

The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Corruption Laws in Preventing or Lessening Future Financial Crises

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I. INTRODUCTION

The most recent global financial crisis resulted in part from a failure of international law.¹ Politicians and other regulators in the United States and abroad failed to effectively work together to create a consistent and proper level of regulation for the financial institutions, the mortgage-backed securities, and the credit default swaps that were at the heart of the crisis.² As evidenced by the recent crisis, the globalization of financial markets within the past few decades has created new systemic risk in which national crises can quickly and easily spread across national borders.³ In the absence of better coordination by politicians and other regulators in the United States and abroad, global financial crises are likely to occur with greater regularity and severity as the world continues to become more interconnected.

Even if a cohesive web of international financial regulation can be developed, enforcement of the various strands of that web of regulation remains a concern. Speaking about the causes of and the remedies to the most recent financial crisis, the United States Department of the Treasury wrote in its June

¹ To be fair, a wide variety of other causes also exist for the most recent financial crisis beyond just a failure of international law. *See, e.g.,* Barbara Black, *Protecting the Retail Investor in an Age of Financial Uncertainty*, 35 U. DAYTON L. REV. 61, 63 (2010) (arguing that the United States Securities and Exchange Commission should have done more to prevent the most recent financial crisis by better regulating the securities and securities transactions that were at the heart of the crisis); Robert Hardaway, *The Great American Housing Bubble: Re-Examining Cause and Effect*, 35 U. DAYTON L. REV. 33, 59 (2010) (crediting the most recent financial crisis to politicians who created a housing bubble by extending “home mortgage tax subsidies for the richest Americans . . . [and] pressuring banks to extend mortgages to marginal buyers”); Jeffrey M. Lipshaw, *Disclosure and Judgment: “We Have Met Madoff and He Is Ours,”* 35 U. DAYTON L. REV. 139, 140 (2010) (asserting that failures in individual judgment were at the heart of the most recent financial crisis); Robert T. Miller, *Morals in a Market Bubble*, 35 U. DAYTON L. REV. 113, 136 (2010) (arguing that “the financial crisis began at the Federal Reserve, where Alan Greenspan and his colleagues on the Federal Open Market Committee made some mistakes in the early years of this decade by keeping interest rates very low for a very long time”); Steven A. Ramirez, *Subprime Bailouts and the Predator State*, 35 U. DAYTON L. REV. 81, 84 (2010) (arguing that the most recent financial crisis was caused by “an orgy of reckless financial management [in which] a number of very large financial firms pursued short-term profits without regard to risks borne by their firms”).

² *See* Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 193 (2008) (“The global scale of the current troubles shows that other countries have been too lax as well, so that there should be a ratcheting up of securities regulation not only in the United States, but worldwide.”).

³ *See* Howell E. Jackson, *A System of Selective Substitute Compliance*, 48 HARV. INT’L L.J. 105, 112 (2007) (“An interesting challenge in the regulation of foreign investments is the possibility of spillover effects in the United States when things go wrong overseas, like the Parmalat scandal or the Asian financial crisis of 1997.”); Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT’L L. 9, 33 (1999) (“Stock market crashes and financial firm failures have become international, just like trading markets.”).

2009 white paper, *Financial Regulatory Reform: A New Foundation* (the Report),⁴ “Without consistent supervision and regulation, financial institutions will tend to move their activities to jurisdictions with looser standards, creating a race to the bottom and intensifying systemic risk for the entire global financial system.”⁵ Beyond just financial institutions, similar concerns exist regarding all financial market participants who may seek to avoid regulatory scrutiny.⁶

Remarkably, anti-corruption law has largely been ignored as a necessary component of financial regulatory reform. Communicating through the United States Department of the Treasury’s report on the financial crisis, the Obama Administration failed to mention the role of domestic or transnational anti-corruption law as a component of creating stable global financial markets.⁷ In fact, the term “corruption” never even appears within the Report.⁸ The Report does contain a variety of goals for raising international regulatory standards and improving international cooperation.⁹ One must worry, however, that corruption in certain jurisdictions may hamper achieving these goals because even if appropriate laws and regulations are passed, corrupt government officials may be unwilling to enforce them.

Worse yet, the voluminous body of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act)¹⁰ also fails to address domestic or transnational anti-corruption law. In fact, the word “corruption” is never mentioned in the myriad of provisions within the Act.¹¹ One might argue that corruption is not addressed within the provisions of Act because political

⁴ U.S. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 2 (2009), available at http://www.treasury.gov/initiatives/Documents/Final_Report_web.pdf.

⁵ *Id.* at 80 (discussing the need to “raise international regulatory standards and improve international cooperation” to prevent future financial crises).

⁶ See Susan Wolburgh Jenah, *Commentary on a Blueprint from Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT’L L.J. 69, 77 (2007) (discussing international securities regulation and suggesting that the key to such regulation is “to strike the right balance between a healthy degree of regulatory competition and proverbial ‘race to the bottom’”).

⁷ See U.S. DEP’T OF THE TREASURY, *supra* note 4.

⁸ See *id.*

⁹ *Id.* at 78–88 (listing goals for raising international regulatory standards and improving international cooperation including strengthening the international capital framework; improving the oversight of global financial markets; enhancing supervision of internationally active financial firms; reforming crisis prevention and management authorities and procedures; strengthening the Financial Stability Board; strengthening prudential regulations; expanding the scope of regulation; introducing better compensation practices; promoting stronger standards in the prudential regulation, money laundering/terrorist financing, and tax information exchange areas; improving accounting standards; and tightening oversight of credit rating agencies).

¹⁰ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 18, 20, 22, 26, 28, 31, 42, and 44 U.S.C.).

¹¹ See *id.*

corruption was not a cause of the most recent financial crisis. Even if that is the case, Congress promulgated the Act as a comprehensive overhaul of financial regulation in the United States.¹²

As I have discussed elsewhere,¹³ the Act represents an incomplete vision for financial regulation because of its failure to adequately address the globalization of financial markets and to provide necessary international law reforms.¹⁴ In regard to anti-corruption law, the Act fails to direct any of the newly created agencies to focus on anti-corruption issues,¹⁵ and even though the Act requires a plethora of studies, Congress failed to mandate a single study regarding the role of anti-corruption regulation in protecting the interests of the United States and in creating stable global financial markets.¹⁶

¹² As stated in the preamble, Congress promulgated the Dodd-Frank Act “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.” *Id.* In short, Congress drafted the Dodd-Frank Act to be a comprehensive overhaul of financial regulation in the United States.

¹³ See Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431 (2011).

¹⁴ *But see* Henry Klehm III, Joan E. McKown & Emily A. Posner, *Securities Enforcement Has Crossed the Border: Regulatory Authorities Respond to the Financial Crisis with a Call for Greater International Cooperation, but Where Will That Lead?*, 13 U. PA. J. BUS. L. 927, 936–40 (2011) (arguing that various general provisions of the Dodd-Frank Act can be employed in ways that combat transnational corruption).

¹⁵ The Dodd-Frank Act does contain a handful of general provisions that mandate international coordination that may lead to progress in combating transnational corruption. Specifically, section 175(a) of the Act permits the President or the President’s designees to “coordinate through all available international policy channels, similar policies as those found in United States law relating to limiting the scope, nature, size, scale, concentration, and interconnectedness of financial companies, in order to protect financial stability and the global economy.” Dodd-Frank Act § 175(a) (to be codified at 12 U.S.C. § 5373). Section 175(b) mandates that the Chairperson of the Financial Stability Oversight Council “regularly consult with the financial regulatory entities and other appropriate organizations of foreign governments or international organizations on matters relating to systemic risk to the international financial system.” *Id.* § 175(b). Section 175(c) mandates that the Board of Governors of the Federal Reserve System and the Secretary of the Treasury “consult with their foreign counterparts and through appropriate multilateral organizations to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies.” *Id.* § 175(c). And, finally, section 112(a)(2)(D) of the Act expressly requires the Financial Stability Oversight Council to “monitor domestic and international financial regulatory proposals and developments, including insurance and accounting issues, and to advise Congress and make recommendations in such areas that will enhance the integrity, efficiency, competitiveness, and stability of the U.S. financial markets.” *Id.* § 112(a)(2)(D) (to be codified at 12 U.S.C. § 5322). These general provisions, however, can hardly be considered a mandate from Congress to fight transnational corruption.

¹⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 18, 20,

Progress has recently been made within the United States relating to transnational anti-corruption regulation. Professor Mike Koehler, a leading commentator and expert on the Foreign Corrupt Practices Act (FCPA), has declared that a “big” and “bold” new era of FCPA enforcement has begun.¹⁷ In addition, Congress has recently conducted hearings on the FCPA.¹⁸ Progress has also been made in the international sphere with the relatively recent adoption of the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention,¹⁹ United Nations Convention Against Corruption,²⁰ and a number of other international agreements regarding transnational anti-corruption regulation.²¹ Still, the lack of mention of domestic and transnational anti-corruption law in the massive body of the Dodd-Frank Act is extraordinarily troubling.

