue of their multilateralism.”²⁵⁸

For example, it may be the case that tax officials in Indonesia or Nigerian oil ministers are subject to low civil-service wages, so it becomes common to seek additional payments.²⁵⁹ How capable are American agencies at distinguishing among various plausible scenarios in a culturally gray area?²⁶⁰

Thus, while much of the world resented perceived U.S. political imperialism during the Cold War, nations are now likely to resent U.S. economic imperialism. The resentment will be exacerbated when nations fear that their culture is at risk of being supplanted by U.S. culture. Moreover, other nations’ sensitivity regarding U.S. economic intrusiveness has become aggravated over the past few years

254. Salbu, *Premature Evocation*, *supra* note 164, at 226.

255. *Id.* at 241. Salbu points out that

[t]he common and therefore presumed motivation behind a particular behavior can differ dramatically from one cultural context to another, making it dangerous to render facile assessments of the motives operating in other societies . . . [because] our assessments are often inaccurate when we evaluate activities from the outside, especially when our understanding of the systems and social structures we observe is superficial.

Id. at 243.

256. See *supra* note 255 and accompanying text. This, however, can be seen from another point of view: “[A] gift is given in public openly, and bribery is given illicitly and secretly” Shaw, *supra* note 170, at 690 n.10 (citing Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, 30 Law & Pol’y Int’l Bus. 196, 209 (1999)). Bill Shaw continues, quoting Ayodele Aderinwale, an African Leadership director:

On the issue of giving somebody a gift, the gift is usually very small. It is a token. It is offered, it is not demanded; it is done in the open; and when it is too big, it becomes an embarrassment and it is returned immediately And people talk about bribery as being part of the African culture They perceive the typical African as a big thief These are some of the fallacies people bring up in order to justify their own corrupt practices.

Id. (quoting Ayodele Aderinwale, Corruption, Democracy and Human Rights in Africa, Keynote Address to the African Leadership Forum on Corruption, Democracy and Human Rights in Africa (Sept. 1994)).

257. See Salbu, *Premature Evocation*, *supra* note 164, at 251.

258. *Id.* at 252-53. “Yet the arbitrary line-drawing that may be acceptable domestically, under conditions of relative cultural homogeneity, can become unacceptable when applied extraterritorially, under conditions of relative cultural heterogeneity.” Salbu, *Threat to Global Harmony*, *supra* note 164, at 430.

259. See Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross-Country Analysis*, in Corruption and the Global Economy, *supra* note 86, at 85-86.

260. See Salbu, *Threat to Global Harmony*, *supra* note 164, at 427.

....

... In a world where U.S. flags are burned in demonstrations against alleged U.S. arrogance and hegemony, any perception of an overweening megalith has the potential to fuel backlash and create an atmosphere of conflict, acts of retributive terrorism, and even war.²⁶¹

Moreover, discretion to investigate and prosecute FCPA violations is left entirely up to U.S. officials at the SEC and DOJ,²⁶² and their history of discretion is not binding.²⁶³

Accordingly, bringing criminal and civil actions against foreign nationals for bribing foreign officials when no clear action took place within U.S. territory, and where, at least on the surface, no material American interest is directly implicated, appears difficult to justify—difficult, but perhaps not impossible.

D. *Is the FCPA an Appropriate Approach to a Complicated, Global Problem?*

In response to critics, proponents point out that it may be incorrect to assume that bribery is not condemned in all societies, and dangerous to rely on this assumption to justify leaving the problem of corruption solely to host nations.²⁶⁴ This is especially important given the increasingly interconnected nature of the world²⁶⁵ which ties the interests of all nations together.²⁶⁶ Moreover, some commentators argue that leaving many developing nations to confront the issue

261. *Id.* at 442-43 (citations omitted).

262. See Ellen S. Podgor, "Defensive Territoriality": A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 Ga. J. Int'l & Comp. L. 1, 25 (2002).

Is it wise to leave these decisions to prosecutorial discretion? Prosecutors have no ethical mandates specifically regarding these decisions. It is also important to note that these decisions can have enormous impact on international relations. Prosecutors, however, are within the executive branch, the nucleus for making decisions related to international relations. . . . Will prosecutors consider the best way to handle improprieties in the business world from a global perspective, or will these decisions only consider a national approach? The uncertainty in how all prosecutors will answer this question makes the enormous discretion being given to prosecutors a point of concern.

Id.

263. See Stephen R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 Cornell Int'l L.J. 657, 682 (2000). Consider: "In applying prosecutorial discretion to cases under the FCPA, does the prosecutor consider whether the transaction has affected competition (foreign or domestic)? No." Response of the U.S.: Questions Concerning Phase 2, *supra* note 63, § 9.3.

264. See *infra* notes 267-68 and accompanying text.

265. See Joseph J. Norton, *A "New International Financial Architecture?"—Reflections on the Possible Law-Based Dimension*, 33 Int'l Law. 891, 894 (1999).

266. See Fritz F. Heimann, *Combating International Corruption: The Role of the Business Community, in Corruption and the Global Economy*, *supra* note 86, at 147.

alone unfairly serves the interests of many industrialized nations who benefit from such bribery.²⁶⁷

Proponents contend that leaving host nations to deal with public corruption on their own is simply unrealistic given that many developing economies are already heavily weighed down by corruption's distorted social and market effects.²⁶⁸ Unfortunately, due to the massive transitions that developing nations undergo, and the bribery that often corrupts the same governmental agencies whose job it is to police such conduct, it may be naive to expect many host countries to effectively deal with corruption without exporting nations policing their corporations, employees, and agents.²⁶⁹ In Indonesia, for example, generous inflows of investment and aid led to disaster because of the deep-set corruption of the Suharto regime.²⁷⁰ Following the collapse of that government,²⁷¹ it might well be wise for the U.S. to try to take a stricter approach in light of the fact that corruption continues to expand.²⁷²

In response to critics who argue that the FCPA could, in theory, apply to culturally sensitive areas such as gift giving, prevalent in many societies and often straddling the boundary between social etiquette and corruption,²⁷³ proponents may point out that typical FCPA cases reveal bribes ranging from a hundred thousand dollars on

267. See Shaw, *supra* note 170, at 690 n.6 (citing Anver Versi, *On Corruption and Corrupters*, Afr. Bus., Nov. 1996, at 7); see also Ala'i, *supra* note 85, at 905; Tarrullo, *supra* note 49, at 679 (noting that at the 1994 Summit of the Americas, Latin American countries went as far so as to "suggest that governments of developed countries had, by failing to act against foreign bribery by their own multinationals, become complicit in that bribery").

268. See Shaw, *supra* note 170, at 691.

For example, in 1997, the International Monetary Fund (IMF) and the World Bank together suspended over \$250 million in loans to Kenya because of the country's inability and refusal to address bribery issues within its government. Further, since "emerging economies have become among the most dynamic, most influential, and therefore among the most watched components of the global economy, fluctuations in [their] fortunes . . . measurably affect the global economy."

Id. at 691-92 (citing Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 Va. J. Int'l L. 229, 233 (1999)); see also Beverley Earle, *Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What Is to Be Done?*, 33 Cornell Int'l L.J. 483, 484 (2000) ("Bribery and corruption threaten the ability of . . . countries to complete their work toward privatization by distorting the development process and discouraging private investment.").

269. See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 Yale J. Int'l L. 257, 279 (1999).

270. See Zemenides et al., *supra* note 40, at 205 (comments of Joseph Onek).

271. See *id.*

272. See George Moody-Stuart, Transparency Int'l, *The Good Business Guide to Bribery: Grand Corruption in Third World Development* 2 (1994).

273. See Salbu, *supra* note 263, at 682-83 (noting that the FCPA has the potential to affect foreigners "making small payments, or tendering small gifts, gratuities, meals, and entertainment" and thus could punish "those small-scale items that are most difficult to categorize as either legitimate or unlawful").

into the millions.²⁷⁴ Even the lowest amounts involve tens of thousands of dollars.²⁷⁵ Thus, while enforcement agencies may have prosecutorial discretion,²⁷⁶ the amounts of the bribes in the *KPMG-SSH*²⁷⁷ and the *ABB*²⁷⁸ actions reinforce the view that this discretion will continue to target large-scale bribes.

III. FILLING IN THE GAPS OF ENFORCEMENT: AGGRESSIVE ENFORCEMENT ON BEHALF OF THE U.S. IS NECESSARY TO ADDRESS INTERNATIONAL PUBLIC CORRUPTION

This part argues that the broadened scope and aggressive enforcement actions following the 1998 amendments are a desirable approach to a pernicious global problem. Part III.A lays out the reasons for supply-side anticorruption efforts, beginning with a more detailed analysis of the mechanics of corruption and its negative social and political effects, the interest of the world community in transnational bribery generally, and the fact that bribery is universally condemned. Part III.B points to the lack of enforcement efforts on behalf of the major non-U.S. exporting nations. Finally, this Comment argues that because corruption is a universally condemned ill which should be, in part, addressed by supply-side efforts and because the mechanisms of FCPA enforcement significantly alleviate claims of overreaching and sovereign infringement, strict enforcement of the FCPA is in fact desirable.

A. Public Bribery Must Be Addressed from the Supply-Side

1. Corruption's Mechanics and Its Ill Effects

Given the current interconnected global economy,²⁷⁹ public corruption and its ruinous effects are of concern to all nations.²⁸⁰ Looked at on a macro level, valuing bribes instead of efficiency undermines the fundamentals of the international trading system,²⁸¹ deters foreign direct investment, and frustrates economic stabilization programs.²⁸²

274. *See id.* at 667.

275. *Id.*

276. *Id.*

277. *See supra* note 185 and accompanying text.

278. *See supra* note 224 and accompanying text.

279. *See Norton, supra* note 265, at 894.

280. *See Heimann, supra* note 266, at 147.

281. *See S. Rep. No. 99-486*, at 13 (1986) (stating that "bribery warps appropriate trade patterns and distorts the market as an efficient allocator of resources").

282. *See Earle, supra* note 268, at 484-85.