A robust and comprehensive system of transnational anti-corruption law is required to create stable global financial markets. The realities of an increasingly interconnected world precipitated the enactment of the FCPA to prevent persons and other entities from engaging in activity that would corrupt foreign government officials.²² The OECD Anti-Bribery Convention,²³ the United Nations Convention Against Corruption,²⁴ and various other international agreements²⁵ have helped to spread transnational anti-corruption

22, 26, 28, 31, 42, and 44 U.S.C.) (requiring dozens of studies for purposes of future regulatory action).

¹⁷ See Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99 (2011).

¹⁸ See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011); *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010).

¹⁹ Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention].

²⁰ U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

²¹ See *infra* Part II.D (discussing various other international agreements regarding anti-corruption regulation).

²² See Foreign Corrupt Practices Act (FCPA) of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

²³ OECD Anti-Bribery Convention, *supra* note 19.

²⁴ U.N. Convention Against Corruption, *supra* note 20.

²⁵ See African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5; Economic Community of West African States Protocol on the Fight Against Corruption, Dec. 21, 2001, *available at* http://www.afrimap.org/english/images/treaty/ECOWAS_Protocol_on_Corruption.pdf; South African Development Community Protocol Adopted the Protocol Against Corruption, Aug. 14, 2001; Council of Europe, Civil Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 174 [hereinafter Civil Law Convention on Corruption]; Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505 [hereinafter Criminal Law Convention on Corruption]; Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26, 1997, 1997 O.J. (C 195) 1; Organization of American States, Inter-American Convention Against

laws throughout the rest of the world. The adoption and enforcement of these laws, however, remains incomplete.²⁶ In the absence of a robust and comprehensive system of transnational anti-corruption laws, the global financial markets remain subject to greater risk of future financial crises.

This Article will focus only on transnational anti-corruption regulation, i.e., laws, such as the FCPA, that prohibit persons and entities from bribing foreign public officials. Robust and ubiquitous domestic anti-corruption laws are also essential to creating stable global financial markets. Due to the focus of the symposium issue in which this Article appears, however, only transnational anti-corruption law will be discussed. The discussion of domestic anti-corruption regulation and stable global financial markets will be left for another day.

This Article contributes to the existing scholarship in three main ways. First, this Article highlights the glaring omission in the recent wave of financial regulatory reform to address, or even mention, anti-corruption regulation.²⁷ Second, this Article charts the current state of transnational anti-corruption law and demonstrates a growing interest in such law. Third, this Article discusses the path forward in anti-corruption regulation and makes various recommendations for future regulatory action.

The remainder of this Article is structured as follows. Part II of this Article discusses the rise of transnational anti-corruption law including the Foreign Corrupt Practices Act, the OECD Anti-Bribery Convention, United Nations Convention Against Corruption, and various other international agreements to prevent transnational activities designed to corrupt government officials. Part III discusses the need for a robust and comprehensive system of transnational anti-corruption law based upon the globalization of financial markets, the existence

Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter Inter-American Convention Against Corruption].

²⁶ See *infra* Part III.B (showing that many nations continue to have high levels of perceived corruption based in part on lack of adequate anti-corruption regulation and lack of adequate enforcement of that regulation).

²⁷ At least one article after the most recent financial crisis has praised the interest of the international community in anti-corruption regulation. See generally Klehm et al., *supra* note 14. The authors assert, “In response to the financial crisis, international and national bodies have placed the issues surrounding global corruption near the top of their agendas.” *Id.* at 929. This is likely a bit of an overstatement. In fact, the authors of the piece make the following clarification: “Although regulators have recognized the need to engage in international cooperation to combat corruption and bribery at a global level, it remains to be seen if this understanding will lead to a meaningful transformation in the area of enforcement.” *Id.* The failure of the United States Department of the Treasury to mention anti-corruption regulation in its goals for regulatory reform and the failure of Congress to mention anti-corruption regulation in the voluminous body of the Dodd-Frank Act makes it difficult to believe that combatting corruption is sufficiently entrenched in the United States’ financial regulatory agenda. See *supra* notes 4, 10. In addition, the continued existence of high levels of perceived corruption in various nations throughout the world means that a lot of work is left to be done in anti-corruption regulation and enforcement. See *infra* Part III.B (discussing the existence of transnational corruption in global financial markets).

of transnational corruption within those markets, and the importance of transnational anti-corruption regulation in preventing or lessening future financial crises. Part IV discusses the future of transnational anti-corruption regulation and offers various domestic and international recommendations for the growth and development of transnational anti-corruption regulation and enforcement. Ultimately, this Article concludes that a robust and comprehensive system of transnational anti-corruption law is required to create stable global financial markets and that in the absence of such a system that financial crises will occur with greater regularity and with greater severity.

II. THE RISE OF TRANSNATIONAL ANTI-CORRUPTION LAW

The current global model of transnational anti-corruption law continues to develop and evolve. This Part surveys the origins and development of transnational anti-corruption law both in the United States and abroad.

A. *The Foreign Corrupt Practices Act*

Remarkably, at the time of the writing of this Article, the origins of the current global model of transnational anti-corruption law are only roughly three and a half decades old. When the FCPA was enacted in 1977, it was the first law of its kind.²⁸ For roughly two and a half decades after its enactment, the FCPA remained relatively dormant with few actions being undertaken to enforce its mandates.²⁹ In recent years, however, the number of enforcement proceedings has blossomed,³⁰ and due to various international agreements,

²⁸ See Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 353 (2010) (noting that the FCPA was the first statute in the world to regulate transnational corruption).

²⁹ See Peter J. Henning, *Taking Aim at the Foreign Corrupt Practices Act*, N.Y. TIMES DEALBOOK (Apr. 30, 2012, 1:55 PM), <http://dealbook.nytimes.com/2012/04/30/taking-aim-at-the-foreign-corrupt-practices-act> (“For the first 30 years or so after its enactment, the antibribery portion of [the FCPA] was used sporadically. Only a handful of cases were brought each year against companies, almost always ending in settlements involving a modest fine, and even fewer involved individuals.”).

³⁰ See *id.* (“Prosecutors have now made enforcement of the law a priority, and more industries have been caught up in investigations. The Justice Department has filed cases against pharmaceutical manufacturers for dealings with state-run health care programs, and is reported to be pursuing an investigation into the dealings of American movie studios in China.”); see also John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 25, 27 (“[T]he total number of FCPA cases brought by the DOJ and SEC from 2007 to 2009 more than doubled the total of all such cases brought in the statute’s first 30 years.”).

similar transnational anti-corruption statutes have bloomed throughout the world.³¹

The FCPA is codified in section 13 and section 30A of the Securities Exchange Act of 1934 (Exchange Act)³² and in two additional federal statutes. Section 13(b)(2)(A) of the Exchange Act mandates that every issuer of securities registered with the SEC “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”³³ This provision was designed to require registered issuers to keep accurate books and records for purposes of determining whether unlawful payments have been made abroad.³⁴ Assuming that a registered issuer adheres to the provision, it also creates the opportunity to detect a variety of other wrongdoing beyond just transnational bribery.³⁵

Section 13(b)(2)(B) requires that every issuer of securities registered with the SEC do the following:

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management’s general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management’s general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences³⁶

This provision mandates the creation of adequate internal controls for purposes of preventing the payment of transnational bribes.³⁷ Similar to section 13(b)(2)(A), section 13(b)(2)(B), if a registered issuer adheres, has the potential to prevent a variety of other wrongdoing beyond just transnational bribery.³⁸

³¹ See *infra* Part II.B–D (discussing the various international agreements that have helped to spread laws similar to the FCPA throughout the world).

³² Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2006).

³³ *Id.* § 78m(b)(2)(A).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* § 78m(b)(2)(B)(i)–(iv).

³⁷ *Id.*

³⁸ 15 U.S.C. § 78(m)(2)(B) (2006).

Section 30A of the Exchange Act contains one of the three anti-bribery provisions of the FCPA.³⁹ Section 30A provides:

It shall be unlawful for any issuer [of any registered security] . . . or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person⁴⁰

Section 30A(2) prohibits similar behavior by an issuer paying bribes to “any foreign political party or official thereof or any candidate for foreign political office . . . in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”⁴¹ In addition, section 30A(3) prohibits similar behavior by an issuer paying bribes to

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office . . . in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.⁴²

In essence, the provision provides a broad prohibition against transnational bribery by issuers of securities registered in the United States.

In addition to section 30A of the Exchange Act, two additional provisions of the United States Code render unlawful transnational bribery. First, 15 U.S.C. § 78dd-2 mirrors the language of section 30A except section 78dd-2 prohibits bribes by domestic concerns, rather than issuers.⁴³ A “domestic concern” is “any individual who is a citizen, national, or resident of the United States” and “any corporation, partnership, association, joint-stock company,

³⁹ *Id.* § 78dd.

⁴⁰ *Id.* § 78dd-1(a)(1).

⁴¹ *Id.* § 78dd-1(a)(2).

⁴² *Id.* § 78dd-1(a)(3).

⁴³ *Id.* § 78dd-2(a).

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.”⁴⁴ Second, 15 U.S.C. § 78dd-3 mirrors the language of section 30A and 15 U.S.C. § 78dd-2, except 15 U.S.C. § 78dd-3 prohibits bribes by persons other than issuers and domestic concerns.⁴⁵

The provisions of the FCPA along with the domestic anti-corruption laws in the United States help to create a robust anti-corruption regime. Especially in regard to transnational anti-corruption regulation, the United States has been relatively successful in exporting its system of anti-corruption law around the globe.

B. *The OECD Anti-Bribery Convention*

International agreements have helped transnational anti-corruption regulation similar to the FCPA to be enacted beyond the borders of the United States. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed in December of 1997.⁴⁶ The Convention is popularly known as the “OECD Anti-Bribery Convention” and requires countries ratifying it to implement laws criminalizing bribery of foreign officials.⁴⁷

The OECD is an international organization that was founded to encourage economic development and world trade.⁴⁸ It traces its origins to the Organisation for European Economic Cooperation (OEEC) that was established in 1947 to administer the Marshall Plan for reconstruction of Europe after World War II.⁴⁹ Based on the success of the OEEC, the OEEC began to evolve into the OECD on December 14, 1960 with the signing of the OECD Convention.⁵⁰ The OECD was officially born on September 30, 1961.⁵¹

⁴⁴ 15 U.S.C. § 78dd-2(h)(1) (2006).

⁴⁵ *Id.* § 78dd-3.

⁴⁶ OECD Anti-Bribery Convention, *supra* note 19.

⁴⁷ *Id.*

⁴⁸ *History*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/about/history/> (last visited May 29, 2012).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

The OECD Anti-Bribery Convention represents one of the OECD's major successes. As of March 2009, the Anti-Bribery Convention had been ratified by all 34 OECD member countries.⁵² These countries include: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.⁵³ Five non-member countries are also parties to the Anti-Bribery Convention: Argentina, Brazil, Bulgaria, Russia, and South Africa.⁵⁴

The provisions of the OECD Anti-Bribery Convention require that countries ratifying it adopt transnational anti-corruption laws similar to the FCPA. Article 1 of the Convention requires that parties adopt laws criminalizing the bribing of foreign government officials.⁵⁵ Article 3 of the Convention requires that parties provide effective and proportionate sanctions for those engaging in such criminal activity.⁵⁶ In addition, the Anti-Bribery Convention provides that parties adopt laws requiring that companies keep accurate books and records, make truthful financial statement disclosure, and adhere to adequate accounting and auditing standards.⁵⁷ The Convention

⁵² *Ratification Status as of April 2012*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/dataoecd/59/13/40272933.pdf> (last visited July 1, 2012) (providing the ratification status of the OECD Anti-Bribery Convention).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ OECD Anti-Bribery Convention, *supra* note 19, at art. 1, para 1 ("Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."); *id.* at art. 1, para. 2 ("Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.").

⁵⁶ *Id.* at art. 3, para. 1 ("The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition."); *see also id.* at art. 3, para. 2 ("In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials."); *id.* at art. 3, para. 4 ("Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.").

⁵⁷ *Id.* at art. 8, para. 1 ("In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework

mandates that parties adopt laws providing sanctions against companies that fail to meet these requirements.⁵⁸

In addition to requiring that parties adopt laws and regulations similar to the FCPA, the OECD Anti-Bribery Convention is also important because it strengthens ties between parties for the purpose of fighting transnational corruption. Section 1 of Article 9 provides:

Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.⁵⁹

Because transnational corruption is by definition a transnational event, cooperation with the government in the jurisdiction where a bribe was directed can be key to a successful prosecution. In addition, because many companies operate in more than one country, having cooperation from regulators in other countries can be key to determining whether a company is maintaining accurate books and records and maintaining adequate internal controls.

The OECD Anti-Bribery Convention also strengthens ties between parties for the purpose of fighting transnational corruption by mandating monitoring and follow-up to ensure that parties are actually adhering to the requirements of the Convention. Article 12 provides:

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear

of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.”).

⁵⁸ OECD Anti-Bribery Convention, *supra* note 19, at art. 8, para. 2 (“Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.”).

⁵⁹ *Id.* at art. 9, para. 1.

the costs of the programme in accordance with the rules applicable to that body.⁶⁰

For the past decade and a half, the OECD Anti-Bribery Convention has been a driving force in the spread of transnational anti-corruption regulation throughout the world.

C. The United Nations Convention Against Corruption

The United Nations Convention Against Corruption has also helped to spread transnational anti-corruption regulation around the globe.⁶¹ The provisions of the Convention regarding transnational anti-corruption regulation draw heavily upon the concepts embodied in the FCPA, OECD Anti-Bribery Convention, and various other international anti-corruption treaties.

The Convention Against Corruption developed from the drafting and adoption of the United Nations Convention Against Transnational Organized Crime.⁶² The General Assembly of the United Nations adopted the Convention Against Transnational Organized Crime by resolution on November 15, 2000.⁶³ That Convention represents the recognition by countries signing and ratifying the document of the seriousness of transnational organized crime, and it represents a major step in coordinating international efforts against such crime.⁶⁴ The Convention Against Transnational Organized Crime was designed in part to address corruption. In the resolution adopting the Convention, the General Assembly asserts that the Convention “will constitute an effective tool and the necessary legal framework for international cooperation in combating, *inter alia*, such criminal activit[y] as . . . corruption.”⁶⁵ Article 8 of the Convention Against Transnational Organized Crime, for example, provides for the criminalization of corruption and requires each party to the Convention to adopt laws and regulations criminalizing the intentional promising, offering, or giving of a bribe to a public official within that nation.⁶⁶ Article 8 also requires

⁶⁰ *Id.* at art. 12.

⁶¹ U.N. Convention Against Corruption, *supra* note 20.

⁶² See U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 343.

⁶³ G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 1, 2001) (providing the resolution by the U.N. General Assembly on November 15, 2000 adopting the United Nations Convention Against Transnational Organized Crime).

⁶⁴ U.N. Convention Against Transnational Organized Crime, *supra* note 62.

⁶⁵ G.A. Res. 55/25, *supra* note 63, at 2.

⁶⁶ U.N. Convention Against Transnational Organized Crime, *supra* note 62, at art. 8, para. 1–1(a) (“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”).

each party to the Convention to adopt laws criminalizing soliciting, or accepting of bribes by a public official within that nation.⁶⁷

In regard to encouraging and coordinating efforts to prevent transnational corruption, however, the Convention Against Transnational Organized Crime is notably deficient. Paragraph 2 of Article 8 provides only that “[e]ach State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences . . . involving [bribery of] a foreign public official or international civil servant” and that “each State Party shall consider establishing as criminal offences other forms of corruption.”⁶⁸ Article 9 does contain some additional vague requirements that parties to the Convention adopt measures against corruption and take “effective action” against corruption.⁶⁹ However, the vague and weak mandate within the Convention Against Transnational Organized Crime that parties must “consider” criminalizing transnational corruption illustrates the Convention’s deficiencies. Even at the time of the drafting, the deficiencies of the Convention Against Transnational Organized Crime in providing adequate anti-corruption regulation were clear to its drafters.

On October 31, 2003, the General Assembly adopted the United Nations Convention Against Corruption.⁷⁰ To provide some context, on December 4, 2000, less than a month after the adoption of the Convention Against Transnational Organized Crime, the General Assembly adopted a resolution appointing an ad hoc committee to negotiate the creation of an “effective international legal instrument against corruption.”⁷¹ In the resolution, the General Assembly noted that the reason for the creation of the ad hoc committee is the “corrosive effect that corruption has on democracy, development, the rule of law and economic activity.”⁷² The ad hoc committee’s work ultimately resulted in the Convention Against Corruption, which was adopted in October of 2003 and entered into force on December 15, 2005.

⁶⁷ *Id.* at art. 8, para. 1–1(b) (“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: . . . (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”).

⁶⁸ *Id.* at art. 8, para. 2.

⁶⁹ *Id.* at art. 9.

⁷⁰ G.A. Res. 58/4, at 3, U.N. Doc. A/RES/58/4 (Nov. 21, 2003) (providing the resolution by the U.N. General Assembly on October 31, 2003 adopting the United Nations Convention Against Corruption).

⁷¹ G.A. Res. 55/61, at 1, U.N. Doc. A/RES/55/61 (Jan. 22, 2001) (providing the General Counsel’s resolution on December 4, 2001 mandating the creation of an ad hoc committee to negotiate the Convention Against Corruption).

⁷² *Id.*

The Convention Against Corruption is lengthy and complex, but a brief overview should be provided regarding some of the major provisions relating to the prevention of transnational corruption. The Convention Against Corruption requires that parties adopt laws and regulations that are similar to the provisions of the Foreign Corrupt Practices Act. For example, Article 12 of the Convention provides:

[E]ach State Party shall take such measures as may be necessary, in accordance [sic] with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects;
- (e) The use of false documents; and
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.⁷³

In addition, Article 16 provides:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.⁷⁴

Article 16 also provides that states shall adopt laws and regulations to criminalize the acceptance or solicitation of a bribe by a foreign public official.⁷⁵ Notably, unlike the Convention Against Transnational Organized Crime, which provided that parties to it merely “consider” adopting

⁷³ U.N. Convention Against Corruption, *supra* note 20, at art. 12, para. 3.