2. Public Corruption's Ill Effects Concern All Members of the World Community

As briefly described above,²⁸³ corrupt systems inefficiently allocate resources to “[t]hose with access to vital information, connections, the necessary cash, and a certain amount of ruthlessness—not the best contenders.”²⁸⁴ Those who pay bribes to win contracts are also likely to make additional illicit payments to receive further tax or regulatory benefits to which they are not entitled.²⁸⁵ This process impedes market access to those unwilling to bribe, even if they might in fact have the most efficient goods and services.²⁸⁶

By obstructing foreign investment and development,²⁸⁷ corruption contributes to the poverty cycle²⁸⁸ as greater debt obligations accumulate and burden future generations.²⁸⁹

Bribery works its ill by creating incentives for projects to be more numerous and expensive than necessary.²⁹⁰ Further, to conceal the bribery, corrupt projects are likely to be overly complex and inefficient, increasing costs and debt obligations further.²⁹¹ Corruption also generates lesser work products, as bureaucrats can be induced to overlook fundamental lapses in safety.²⁹² This can particularly impact the public if it leads to poor infrastructure built

283. See *supra* Part I.B.1.

284. Elliott, *supra* note 89, at 120; see also Rose-Ackerman, *supra* note 86, at 42.

Although there is no necessary relationship between honesty and efficiency, the need to pay bribes is an entry barrier. Only those who already have a close trusting relationship with government officials and politicians may enter the bidding. Officials may refuse to deal with those they do not know for fear of exposure.

Id.

285. See Rose-Ackerman, *supra* note 86, at 42.

286. See Heimann, *supra* note 266, at 147.

287. See Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, Fin. & Dev., Mar. 1998, at 7 (noting that in “a recent survey of more than 150 high-ranking public officials and key members of civil society from more than 60 developing countries, the respondents ranked public sector corruption as the most severe impediment to development and growth in their countries”).

288. See Addressing the Challenges, *supra* note 23, at 1.

289. See Elliott, *supra* note 89, at 121; see also Heimann Testimony, *supra* note 81, at 55 (noting that “[m]uch of the failure of international development programs to improve the economies of the world’s poorest countries is now widely attributed to corruption”). For example,

[S]ince the fall of Suharto, [with] greater time to analyze the banking crisis and, at least with respect to Indonesia, there is no question that corruption played a major role. The banks in Indonesia essentially became dysfunctional because they were making enormous loans to unproductive enterprises that were owned by various high-level political figures (Suharto, his relatives or others).

Zemenides et al., *supra* note 40, at 205 (comments of Joseph Onek).

290. See Rose-Ackerman, *supra* note 86, at 42.

291. See *id.*

292. See *id.* at 43.

with "cheap, substandard materials in the construction of buildings or bridges."²⁹³

Moreover, rather than cutting through bureaucratic "red tape," corruption generates incentives for bureaucrats to create "delays and unnecessary requirements as a way of inducing payoffs."²⁹⁴ In this sense, bribes operate as taxes, except they are far more uncertain and arbitrary, and they require secrecy.²⁹⁵ This has the effect, even as normal taxes do, of deterring investment.²⁹⁶ These effects are cumulative and ultimately ruinous. The market crisis in Asia is a powerful example that "discredit[s] the claim that rapid economic growth can continue notwithstanding endemic corruption."²⁹⁷

Unsurprisingly, empirical studies show that growth declines with increased corruption, with small entrepreneurs facing particular challenges and often marginalized.²⁹⁸ Studies show that if a corruption "score" rises positively from six to eight, out of a possible ten, with ten representing "no perceived corruption," the investment-GDP ratio grows four percent, creating half a percent gain in annual per capita GDP growth.²⁹⁹

293. Mauro, *supra* note 259, at 87. As some point out, corruption literally kills:

On August 17, 1999, an earthquake centered in Izmit, Turkey killed over 40,000 people. Most of the people killed were buried in kaçak buildings—"contraband" buildings whose builders had bribed their way around Turkey's building codes. Four years earlier, in Seoul, South Korea, the Sampoong department store collapsed, killing over three hundred and injuring over nine hundred people. As with the kaçak buildings, the builders of the Sampoong department store paid bribes rather than meeting local business codes. The Sampoong department store's collapse capped three years of disasters involving man-made constructions in Korea, in which over one thousand lives and billions of dollars were lost due to the convergence of negligence, inexperience, and corruption.

Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 Cornell Int'l L.J. 627, 627-28 (2000).

The corruption that resulted in these deaths involved local businesspersons bribing local officials. Corruption, however, is no more limited by political boundaries than are business transactions, and a significant percentage of large bribes paid around the world are probably paid by persons or companies that are not local. These bribes are no less harmful because they are paid by non-local entities. Indeed, transnational bribery is as lethal as any form of bribery, and its control is a subject worthy of study by transnational scholars.

Id. at 628.

294. Rose-Ackerman, *supra* note 86, at 43.

295. See Mauro, *supra* note 259, at 86.

296. See *id.*

297. Heimann *Testimony*, *supra* note 81, at 55.

298. See Rose-Ackerman, *supra* note 86, at 45-46.

299. See Schroth, *supra* note 38, at 619-20 (citations omitted).

3. Where Does the Money Go?

Corrupt systems filter disproportionate gains to the briber and the bribee.³⁰⁰ As such, “the country’s wealth is distributed to insiders and corrupt bidders, contributing to inequalities in wealth.”³⁰¹

While it is possible in theory that the illicit funds received could be invested wisely in the host nation, the payments generally capitalize illegal ventures or enter foreign financial institutions in order to remain secret.³⁰² Moreover, in order to make up for the lost revenue, states cut benefits and/or increase taxes.³⁰³ For instance, in the *KPMG-SSH* case alone, Indonesia stood to lose millions of dollars in tax revenue had the scheme not been exposed.³⁰⁴

The inequality of resource allocation due to corruption becomes glaringly apparent in developing nations rich in natural resources when per capita income for average citizens remains constant despite dramatic booms in the state’s particular resource, as in Nigeria,³⁰⁵ where ABB’s subsidiaries participated in the fraud.³⁰⁶

The effect of corruption may be seen as particularly unfair if programs designed to directly aid the poor are susceptible to illicit payments, since those with the most need will be least able to secure access.³⁰⁷ From the point of view of average citizens who suffer most acutely from corruption’s effects, unwillingness on the part of

300. See Rose-Ackerman, *supra* note 86, at 43-44.

301. *Id.* at 44.

302. See *id.* at 43-44.

303. See *id.* at 44.

304. See *supra* notes 191-93 and accompanying text.

305. See Rose-Ackerman, *supra* note 86, at 44.

Because of its size and significance in Nigerian life, the oil and gas industry affords numerous opportunities for corruption at various levels.

....

Perhaps the public initiatives are the best illustration of the effects of corruption. Corruption has been identified as a major factor for the ineffectiveness of community development and poverty alleviation efforts in the oil-producing communities. “[O]ne of the most likely explanations [for the failures of government and corporate development efforts] is the influence of the prevalent corruption and inefficiency in Nigeria on the conduct of government officials, oil company staff and local contractors.” OMPADEC essentially failed because of mismanagement of resources and massive corruption. It is disturbing that even at this early stage in the NDDC’s operations, the commission is already associated with controversy regarding its enormous expenditures on presidential politics, an issue that has nothing to do with improving the conditions of the people in the oil-producing areas.

Emeka Duruigbo, *Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds*, 30 N.C. J. Int’l L. & Com. Reg. 121, 126 (2004) (alterations in original) (internal citations omitted).

306. See *supra* note 224 and accompanying text.

307. See Rose-Ackerman, *supra* note 86, at 44.

developed nations to police their end of the bribery game might itself be perceived as a type of imperialism.³⁰⁸

4. Political Effects on Host Nations Delegitimizing Democratic Governments—Entrenching Authoritarian Regimes

The harm of corruption can become greater than a matter of wasted resources and the odious debts thereby created.³⁰⁹ Corrupt processes can threaten the very ability of developing nations to transition into democratic and free-market economies.³¹⁰ As governmental legitimacy of the corrupt order becomes dangerously undermined in the eyes of the governed,³¹¹ instability and even authoritarian coups may ensue.³¹² Such pressures threaten collective security.³¹³ This is of particular importance to the United States and other nations who have an interest in avoiding instability,³¹⁴ which thwarts democratic initiatives and creates a greater potential for despotic military rule.³¹⁵

Perhaps worse, corruption can act as a means of entrenching undemocratic power.³¹⁶ This is effectuated through selective payoffs and favors to prominent elites, securing their favor and reducing political competition.³¹⁷

308. See Nichols, *supra* note 88, at 950.

309. See Elliott, *supra* note 89, at 121.

310. See Heimann Testimony, *supra* note 81, at 55. A survey by the World Bank of 3600 companies in sixty-nine countries disclosed that bribes had been paid by forty percent of the companies. J. Lee Johnson, *A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing*, 63 Mo. L. Rev. 979, 979 (1998).

311. See Shaw, *supra* note 170, at 706.

312. See Rose-Ackerman, *supra* note 86, at 45.

313. See Addressing the Challenges, *supra* note 23, at 1.

314. See Collier, *supra* note 84 ("Recent empirical studies demonstrate that high political corruption levels weaken democratic institutions, reduce foreign and domestic investment, and slow overall economic growth.").

315. See Zemenides et al., *supra* note 40, at 209 (comments of Joseph Onek); see also Rose-Ackerman, *supra* note 86, at 31, 45. Ironically, rampant "[c]orruption helped to wipe out the Suharto" dictatorship in Indonesia due to widespread, unfavorable press coverage of the corruption in Indonesia, aided by nongovernmental organizations Corruption Watch and Transparency International, which led Indonesians to demand government reform. Zemenides et al., *supra* note 40, at 207-08 (1999) (comments of Joseph Onek). However, similar to other countries with endemic corruption such as Nigeria,

the new Indonesian government has restraints on it. There is still a very powerful military. To the extent that the government investigates and fully attempts to punish past corruption, it raises the issue of whether the military will remain in the barracks or will it attempt to overthrow the government.

Id. at 207.