⁷⁴ *Id.* at art. 16, para. 1.

⁷⁵ *Id.* at art. 16, para. 2 (“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”).

transnational anti-corruption laws and regulations,⁷⁶ the Convention Against Corruption requires that parties to it “shall” adopt such laws and regulations.⁷⁷

Chapter IV of the Convention also contains a number of provisions designed to improve international cooperation in preventing corruption.⁷⁸ For example, Article 46 addresses mutual legal assistance;⁷⁹ article 48 addresses law enforcement cooperation;⁸⁰ and Article 49 addresses joint investigations.⁸¹ In addition, chapter VI contains provisions relating to technical assistance and the exchange of information relating to corruption.⁸² Moreover, Article 63 of the Convention Against Corruption requires the establishment of a Conference of States Parties to oversee the implementation of the agreement.⁸³ These provisions and others in the Convention Against Corruption have helped to improve cooperation among the 140 signatories and 160 parties to the Convention at the time of the writing of this Article.⁸⁴

D. Other International Agreements Designed to Combat Transnational Corruption

In addition to the international agreements already mentioned, a number of other international agreements exist that are designed to combat transnational corruption. The OECD Anti-Bribery Convention and the United Nations Convention Against Corruption are debatably the most important international agreements because of the economic strength of the countries signing and ratifying the OECD Anti-Bribery Convention and the large number of countries signing and ratifying the United Nations Convention Against Corruption.⁸⁵ At least some discussion should be provided, however, of a number of the other international agreements designed to combat corruption to help trace the origins and growth of transnational anti-corruption regulation on the international level.⁸⁶

⁷⁶ U.N. Convention Against Transnational Organized Crime, *supra* note 62, at art. 8.

⁷⁷ *See, e.g.*, U.N. Convention Against Corruption, *supra* note 20, at art. 16, para. 1.

⁷⁸ *See id.* at ch. IV.

⁷⁹ *See id.* at art. 46.

⁸⁰ *See id.* at art. 48.

⁸¹ *See id.* at art. 49.

⁸² *See id.* at ch. VI.

⁸³ U.N. Convention Against Corruption, *supra* note 20, at art. 63.

⁸⁴ *See Signatories to the United Nations Convention Against Corruption*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited July 7, 2012) (providing a complete list of signatories and parties to the United Nations Convention Against Corruption).

⁸⁵ *See supra* notes 52–54 and accompanying text (providing a list of parties to the OECD Anti-Bribery Convention); *supra* note 84 and accompanying text (providing a list of countries who are signatories and parties to the United Nations Convention Against Corruption).

⁸⁶ As discussed in the previous subsection, the United Nations Convention Against Transnational Organized Crime also marked an important milestone in the growth of

The Inter-American Convention Against Corruption was the first international anti-corruption treaty.⁸⁷ The member states of the Organization of American States drafted the Inter-American Convention Against Corruption, and it was adopted on March 29, 1996.⁸⁸ As stated in the preamble to the document, the member states recognized “that fighting corruption . . . prevents distortions in the economy” and “that, in some cases, corruption has international dimensions, which requires coordinated action by States to fight it effectively.”⁸⁹ Article VIII of the Inter-American Convention Against Corruption requires parties to prohibit and punish acts of transnational bribery.⁹⁰ The Convention was also designed to encourage coordination among party states in fighting corruption.⁹¹ For example, Article XIV contains broad mandates requiring assistance and cooperation among parties to the convention.⁹² As of the writing of this Article, the Inter-American Convention Against Corruption has been ratified by dozens of countries in North and South America.⁹³

transnational anti-corruption law. *See supra* Part II.C (discussing the United Nations Convention Against Transnational Organized Crime). In addition, national anti-corruption laws, such as the Foreign Corrupt Practices Act, also have provided a catalyst for the development of international agreements on regulation of transnational corruption. *See supra* Part II.A (discussing the Foreign Corrupt Practices Act).

⁸⁷ *Organization of American States (OAS)*, INT’L ASS’N OF ANTI-CORRUPT AUTHORITIES (Feb. 15, 2012), http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/InterGovernmentalOrganization/201202/t20120215_805470.shtml; *see also* Inter-American Convention Against Corruption, *supra* note 25.

⁸⁸ *Id.* at pmb1.

⁸⁹ *Id.*

⁹⁰ *Id.* at art. VIII (“[E]ach State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official’s public functions.”).

⁹¹ *Id.* at art. II, para. 2 (stating that one of the purposes of the Convention is “[t]o promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance”).

⁹² *Id.* at art. XIV.

⁹³ *Signatories and Ratifications of the Inter-American Convention Against Corruption*, ORG. OF AM. STATES, <http://www.oas.org/juridico/english/Sigs/b-58.html> (last visited May 29, 2012).

During the late 1990s, European nations also began developing international agreements to combat corruption. Although other international treaties in Europe contained mandates that arguably required the criminalization of corruption,⁹⁴ the European Union enacted the first major international anti-corruption treaty exclusively among European nations on May 26, 1997 with the adoption of the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.⁹⁵ The Convention requires member states of the European Union to criminalize passive corruption, which occurs when a public official requests or receives a bribe,⁹⁶ and it also requires member states to criminalize active corruption, which occurs when a person or entity gives or promises a bribe.⁹⁷ Importantly, the Convention defines the term “official” to include a national official of any other member state, which means that parties to the Convention are required to criminalize transnational bribery.⁹⁸ Article 9 of the Convention also contains broad provisions mandating cooperation in investigating, prosecuting, and punishing corruption.⁹⁹

⁹⁴ See, e.g., Convention on the Protection of the European Communities’ Financial Interests, July 26, 1995, art. 1, 1995 O.J. (C 316) 49 (requiring that member states of the European Union adopt laws and regulations protecting the European Communities’ financial interests and criminalizing fraud, including “the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities” and “the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities”).

⁹⁵ Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, *supra* note 25.

⁹⁶ *Id.* at art. 2, para. 1 (“For the purposes of this Convention, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption.”).

⁹⁷ *Id.* at art. 3, para. 1 (“For the purposes of this Convention, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption.”).

⁹⁸ *Id.* at art. 1.

⁹⁹ *Id.* at art. 9.

In addition to the European Union, the Council of Europe has also negotiated and created international agreements to combat corruption. Because the Council of Europe is currently composed of forty-seven countries, which exceeds the twenty-seven countries of the European Union, the treaties generated by the Council of Europe arguably have greater impact.¹⁰⁰

On January 27, 1999, the Council of Europe adopted the Criminal Law Convention on Corruption.¹⁰¹ In contrast to earlier anti-corruption treaties, e.g., the OECD Anti-bribery Convention and the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, the Council of Europe's Criminal Law Convention on Corruption is a more complex and comprehensive agreement with many similarities to the United Nations Convention Against Corruption.¹⁰² In terms of transnational anti-corruption regulation, the Criminal Law Convention on Corruption requires parties to criminalize active and passive bribery relating to foreign public officials and foreign public assemblies.¹⁰³ In addition, the Criminal Law Convention on Corruption requires parties to criminalize active and passive bribery relating to officials of international organizations,¹⁰⁴ members of international parliamentary assemblies,¹⁰⁵ and judges and officials of international courts.¹⁰⁶ Chapter IV also contains extensive provisions regarding international cooperation.¹⁰⁷ Notably, Article 24 requires that implementation of the Convention will be monitored by the Group of States Against Corruption,¹⁰⁸ a group formed by the Council of Europe to monitor compliance with the Council's anti-corruption standards.¹⁰⁹

¹⁰⁰ See *The Council of Europe in Brief*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=nepasconfondre&l=en> (last visited July 4, 2012) (comparing and contrasting the Council of Europe and the European Union).

¹⁰¹ Criminal Law Convention on Corruption, *supra* note 25.

¹⁰² See generally *id.*

¹⁰³ *Id.* at art. 5–6.

¹⁰⁴ *Id.* at art. 9.

¹⁰⁵ *Id.* at art. 10.

¹⁰⁶ *Id.* at art. 11.

¹⁰⁷ See Criminal Law Convention on Corruption, *supra* note 25, at ch. IV.

¹⁰⁸ *Id.* at art. 24.

¹⁰⁹ *What is GRECO?*, COUNCIL OF EUR., http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp (last visited May 29, 2012).

In addition, on November 4, 1999, the Council of Europe adopted the Civil Law Convention on Corruption.¹¹⁰ The purpose of the Convention is to provide civil remedies for those who have been victims of corruption.¹¹¹ Each party to the Convention is required to adopt and provide remedies under that party's system of law for any person who has suffered as a result of corruption.¹¹² Article 13 of the Convention contains a broad statement that parties to the Convention will cooperate in matters relating to civil proceedings,¹¹³ and Article 14 provides that compliance with the Convention will be monitored by the Group of States Against Corruption.¹¹⁴

During the early 2000s, nations in Africa also began adopting agreements to combat corruption. On December 21, 2001, the Economic Community of West African States adopted the Protocol on the Fight Against Corruption.¹¹⁵ The Economic Community of West African States is a regional organization of fifteen African nations designed to promote the economic integration of its member states,¹¹⁶ which are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.¹¹⁷ The Protocol obligates parties to enact broad prohibitions against corruption.¹¹⁸ The Protocol specifically requires parties to assess whether their laws are adequate for preventing transnational corruption,¹¹⁹ to create laws and regulations discouraging corruption of foreign officials,¹²⁰ and to prohibit and punish transnational corruption.¹²¹ The Protocol

¹¹⁰ Civil Law Convention on Corruption, *supra* note 25.

¹¹¹ *Id.* at art. 1 (“Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.”).

¹¹² *Id.*

¹¹³ *Id.* at art. 13 (“The Parties shall co-operate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgements and litigation costs, in accordance with the provisions of relevant international instruments on international co-operation in civil and commercial matters to which they are Party, as well as with their internal law.”).

¹¹⁴ *Id.* at art. 14.

¹¹⁵ Economic Community of West African States Protocol on the Fight Against Corruption, *supra* note 25, at 11.

¹¹⁶ *ECOWAS in Brief*, ECON. COMMUNITY OF W. AFR. STATES, http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (last visited May 29, 2012).

¹¹⁷ *The ECOWAS Commission*, ECON. COMMUNITY OF W. AFR. STATES, <http://www.ecowas.int/> (last visited May 29, 2012) (providing a list of the members of the Economic Community of West African States).

¹¹⁸ *See* Economic Community of West African States Protocol on the Fight Against Corruption, *supra* note 25.

¹¹⁹ *Id.* at art. 4, para. 3 (“Each State Party shall review its legislation with a view to ascertaining whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and where it is not, it shall take appropriate remedial measures.”).

¹²⁰ *Id.* at art. 5.

also obligates parties to maintain adequate revenue-collection systems and to require companies to maintain adequate books and records for purposes of detecting corruption.¹²² Two of the central objectives of the Protocol are “to intensify and revitalise cooperation between State Parties, with a view to making anti-corruption measures more effective” and “to promote the harmonisation and coordination of national anticorruption laws and policies.”¹²³ Unfortunately, the Protocol is supposed to enter into force only upon ratification by nine signatory states,¹²⁴ and sufficient ratification had not yet occurred at the time of writing of this Article.¹²⁵

On August 14, 2001, the Southern African Development Community adopted the Protocol Against Corruption.¹²⁶ Similar to the Economic Community of West African States, the Southern African Development Community is a regional organization of fifteen African nations designed to promote the economic integration of its member states, which are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe.¹²⁷ The Protocol contains broad provisions designed to coordinate and harmonize efforts among parties to combat domestic and transnational corruption.¹²⁸ The Protocol specifically requires parties to prohibit and punish transnational corruption.¹²⁹ Parties must also adopt other deterrents against transnational bribery, including requiring

¹²¹ *Id.* at art. 12, para. 1 (“Each State Party shall prohibit and punish the act of offering or giving to a foreign public official, either directly or indirectly, any object of pecuniary value such as gifts, promises or favors, to compensate the public official for an act or an omission in the exercise of his official functions.”).

¹²² *Id.* at art. 5.

¹²³ *Id.* at art. 2.

¹²⁴ Economic Community of West African States Protocol on the Fight Against Corruption, *supra* note 25, at art. 22.

¹²⁵ *International Conventions*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/cleangovbiz/internationalconventions.htm#africa> (last visited May 29, 2012) (reporting that the Economic Community of West African States Protocol on the Fight Against Corruption has never entered into force due to a lack of ratifications).

¹²⁶ Southern African Development Community Protocol Against Corruption, *supra* note 25.

¹²⁷ *Introducing SADC*, S. AFR. DEV. COMMUNITY, <http://www.sadc.int/index/browse/page/715> (last visited May 29, 2012) (providing an overview of the Southern African Development Community).

¹²⁸ *See, e.g.*, Southern African Development Community Protocol Against Corruption, *supra* note 25, at art. 2.

¹²⁹ *Id.* at art. 6, para. 1 (“Subject to its domestic law, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its own nationals, persons having their habitual residence in its territory, and businesses domiciled there, to an official of a foreign State, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official’s public functions.”).

publicly held companies to maintain adequate books, records, and internal controls.¹³⁰

Finally, on July 11, 2003, the African Union adopted the Convention on Preventing and Combating Corruption.¹³¹ The African Union is an organization designed to build unity among and confront economic, social, and political issues facing its member nations.¹³² The Convention on Preventing and Combating Corruption focuses mainly on the creation of domestic anti-corruption law within the nations that are parties to the agreement.¹³³ With that said, the Convention does require that parties criminalize certain types of transnational corruption,¹³⁴ and it also requires that parties work together to prevent transnational corruption.¹³⁵ The Convention also provides for cooperation in transnational investigations,¹³⁶ and it provides for robust technical cooperation and mutual legal assistance among parties to the agreement.¹³⁷ In addition, the Convention establishes the Advisory Board on Corruption to oversee the implementation of the Convention, to advise the African Union on corruption issues, and to promote anti-corruption law and regulation.¹³⁸

¹³⁰ *Id.* at art. 4, para. 1.

¹³¹ African Union Convention on Preventing and Combating Corruption, *supra* note 25.

¹³² *AU in a Nutshell*, AFR. UNION, <http://www.au.int/en/about/nutshell> (last visited May 29, 2012) (providing an overview of the African Union, including its origins, objectives, and structure); *see also Member States*, AFR. UNION, http://www.au.int/en/member_states/countryprofiles (last visited May 29, 2012) (providing a listing of the member states of the African Union).

¹³³ *See* African Union Convention on Preventing and Combating Corruption, *supra* note 25, at art. 2.

¹³⁴ *Id.* at art. 19, para. 1 (“In the spirit of international cooperation, State Parties shall . . . [c]ollaborate with countries of origin of multi-nationals to criminalise and punish the practice of secret commissions and other forms of corrupt practices during international trade transactions.”).

¹³⁵ *Id.* at art. 19, paras. 2, 4 (“In the spirit of international cooperation, State Parties shall . . . [f]oster regional, continental and international cooperation to prevent corrupt practices in international trade transactions . . . [and] [w]ork closely with international, regional and sub regional financial organizations to eradicate corruption in development aid and cooperation programmes by defining strict regulations for eligibility and good governance of candidates within the general framework of their development policy.”).

¹³⁶ *Id.* at art. 19, para. 5 (“In the spirit of international cooperation, State Parties shall . . . [c]ooperate in conformity with relevant international instruments on international cooperation on criminal matters for purposes of investigations and procedures in offences within the jurisdiction of this Convention.”).

¹³⁷ *See id.* at art. 18.

¹³⁸ *Id.* at art. 22.

All of these agreements laid the groundwork for the adoption of the United Nations Convention Against Corruption by the United Nations General Assembly on October 31, 2003.¹³⁹ The international agreements to combat corruption prior to the adoption of the United Nations Convention Against Corruption and the Convention Against Corruption itself demonstrate two things. First, the international community has recognized that corruption poses a threat to the global economy and global civil society. Second, the international community has recognized that affirmative steps on an international level must be taken to fight corruption, especially transnational corruption.

III. THE NEED FOR A ROBUST AND COMPREHENSIVE SYSTEM OF TRANSNATIONAL ANTI-CORRUPTION LAW

After exploring the rise of transnational anti-corruption regulation and examining the current international architecture of such regulation, the following question lingers: If comprehensive international agreements exist regarding transnational anti-corruption regulation,¹⁴⁰ and if many nations, including the United States, are working vigorously to enforce their transnational anti-corruption laws,¹⁴¹ why are additional efforts needed to create and maintain a robust and comprehensive system of transnational anti-corruption law for purposes of creating stable global financial markets?

This question can be answered in a variety of different ways. First, the existence of comprehensive international agreements does not mean that the requirements contained within their provisions have adequately been codified within the legal systems of the countries that have adopted and ratified the agreements. Second, even if the requirements of the international agreements have been codified, that does not mean that countries will adequately enforce such regulation. Third, if many nations, including the United States, are working vigorously to enforce their transnational anti-corruption laws, this does not mean that all countries are behaving this way, which creates global systemic risk and the potential for a “race to the bottom.” Fourth, even if many nations, including the United States, are working vigorously to enforce their transnational anti-corruption laws, this may not continue to occur without consistent and continual dedication to fighting corruption.

¹³⁹G.A. Res. 58/4, at 3, U.N. Doc. A/RES/58/4 (Nov. 21, 2003) (providing the resolution by the U.N. General Assembly on October 31, 2003 adopting the United Nations Convention Against Corruption).

¹⁴⁰See *supra* Part II.B–D (discussing the current international architecture of transnational anti-corruption regulation, including various international agreements).

¹⁴¹See *supra* note 17 and accompanying text (discussing the “big” and “bold” new era of FCPA enforcement).