316. See Rose-Ackerman, *supra* note 86, at 45.

317. See *id.*

5. Supply-Side Anti-Bribery Efforts Are Necessary

The damaging effects of corruption illustrate the importance to all nations of addressing public corruption. As one commentator has noted:

The crises in Asia and Russia have served as a reminder of the interdependent international environment in which we now live. What might have been thought of as a regional crisis in the past is now viewed as a global crisis with far-reaching global challenges.

Closely attendant to the rapid acceleration of many countries towards greater competition and free market capitalism is the necessity for a change in the way these countries operate in the global business environment.³¹⁸

Understandably, curbing public corruption cannot be achieved through any one mechanism.³¹⁹ Rather, advancing this goal requires a broad effort, targeting both the demand-side as well as the supply-side.³²⁰

But on the supply-side, international bribery is subject to a free-rider problem.³²¹ So long as the players involved are not subject to penalties, it behooves them to continue bribing rather than competitively disadvantage themselves.³²² It therefore is necessary to create clear bribery proscriptions and follow through with enforcement efforts.³²³ As one commentator noted: "Such action, even if taken only by countries of the North, will have great effects in the South as well, helping to dry up the 'supply side' of bribe markets."³²⁴

Any program to curb bribery by businesses must prohibit not only employees from engaging in corrupt acts, but also third parties acting on their behalf.³²⁵ If the FCPA could be easily circumvented by

318. George et al., *supra* note 168, at 25-26. George writes further:

Leaders in the [bribe] recipient nations know that in order to receive necessary capital they will have to meet anti-corruption standards. This provides an indirect motivation for the recipient nations to promulgate measures that seek to reduce illicit business transactions

. . . .
... As individual nations criminalize bribery in business transactions there will be a reduction in the level of corruption. Only then will the world marketplace become a level playing field which embraces the principles of fairness and transparency and enhances confidence in the arena in which international business and securities transactions occur.

Id. at 47-48.

319. See Heimann, *supra* note 266, at 148.

320. See *id.*

321. See Elliott, *supra* note 89, at 121.

322. See Tarullo, *supra* note 49, at 686.

323. See Elliott, *supra* note 89, at 121.

324. *Id.*

325. See Heimann, *supra* note 266, at 153.

delegating the prohibited conduct to foreign agents, it would largely be ineffectual.³²⁶ This is important for another reason. Considering the cross-border complexity³²⁷ of international business transactions pieced together through negotiations and communications spanning the globe and often involving sophisticated accounting firms and lawyers,³²⁸ it may be unreasonable to expect “[n]ascent, inexperienced government agencies . . . [to] locate, investigate, and extradite bribe authorizers situated far beyond their borders.”³²⁹ For instance, in the *KPMG-SSH* case, presumably the bribe-taking official was in breach of Indonesian law, yet it seems that such bribery was commonplace and went largely unpunished.³³⁰

If foreign officials find it difficult to effectively police their own bureaucrats, how difficult will it be for them to police foreign investors? Corruption is inherently difficult to control and detect because of its secretive nature.³³¹ Additionally, bribery often corrupts the same governmental agencies whose job it is to police such conduct.³³²

Thus, while it may seem, on the surface, imperious for the United States to punish a native Indonesian and an Indonesian company for bribing an Indonesian tax official, it is difficult to see how such activity, devastating many developing countries, would have been sanctioned were it not for Baker Hughes’s fear of violating the FCPA.

Accordingly, keeping in mind the cooperative measures U.S. enforcement agencies take,³³³ it may be seen that “[t]he FCPA plays a positive role in bringing transparency to the bargaining table and exposing corruption. Otherwise, illicit transactions would pass unnoticed, and the informational requirements of a free market would be further diminished.”³³⁴

326. See *The Short Arm of the Law*, *supra* note 167, at 63-65. While criticizing the FCPA for loopholes that allow foreign subsidiaries to do the dirty work of multinationals in jurisdictions where the host government has not signed the OECD Convention, this article noted that the *KPMG-SSH* “case could push the extraterritorial ambitions of the American authorities a bit further,” *id.* at 64, and begin to close the loopholes that “are big enough for a half-blind elephant to blunder through,” *id.* at 63.

327. See Nichols, *supra* note 269, at 292 (“Globalization facilitates the creation of commercial relations with little regard for national boundaries.”).

328. See *supra* Part II.A.

329. See Nichols, *supra* note 269, at 282.

330. Indonesia ranks among the most corrupt nations, receiving a score of less than two out of ten. See Press Release, Transparency International, 2002 Transparency International Corruption Perceptions Index (Aug. 28, 2002), available at http://www.transparency.org/pressreleases_archive/2002/dnld/cpi2002.pressrelease.en.pdf.

331. See Heimann, *supra* note 266, at 148.

332. See Nichols, *supra* note 269, at 279.

333. See *supra* Part I.C.

334. Shaw, *supra* note 170, at 705-06.

In light of the recent FCPA enforcement actions,³³⁵ many international firms and businesspersons would be wise to take the FCPA into consideration³³⁶ when conducting any business which might conceivably create a sufficient U.S. nexus.³³⁷ This is a positive development. No culture embraces corrupt practices, a proposition to which this Comment now turns.

6. Corruption Is Universally Condemned

While cultural norms such as gift giving might be perceived, in theory, as “corrupt” to an outsider,³³⁸ modern anti-bribery proponents reject the claim that cultural contexts render universal anti-bribery norms impossible.³³⁹ Rather, “the majority of people in nearly all cultures understand that most of the kinds of corruption . . . are neither lawful nor customary.”³⁴⁰

It is not impossible to differentiate between conduct that is corrupt from other cultural behaviors.³⁴¹

Giving a government official a holiday gift, even if given more in hopes of creating goodwill than out of a genuine affection, is not corrupt because there is no quid pro quo for misuse of office On the other hand, providing an official’s son with a scholarship with the understanding that the official will award a contract to the giver is bribery and is corrupt.³⁴²

An acceptable definition of public bribery captures this difference: A bribe is the giving of a benefit in order to receive preferential treatment in the form of an abuse or misuse of public power.³⁴³

Further, every nation has laws proscribing bribery of its officials.³⁴⁴ Indeed, it is worth noting that the FCPA is only violated if the act was

335. See, e.g., Press Release, *supra* note 171.

336. See *id.* (“Companies that think they can bribe their way into overseas contracts are sadly mistaken. Businesses that attempt to manipulate the free market by paying off foreign officials will face serious consequences for dishonest and illegal activity.” (quoting Assistant Attorney General Christopher A. Wray)). Some commentators expect such prosecutions to grow because “the [DOJ] and the [SEC] are increasing their focus on pursuing businesses and executives for FCPA violations. The 1990’s have seen large fines and, for the first time, jail time for executives violating the Act.” Savage et al., *supra* note 71, at 1.

337. See *supra* notes 158, 210, 231-37 and accompanying text.

338. See Salbu, *Threat to Global Harmony*, *supra* note 164, at 430.

339. See Ala’i, *supra* note 85, at 904.

340. *Id.* (quotations omitted); see also Heimann, *supra* note 266, at 149 (stating that “so-called respect for cultural diversity is usually an excuse for continuing corruption” and that “[t]here is no country in the world where bribery is legally or morally acceptable”).

341. Nichols, *supra* note 88, at 870-71.

342. *Id.* at 870-72.

343. See *id.* at 870.

344. See *id.* at 876 & n.38 (further stating that proscription of public bribery existed in “the most ancient laws” such as the Code of Hammurabi and the Edict of Hammab).

in fact illegal in the jurisdiction in which it was committed.³⁴⁵ While law and morality do not always overlap,³⁴⁶ corruption is not only universally proscribed by law, it also "is condemned . . . by each of the major religious and moral schools of thought."³⁴⁷

At the very least, absent evidence to the contrary, assuming universal condemnation of bribery is safer than assuming that bribery is so socially contextual that it is not susceptible to remedy. Indeed, if it is the case that most, if not every, society rejects corruption, then "the willingness of Western countries to overlook bribery by their large companies . . . of government officials [may itself be seen] as a form of imperialism."³⁴⁸

But even if one assumes that international public corruption is an issue worth addressing, in part, on the supply-side through anti-bribery legislation, it could still be argued that the U.S. nevertheless goes too far and should content itself with minding its own citizens and business concerns. This is subject to two rejoinders. First, other major exporting nations have thus far failed to vigorously enforce anti-bribery legislation adopted pursuant to international agreement.³⁴⁹ Second, FCPA enforcement is unlikely to interfere unduly with host nations because of the mechanics of enforcement actions abroad; in fact, such actions may bolster transparent foreign business practices and foment international cooperation on more levels.³⁵⁰

B. *A Lack of Incentive and Capacity, A Lack of Enforcement*

While the widespread dangers of rampant public corruption provided the political capital and motivation necessary to achieve the broad anti-bribery agreements such as the OAS Treaty³⁵¹ and the OECD Convention,³⁵² "implementation of the relevant international agreements has been limited at best"³⁵³ while the pervasiveness of corruption has only increased.³⁵⁴

345. See *supra* note 63 and accompanying text.

346. See Nichols, *supra* note 88, at 877 (describing how little notice is given to "morals laws, [which] prohibit most forms of sexual contact").

347. *Id.* at 878. Additionally, leading business ethicists posit "the existence of a universal norm for the efficient allocation and distribution of necessary social resources," which is violated by bribery "and therefore should not be accepted in any society." *Id.* at 880-81.

348. *Id.* at 950.

349. See *infra* Part III.B.

350. See *infra* Part III.C.

351. Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808, 818-19.

352. OECD Convention, *supra* note 20, 37 I.L.M. at 1.

353. Tarullo, *supra* note 49, at 666.

354. See Moody-Stuart, *supra* note 272, at 2 (stating that the incidence of corruption has "increased tremendously" and "[w]hat used to concern a relatively

The lack of anti-bribery enforcement on behalf of many of the OECD members may be due to the fact that the U.S. was only able to secure ratification but was not able to alter the “underlying game being played by [OECD] countries.”³⁵⁵ Stated simply, exporting nations stand to gain if the U.S. is subject to anti-bribery proscription while they remain free to bribe importing nations, in practice, if not under their law.³⁵⁶ In this way, OECD Convention members used ratification of the treaty as “the least-cost way of moving the problem out of the public eye”³⁵⁷ without having to give up the competitive advantage.