Of course, this raises a second more basic question: Why is fighting corruption so important to creating stable global financial markets? In the remainder of this section, the globalization of financial markets, the existence of transnational corruption in global financial markets, and the importance of transnational anti-corruption regulation in preventing or lessening future financial crises will be explored.

A. *The Globalization of Financial Markets*

The globalization of financial markets is beyond peradventure. A few words, however, ought to be offered about how and why the transition from national and regional markets to global financial markets has occurred to highlight the importance of transnational anti-corruption regulation because of the increasingly interconnected global economy. The world has changed significantly since 1977, when the FCPA was originally enacted, and a robust and comprehensive system of transnational anti-corruption regulation is needed to ensure the stability of the emerging global financial markets.

This is not to claim that the global financial markets that currently exist are seamless and allow for the unrestricted flow of capital and financial services.¹⁴² Regulation still remains largely set in the national context, rather than on the international level.¹⁴³ Financial markets, however, are significantly more interconnected and international than when the FCPA came into being.

The transition from national or regional markets to international financial markets has occurred for a variety of reasons. Although the United States' financial markets, especially its capital markets, were preeminent for much of the twentieth century, the growth and development of strong national financial markets in Asia, Europe, and South America have shifted the focus away from the United States.¹⁴⁴ Notably, the rise of strong national economies in Brazil, Russia, India, and China, which are commonly referred to as the "BRIC" nations, has allowed capital and financial services to spread more evenly around

¹⁴² See Edward F. Greene, *Beyond Borders: Time to Tear Down the Barriers to Global Investing*, 48 HARV. INT'L L.J. 85, 97 (2007) (arguing "that the securities markets have evolved beyond jurisdictional borders and that its current regulatory regime has resulted in barriers to competition and placed roadblocks in the way of investor access to cross-border investment opportunities that have contributed to increased cost and market inefficiencies").

¹⁴³ U.S. DEP'T OF THE TREASURY, *supra* note 4, at 80 (noting that in terms of financial markets, "regulation is still set largely in a national context").

¹⁴⁴ See Robert G. DeLaMater, *Recent Trends in SEC Regulation of Foreign Issuers: How the U.S. Regulatory Regime Is Affecting the United States' Historic Position as the World's Principal Capital Market*, 39 CORNELL INT'L L.J. 109, 117 (2006) ("The securities markets outside the United States have grown in breadth and depth of their own over the past twenty years and now afford issuers in their home countries significant opportunities for financing that did not previously exist."); Greene, *supra* note 142, at 85 ("There can be no argument that the securities markets are now global and that the dominance of the United States as the leading player in the global marketplace is being challenged.").

the globe.¹⁴⁵ The rise of the Internet and other forms of communication has tied together these strong national economies and financial markets in ways that were not previously possible.¹⁴⁶

Financial market participants now think globally, rather than on a national or regional basis. For example, increasingly businesses are willing to seek capital globally, rather than seeking capital within the borders of a single nation.¹⁴⁷ In addition, retail and institutional investors now seek opportunities internationally as a means of portfolio diversification and to offset currency fluctuations.¹⁴⁸ Financial service providers are also increasingly ignoring national borders to seek new profit-making opportunities globally.¹⁴⁹

¹⁴⁵ See Roberta S. Karmel, *The EU Challenge to the SEC*, 31 *FORDHAM INT'L L.J.* 1692, 1711–12 (2008) (“The new strong capital markets in Asia and South America, and in particular in the so-called BRIC countries (Brazil, Russia, India, and China), challenge both the EU and the SEC to shape their regulatory approaches to foreign issuers and foreign financial institutions so as not to lose their competitive places as market regulators.”).

¹⁴⁶ See Greene, *supra* note 142, at 86 (discussing the role of the Internet in the creation of transnational capital markets); Jenah, *supra* note 6, at 69–70 (“Globalization is a fact. Innovative technologies are driving faster and more efficient trading, and they do not recognize national borders. Capital market participants are expanding their business activities into foreign markets. Investors are seeking international investment opportunities. The impact of these changes is profound and not yet fully realized.”); George W. Madison & Stewart P. Greene, *TIAA-CREF Response to A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 *HARV. INT'L L.J.* 99, 99 (2007) (“The rapid pace of technological advances is bringing us closer to the reality of a seamless global capital market. In such a world, investors would have access to increased liquidity, greater diversification, and a wider range of investment options regardless of their location. Capital would be more efficiently allocated throughout the global economy to the benefit of all participants.”); Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 *HARV. INT'L L.J.* 31, 33 (2007) (“[A]dvances in technology have lowered structural barriers to the global trade in services as well as goods, making a truly global capital market (in every sense of the word) a real possibility.”).

¹⁴⁷ See DeLaMater, *supra* note 144, at 117 (noting that the growth and development of markets outside the United States has given many issuers opportunities to seek capital in places where they could not previously).

¹⁴⁸ See Greene, *supra* note 142, at 85–86 (“Investing in non-U.S. markets is no longer the exclusive province of megainstitutions or the ultrawealthy; it is an essential component of prudent portfolio diversification for all investors.”); Tafara & Peterson, *supra* note 146, at 31 (“Investors now search beyond their own borders for investment opportunities and, unlike the past, many of these investors are not large companies, financial firms, or extremely wealthy individuals.”).

¹⁴⁹ See Jackson, *supra* note 3, at 107 (“[I]ssuers are not the only entities with mobility in modern capital markets: investors, exchanges, brokerage houses, and a wide range of professional service providers can and do move around the world.”); Tafara & Peterson, *supra* note 146, at 34 (“For many financial intermediaries, access to overseas securities, commodities, and currency markets is vital to staying in business.”).

The evolution of securities exchanges provides additional evidence of the globalization of financial markets. The demutualization of many securities exchanges in the past few decades has transformed these exchanges into for-profit entities.¹⁵⁰ As a result, these exchanges have been willing to eschew previous nationalistic and protectionist tendencies and have begun to seek profit-making opportunities beyond their home nations.¹⁵¹ The wave of securities exchange demutualization has, at least in part, fueled a wave of securities exchange consolidation.¹⁵² On April 4, 2007, the merger between the New York Stock Exchange and Euronext gave birth to the world's first transcontinental stock exchange.¹⁵³ In the past few years, the push for consolidation has continued.¹⁵⁴ For example, NYSE Euronext and the Deutsche Börse, which operates the Frankfurt Stock Exchange, have been in merger discussions as recently as February 1, 2012, when the European Commission blocked the deal from moving forward based on concerns that the merger would create a monopoly in derivatives markets.¹⁵⁵ Regardless of the failure of that merger, national exchanges are slowly fading into the past and being replaced by transnational entities.¹⁵⁶

¹⁵⁰ See Roberta S. Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP. FIN. & COM. L. 355, 356 (2006) (discussing the demutualization of securities exchanges to for-profit entities and the resulting requirement that these exchanges must “please their shareholders as well as their customers”).

¹⁵¹ See Jenah, *supra* note 6, at 71 (explaining that demutualization “has . . . unleashed pressure from shareholders to increase profits through expansion, investment in new technology, and cost cutting, forcing these for-profit entities to eschew nationalistic or protectionist tendencies in the bid for value maximization”).

¹⁵² See Eric J. Pan, *A European Solution to the Regulation of Cross-Border Markets*, 2 BROOK. J. CORP. FIN. & COM. L. 133, 136 (2007) (“Demutualization and increased competition has led to a wave of consolidation by the European exchanges.”); Tafara & Peterson, *supra* note 146, at 31 (“Today, mergers and talks of mergers among the world’s stock exchanges make obvious what many finance professionals have long known: capital markets are global.”).

¹⁵³ See generally Bo Harvey, Note, *Exchange Consolidation and Models of International Securities Regulation*, 18 DUKE J. COMP. & INT’L L. 151 (2007); Sara M. Saylor, Note, *Are Securities Regulators Prepared for a Truly Transnational Exchange?*, 33 BROOK. J. INT’L L. 685 (2008).

¹⁵⁴ See Jenah, *supra* note 6, at 71 (explaining that the current “chess game of proposed exchange mergers, capital tie-ups, and alliances being played out on the global stage bears witness to the truism that capital markets are global”).

¹⁵⁵ *Failed Bid Takes Toll on Exchange*, N.Y. TIMES, Apr. 30, 2012, <http://www.nytimes.com/2012/05/01/business/nyse-euronext-hurt-by-failed-merger-bid.html> (discussing the failed merger between NYSE Euronext and Deutsche Börse because “[t]he European Commission blocked the deal on Feb. 1, saying the derivatives exchanges would have given the combined company a monopoly”).

¹⁵⁶ See *supra* note 152.

Remarkably, despite its almost unwavering focus on domestic financial regulation,¹⁵⁷ the United States has also fueled the globalization of financial markets by helping to drive financial market participants beyond its borders. Aggressive regulation, e.g., Sarbanes-Oxley,¹⁵⁸ and past aggressive enforcement by financial regulators has caused market participants to look for opportunities globally.¹⁵⁹ Moreover, the United States' culture of aggressive litigation, especially by shareholders, has incentivized many to exit from the United States markets.¹⁶⁰

All of this leads, of course, to the conclusion that financial markets are global, although they still remain somewhat fragmented as a result of national and regional regulation.¹⁶¹ With this dramatic transformation occurring in the past few decades, fighting domestic and international corruption takes on new importance in terms of lessening risk to the global financial system.

B. Transnational Corruption in the Global Financial Markets

The presence of corruption within the global financial system should create universal concern because of how interconnected the world has become, yet the existence of corruption remains unevenly spread across the globe. In this section, the levels of corruption throughout the world will be explored.

This exploration of corruption around the world will be unavoidably limited in two main ways. First, the discussion will be limited to perceptions of corruption, rather than actual corruption. Actual corruption is extraordinarily difficult to measure because it can be difficult to detect. Investigations and prosecutions are not an adequate measure because jurisdictions vary in their

¹⁵⁷ See generally Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431 (2011) (discussing Congress's failure to adequately address the globalization of financial markets in the myriad of provisions contained within the Dodd-Frank Act).

¹⁵⁸ See Karmel, *supra* note 150, at 356–57 (arguing that “the primary reasons why the NYSE has been losing listings is that foreign issuers are disenchanted with the U.S. stock market because of the costs of compliance with the requirements of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and because of the U.S. culture of shareholder litigation” (footnote omitted)). *But see* Jackson, *supra* note 3, at 108 (“Although many have pointed to the passage of the Sarbanes-Oxley Act of 2002 as damaging the ability of U.S. exchanges to compete for foreign cross-listings, there is ample evidence that the erosion of U.S. market power for foreign listings was already underway well before 2002.”).

¹⁵⁹ See Jenah, *supra* note 6, at 71 (“Some claim that the increased regulatory burden in the United States, combined with mounting concerns over exposure to U.S.-style class actions and more aggressive enforcement, may be driving companies to raise capital in foreign markets.”).

¹⁶⁰ *Id.*

¹⁶¹ See *supra* notes 142–43 (noting that financial markets are not seamless because most regulation is still set on the national level).

anti-corruption regulation and enforcement.¹⁶² Moreover, surveys of regulators regarding whether they are corrupt are unsurprisingly worthless because few, if any, regulators would admit that they engage in corrupt activities. Measuring perceptions of the existence of corruption proves to be the only available measure. In fact, it may be the best measure because many financial markets, especially securities markets, are confidence driven, and perception may be even more important than reality.¹⁶³ Second, the discussion of the existence of corruption in global financial markets will also be limited because the available current empirical data is somewhat imprecise. Little data is available that specifically focuses on the existence or the perception of the existence of transnational corruption.¹⁶⁴ Thus, the discussion in this Article will examine perceptions of corruption generally because of the lack of data focusing solely on corruption that transcends national borders.

Transparency International is one of the leading sources for data on perceptions of corruption throughout the world. The organization is a non-governmental entity with a mission “to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society.”¹⁶⁵ Its long-term vision is to create “a world in which government, politics, business, civil society and the daily lives of people are free of

¹⁶² See Wayne Batchis, *Reconciling Campaign Finance Reform with the First Amendment: Looking Both Inside and Outside America's Borders*, 25 QUINNIAC L. REV. 27, 53 (2006) (noting that “approaches to ameliorating political corruption vary significantly among the countries of the world”).

¹⁶³ See Paul D. Cohen, *Securities Trading Via the Internet*, 4 STAN. J.L. BUS. & FIN. 1, 11 (1998) (“Securities markets play a significant role in the economic life of the U.S. and the world. The growing importance of the securities markets is a direct result of investor confidence in those markets.”); Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 CONN. L. REV. 393, 419 (2006) (“If investors fear being defrauded by issuers, broker dealers, exchanges or other market intermediaries, or that the investment odds are otherwise rigged, they will no longer invest in the stock market.”).

¹⁶⁴ Transparency International does compile the Bribe Payers Index. See *2011 Bribe Payers Index*, TRANSPARENCY INT'L, <http://bpi.transparency.org/bpi2011/> (last visited July 1, 2012). As Transparency International describes it, “The Bribe Payers Index is a unique tool capturing the supply side of international bribery, specifically focussing [sic] on bribes paid by the private sector.” *2011 Bribe Payers Index: In Detail*, TRANSPARENCY INT'L, http://bpi.transparency.org/bpi2011/in_detail/ (last visited July 1, 2012). With that said, this Index measures only the likelihood of businesses from twenty-eight countries and territories to pay bribes when doing business. *Id.* Although the Index provides useful information, it does not focus on the corrupting impact of transnational bribery and it only focuses on businesses within twenty-eight countries and territories, i.e., the information within the Bribe Payers Index does not provide a complete or precise picture of the scope and extent of transnational corruption in global financial markets. See *id.*

¹⁶⁵ *Our Organisation: Mission, Vision and Values*, TRANSPARENCY INT'L, http://www.transparency.org/whoweare/organisation/mission_vision_and_values (last visited July 1, 2012) (providing the mission, vision, and values of Transparency International).

corruption.”¹⁶⁶ The organization, which was founded in 1993, describes itself as “politically non-partisan” and touts its “independence” from outside influence.¹⁶⁷ It is currently headquartered in Berlin, Germany, and it operates through more than one hundred national chapters that are located throughout the world.¹⁶⁸ The efforts of these national chapters are coordinated by an international secretariat in Berlin.¹⁶⁹ Transparency International played a role in the drafting of both the OECD Anti-Bribery Convention and the United Nations Convention Against Corruption.¹⁷⁰

One of the major accomplishments of Transparency International is the Corruption Perceptions Index (Index).¹⁷¹ The Index is a ranking of countries based upon perceived levels of public corruption.¹⁷² It is compiled annually using various surveys and other assessments as a basis to score and rank individual nations.¹⁷³ It is viewed as one of the best tools for assessing corruption and is regularly referenced by academics, economists, journalists, and other individuals in analyzing perceived levels of corruption around the globe.¹⁷⁴

¹⁶⁶ *Id.*

¹⁶⁷ *Our Organisation: Overview*, TRANSPARENCY INT’L, <http://www.transparency.org/whoware/organisation> (last visited July 1, 2012) (providing a brief overview of Transparency International and how it functions).

¹⁶⁸ *Our Organisation: Our Chapters*, TRANSPARENCY INT’L, http://www.transparency.org/whoware/organisation/our_chapters (last visited July 1, 2012) (discussing the role of the more than one hundred national chapters that are part of Transparency International and providing a map detailing where those chapters are located).

¹⁶⁹ *Our Organisation: Secretariat*, TRANSPARENCY INT’L, <http://www.transparency.org/whoware/organisation/secretariat> (last visited July 1, 2012) (describing the secretariat of Transparency International and the tasks associated with the secretariat’s position).

¹⁷⁰ *Our Organisation: FAQs on Transparency International*, TRANSPARENCY INT’L, http://www.transparency.org/whoware/organisation/faqs_on_transparency_international/2/ (last visited July 1, 2012) (offering a brief description of Transparency International’s role in drafting the OECD Anti-Bribery Convention and the United Nations Convention Against Corruption).

¹⁷¹ *See Corruption Perceptions Index: Overview*, TRANSPARENCY INT’L, <http://www.transparency.org/research/cpi> (last visited July 1, 2012) (providing a brief description of the Corruption Perceptions Index and providing links to the current and past editions of the Index).

¹⁷² *Id.*

¹⁷³ *See 2011 Corruption Perceptions Index: In Detail*, TRANSPARENCY INT’L, http://cpi.transparency.org/cpi2011/in_detail/ (last visited July 1, 2012) (offering a discussion of the Corruption Perceptions Index, including a link to a group of documents describing the sources and methodology used in compiling the Index).

¹⁷⁴ *See Our Organisation: FAQs on Transparency International*, *supra* note 170 (describing the Corruption Perceptions Index and the parties who regularly reference it).

The Corruption Perceptions Index from 2011, the most recent Index available at the time of the writing of this Article, demonstrates that corruption poses a threat to the global financial markets.¹⁷⁵ While the United States, most of Western Europe, Japan, and various other countries are perceived as having relatively low levels of public corruption, a number of countries that play major roles in the global financial markets are perceived as having very high levels of corruption.¹⁷⁶

In compiling the Index, Transparency International scores each country or territory on a scale from zero to ten in which zero means that the country has a high level of perceived public corruption and ten means that the country has a low level of perceived public corruption.¹⁷⁷ It then ranks each country or territory in relation to other countries or territories included in the Index.¹⁷⁸ For example, New Zealand scored a 9.5 in the Index and ranked first by having the lowest level of perceived public corruption of countries and territories ranked in the Index; Germany scored an 8.0 and tied for fourteenth; Japan also scored an 8.0 and tied for fourteenth; the United Kingdom scored a 7.8 and ranked sixteenth; the United States scored a 7.1 and ranked twenty-fourth; and France scored a 7.0 and ranked twenty-fifth in the Index.¹⁷⁹ These relatively positive scores and rankings can and should be contrasted with the relatively negative scores and rankings of many of the countries and territories in Africa, Asia, and South America.¹⁸⁰ Especially troubling is that many of the countries with the world's strongest emerging economies have relatively high perceived levels of public corruption.¹⁸¹ For example, Brazil scored a 3.8 and ranked seventy-third; China scored a 3.6 and ranked seventy-fifth; India scored a 3.1 and ranked ninety-fifth; and Russia scored a 2.4 and ranked one hundred forty-third on the Index.¹⁸² In addition to the Corruption Perceptions Index, Transparency International also compiles a variety of other country-specific information that tells a similar tale.¹⁸³

¹⁷⁵ See *2011 Corruption Perceptions Index: Results*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2011/results/> (last visited July 1, 2012) (providing scores and rankings of countries throughout the world based on perceived levels of public corruption).