Economic self-interest is not the only explanation for the dearth of prosecutions and investigations. One must also consider resources and capacity.³⁵⁸ “[I]t is likely to be some time before other countries match the severe and often vigorous enforcement of the U.S. provisions . . . by an expert and experienced bureaucracy . . .”³⁵⁹ After all, in the world of international commerce, detecting secret, illicit transactions taking place abroad is not easy to do.³⁶⁰ “[One] need[s] very sophisticated law enforcement to do that.”³⁶¹ So, it may also be the case that the law enforcement agencies of exporting nations, because they are not particularly designed or equipped to tackle the task, are merely “indifferen[t] rather than resistan[t].”³⁶²

Whatever the most persuasive rationale, or rationales, it seems evident that obstacles for the world community’s largest exporters to effectively combat bribery persist.³⁶³ So long as non-U.S. multinationals do not fear prosecution, it behooves them, as rational economic actors, to continue to carry out corrupt practices.³⁶⁴

small number of people working in a relatively small number of countries has now become a major South-wide problem”).

355. Tarullo, *supra* note 49, at 667. “[M]any U.S. companies facing moral and/or criminal deterrents . . . evaluate the payoff for bribery as negative, making their dominant strategy non-bribery. The dominant strategy of many multinationals from other countries appears to have remained bribery . . .” *Id.* at 672.

356. *Id.* at 674.

357. *Id.* at 680.

358. *See id.* at 683 (“The obvious explanation for the lack of prosecutions is that OECD members lack either the will or the capacity to meet their obligations. There are other, more benign explanations, though none is particularly convincing.”).

359. Schroth, *supra* note 38, at 614.

360. Zemenides et al., *supra* note 40, at 207 (comments of Joseph Onk).

361. *Id.*

362. Tarullo, *supra* note 49, at 688.

363. *See id.* at 684. Transparency International’s “‘Bribe Payer’s Index’ reveals only the most modest change during the last several years in the perception of business experts in leading emerging markets as to the propensity for bribery of companies from OECD Convention signatories”; a separate survey reveals that “only one in five overseas executives of multinationals knew anything about the Convention beyond its mere existence.” *Id.* (citing Press Release, Transparency International, Bribe Payer’s Index 2002 (May 14, 2002), available at http://www.transparency.org/pressreleases_archive/2002/2002.05.14.bpi.en.html).

364. *See id.* at 686.

If this is so, in order for international anti-bribery measures to bear fruit, broad enforcement of the FCPA as demonstrated in the *KPMG-SSH* and *ABB* actions is necessary.

C. Cooperative Enforcement

With respect to cases in which the interests of OECD Convention members are affected, as in the *ABB* action,³⁶⁵ the treaty's mandate for expansive jurisdiction³⁶⁶ and maximal cooperation³⁶⁷ should serve to alleviate aggravation. But what of nations, such as Indonesia in the *KPMG-SSH* case,³⁶⁸ who share no such internationally binding agreements with the U.S.?

To bolster the enforcement ability of foreign regulators as well as to effectively enforce U.S. law, American agencies have enlisted the help of their foreign counterparts, an engagement of growing success.

More than ever, the SEC is keenly aware of the links between US markets and those around the world, and the importance of working collaboratively with . . . foreign counterparts. Indeed, on both the enforcement and regulatory sides, international cooperation is evolving into the cornerstone of the Commission's activities.³⁶⁹

Increasing the ability of U.S. authorities to gather necessary evidence is not the only goal in developing these arrangements. Agencies like the SEC also advance broad cooperation and training in the area of financial enforcement.³⁷⁰ The SEC has an Office of International Affairs, whose primary purpose is to collaborate with the Commission's foreign counterparts, providing both training and technical assistance, especially to foreign agencies in developing markets.³⁷¹ At the time of the *KPMG-SSH* action, the United States shared an information-sharing agreement with the Indonesian government.³⁷²

To better enable this cooperative mandate, in the same year the FCPA was last amended, Congress enacted "legislation authorizing

365. See *supra* Part II.B.

366. See *supra* Part I.B.2.a.

367. See *supra* Part I.B.2.b.

368. See *supra* Part II.A.

369. The SEC Speaks in 2004, *supra* note 144, at 547.

370. See Jarmer, *supra* note 147, at 2135.

371. See *id.*

372. See *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, 29 Int'l Law. 780, 818 (1995) [hereinafter *Mutual Assistance*]. In regards to that agreement:

The Indonesian Understanding provides for communication and cooperation on all matters relating to the operation of the U.S. and Indonesian securities markets and the protection of investors. Both the SEC and BAPEPAM express their commitment to use their best efforts to provide mutual assistance to facilitate the effective administration and enforcement of their respective securities laws and regulations.

Id.

the SEC to conduct investigations on behalf of foreign securities authorities . . . without regard to whether the facts stated in the request constitute a violation of U.S. law.”³⁷³ This is unusual because states generally predicate information sharing on a basis of mutual violation whereby the alleged conduct would have to violate the laws of either country.³⁷⁴

Thus, the degree to which the SEC reaches out and works with its foreign counterparts “not only enhance[s] the jurisdictional reach of the SEC, but also pave[s] the way for foreign authorities” to learn and benefit from the expertise of American regulators.³⁷⁵ Accordingly, enforcement actions abroad by the SEC may lead to greater harmony between the United States and foreign governments while avoiding diplomatic rifts because of the requisite cooperation and free-flowing communication involved.

Given that the cooperation from foreign law enforcement needed by American officials is still not always easy to attain,³⁷⁶ and that it takes much energy³⁷⁷ to prosecute abroad, it seems highly unlikely the

373. See *id.* at 819.

374. See, e.g., *Collins v. Loisel*, 259 U.S. 309, 312 (1922) (stating that “[t]he law does not require that the name by which the crime is described in the two countries shall be the same, . . . [only that] the particular act charged is criminal in both jurisdictions”); *Wright v. Henkel*, 190 U.S. 40, 58 (1903) (stating that “[t]he general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties”).

375. Cohen, *supra* note 62, at 504. “To this end, the Exchange Act specifically permits the SEC to conduct investigations, if so requested by foreign authorities, regardless of whether the acts as alleged would constitute a violation of U.S. law.” *Id.*; see also *Mutual Assistance*, *supra* note 372, at 796.

376. See Response of the U.S.: Questions Concerning Phase 2, *supra* note 63, § 9.2. The DOJ states as follows:

The chief difficulty in investigating and prosecuting foreign bribery cases has been the lack of cooperation in obtaining evidence located outside the United States. In some instances, to overcome a perceived lack of mutuality or the absence of a Mutual Legal Assistance Treaty, the Department of Justice developed the so-called “Lockheed Agreements,” . . . which were case-specific. Nevertheless, although in some cases, e.g., Niger and Syria, countries have provided access to witnesses and extradited defendants, other countries have not provided evidence for use in FCPA prosecutions, citing lack of mutuality. Since the signing and subsequent ratification of the OECD Convention by some of these countries, mutuality has become less of an issue, although it is clearly still relevant when seeking evidence from non-OECD countries.

Id. From this, one might infer that foreign nations have significant control over potential prosecutions arising from conduct in their jurisdictions. Further, it also seems reasonable that successful investigations and prosecutions on behalf of the DOJ have been enabled by extensive cooperation between the DOJ and foreign law enforcement.

377. See *id.* § 2.3. The DOJ states that

[t]he funding of FCPA investigations and prosecutions is not a separate line item in the Department of Justice’s budget. All FCPA investigations and prosecutions are supervised by attorneys of the Criminal Division’s Fraud Section. In every budget cycle, the Fraud Section submits a budget request

U.S. will investigate marginal or sensitive transactions that would affront another nation.

Indeed, no official protest arose from the nations involved in the *KPMG-SSH* or *ABB* actions. In fact, there is no empirical data supporting the claim that the FCPA has aggrieved any nation in which an illicit bribe was consummated and sanctioned.³⁷⁸

CONCLUSION

“Criminalization of transnational bribery simply involves a country prohibiting its citizens and their employees [and agents] from engaging in conduct in another country that is illegal, destructive, and socially condemned” at home. This criminalization does not constitute moral imperialism. Indeed, to allow such conduct is morally questionable.³⁷⁹

The extraterritorial expansion of the FCPA depended upon the rising awareness of international corruption’s pervasive and devastating effects. This heightened awareness shifted public opinion away from the notion that corruption is simply an unfortunate, but necessary cost of doing business in certain parts of the world. This shift allowed decades of U.S. diplomatic efforts to succeed in creating various international agreements dealing with foreign bribery. Accordingly, in FCPA cases that implicate, for example, the interests of fellow OECD Convention members, the U.S. may point to that treaty’s jurisdiction-friendly provisions to assuage claims of overreaching, and likewise rely upon its mandate of maximal cooperation to aid prosecutions. In regard to states with which the United States does not share a formal anti-bribery treaty, American law enforcement has quite effectively forged less formal information sharing agreements that not only respect the foreign state’s right to control investigations within its bounds, but have also proven useful in building professional relationships between U.S. agencies and their foreign counterparts. Further, while prosecuting marginal conduct might well affront social sensitivities, such as the gift-giving norm in many Asian societies, FCPA enforcement has exclusively targeted large-scale, socially-undesirable, and value-decreasing acts that are universally condemned. Thus, due to a lack of enforcement on the part of OECD members, aggressive action on the part of the U.S. is imperative for international anti-bribery efforts to be efficacious. Rather than viewing recent expanded and aggressive FCPA

to the Division’s budget officers, and this request is incorporated into the Department’s overall budget request to Congress.

Id.

378. See Nichols, *supra* note 293, at 645-46 (citation omitted). Nichols observes: “In . . . twenty years, not one meaningful diplomatic rift can be attributed to enforcement of the Act.” *Id.* at 646.

379. Shaw, *supra* note 170, at 705-06 (quotations omitted).

enforcement as morally imperious, these actions should be seen as working to advance international partnership in addressing a complex and entrenched problem.

Notes & Observations