¹⁷⁶ *Id.*

¹⁷⁷ *2011 Corruption Perceptions Index: In Detail*, *supra* note 173 (explaining the scoring and ranking used in the Corruption Perceptions Index).

¹⁷⁸ *Id.*

¹⁷⁹ *2011 Corruption Perceptions Index: Results*, *supra* note 175.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *Id.*

¹⁸³ See *Transparency International: Country Profiles*, TRANSPARENCY INT'L, <http://www.transparency.org/country> (last visited July 1, 2012) (providing information compiled by Transparency International for purposes of studying and analyzing the existence of corruption within individual nations); *What We Do: National Integrity System Assessments*, TRANSPARENCY INT'L, <http://www.transparency.org/whatwedo/nis> (last visited July 1, 2012) (discussing the National System Assessments in which Transparency

Despite the willingness and ability of many countries to fight corruption, the level of perceived corruption in a number of emerging economies remains a concern. Because financial markets are global, the susceptibility of these economies to corruption creates global systemic risk that should be acknowledged and addressed to help render the global financial markets more efficient and to prevent future financial crises.

C. The Importance of Transnational Anti-Corruption Regulation in Preventing or Lessening Future Financial Crises

Although a great deal of progress has been made in regard to the spread of transnational anti-corruption regulation and in regard to the enforcement of that regulation, anti-corruption law has largely been ignored as a necessary component of financial regulatory reform. As a result of the relatively recent globalization of financial markets, anti-corruption regulation has a new and increasing importance in reducing systemic risk and in creating a stable global economic system. A few additional words ought to be offered as to why transnational anti-corruption regulation is so important in preventing or lessening future financial crises.

The costs of corruption within financial markets are far-reaching and expensive. Corrupt public officials can prevent the passage of necessary financial regulatory reforms and can also prevent the enforcement of laws and regulations that are currently in existence. In addition, corruption can also siphon away funds from businesses and prevent or lessen investors' willingness to invest in companies and partake in other activities that support economic growth.

Quantitative data on the cost of corruption is difficult to obtain because it is hard to know how much corruption goes undetected and unprosecuted. The qualitative data on the impact of corruption is much easier to provide. In describing the impact of corruption, Transparency International offers the following description: "Economically, corruption depletes national wealth. Corrupt politicians invest scarce public resources in projects that will line their pockets Corruption also hinders the development of fair market structures and distorts competition, which in turn deters investment."¹⁸⁴ In sum, the dangers of any kind of corruption, including transnational corruption, are substantial and can lead to instability in financial markets and potentially dire results.

International "evaluates key 'pillars' in a country's governance system, both in terms of their internal corruption risks and their contribution to fighting corruption in society at large").

¹⁸⁴See *Our Organisation: FAQs on Corruption*, TRANSPARENCY INT'L, http://www.transparency.org/whoware/organisation/faqs_on_corruption (last visited July 1, 2012).

The globalization of financial markets creates new concerns about corruption because the increasing interconnectedness of the world means that financial crises and financial scandals are much more likely to be transnational and global events, rather than just national occurrences.¹⁸⁵ Corruption within a single nation could lead to a financial crisis that spills over quickly and easily to other countries.¹⁸⁶

Even the appearance of corruption can be enough to trigger financial crises and to create market inefficiencies. For example, as previously discussed, securities markets are confidence driven, and the perception of corruption may be even more important than reality.¹⁸⁷ Confidence in the market determines individuals' willingness to invest and willingness to retain the securities that they purchase.¹⁸⁸ The stock market crash of 1929 in the United States occurred in part because of the perception that the state statutes regulating the national securities markets were inadequate to prevent fraud and corruption within those markets.¹⁸⁹ Ultimately, Congress had to enact a robust and comprehensive system of securities regulation with the passage of the Securities Act of 1933¹⁹⁰ and the Securities Exchange Act of 1934¹⁹¹ to restore public confidence and remove the specter of fraud and corruption.¹⁹²

A robust and comprehensive system of transnational anti-corruption law is required to create stable global financial markets. To lessen or prevent future financial crises, corruption and the perception of the corruption must be eliminated to the extent possible, and when acts of transnational corruption do occur they must be detected and prosecuted as quickly as possible.

¹⁸⁵ See *supra* note 3 and accompanying text (observing that financial scandals and crises are increasingly international events because of how easily they can spill over from one country to the next).

¹⁸⁶ See *supra* note 3 and accompanying text.

¹⁸⁷ See *supra* note 163 and accompanying text.

¹⁸⁸ See *supra* note 163 and accompanying text.

¹⁸⁹ See Eric C. Chaffee, *Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser–Seller Requirement*, 11 U. PA. J. BUS. L. 843, 851 (2009) (discussing the causes of the stock market crash of 1929 and the Great Depression).

¹⁹⁰ Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C §§ 77a–77aa (2006 & Supp. IV 2011) (current version at 15 U.S.C.S. §§ 77a–77aa (LexisNexis 2012))).

¹⁹¹ Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C.S. §§ 78a–78pp (2006 & Supp. IV 2011) (current version at 15 U.S.C.S. §§ 78a–78pp (LexisNexis 2012))).

¹⁹² See Eric C. Chaffee, *Beyond Blue Chip: Issuer Standing to Seek Injunctive Relief Under Section 10(b) and Rule 10b-5 Without the Purchase or Sale of a Security*, 36 SETON HALL L. REV. 1135, 1138–40 (2006) (discussing the rise of federal securities law in the United States).

IV. THE PATH FORWARD

Any activity that helps in the spread and enforcement of meaningful transnational anti-corruption regulation is a good thing. With that said, the following actions would be especially helpful in creating a robust and comprehensive system of transnational anti-corruption law.

First, lawmakers and other regulators in the United States should place a consistent and constant emphasis on combatting corruption by including active discussion of it in all financial regulatory efforts. Although a “big” and “bold” new era of FCPA enforcement has begun,¹⁹³ the United States must insure that this era is not brief and fleeting. The best way to accomplish this is to make sure that corruption is a constant part of all discussions relating to financial regulation. Even though the level of perceived financial regulation in the United States is relatively low,¹⁹⁴ the United States can maintain this reputation by continuing to focus on preventing transnational corruption and can also motivate other countries to focus on anti-corruption regulation through its political rhetoric and actions.

Second, beyond just including combatting corruption in discussions of financial regulation and enforcement, anti-corruption measures should be explicitly incorporated into relevant statutes and regulations, whenever possible. Although the Dodd-Frank Act may have implicitly addressed anti-corruption issues,¹⁹⁵ the lack of mention of corruption in the voluminous body of the Act is inexcusable. The drafters of the Act failed to adopt provisions directly addressing corruption, failed to order any study of corruption as a threat to the global financial system, and failed to mandate any new or existing financial regulatory agency to focus its efforts on the prevention of corruption. The United States was previously able to create a “race to the top” in transnational financial corruption regulation through its passage of the FCPA, which was the first statute of its kind.¹⁹⁶ The United States should and must continue to be a leader in anti-corruption regulation and enforcement as a means of reducing systemic risk to the global financial markets.

Third, the United States must continue to enforce its domestic and transnational anti-corruption laws and regulations. Even the most comprehensive and robust systems of laws and regulations will be ineffective if they are not enforced. The United States may have entered a “big” and “bold” era of FCPA enforcement,¹⁹⁷ but no guarantee exists that that era will continue

¹⁹³ See *supra* note 17 and accompanying text (discussing the recent increased emphasis on FCPA enforcement in the United States).

¹⁹⁴ See *supra* note 179 and accompanying text (noting that the United States has a relatively low perceived level of corruption).

¹⁹⁵ See Klehm et al., *supra* note 14, at 936–40 (arguing that certain provisions of the Dodd-Frank Act implicitly help in the fight against corruption).

¹⁹⁶ See *supra* Part II.A (providing an overview of the FCPA and noting that at the time of its passage it was the first statute of its kind).

¹⁹⁷ See Koehler, *supra* note 17 (discussing the current era of FCPA enforcement).

indefinitely. The FCPA and other transnational anti-corruption statutes help to ensure that public officials will engage in regulation and enforcement without certain types of improper influences. For that to happen, however, the FCPA and other transnational anti-corruption statutes must also be enforced themselves.

Fourth, in addition to generally enforcing domestic and transnational anti-corruption laws and regulation, the United States must continue to support and provide adequate funding for the United States Securities and Exchange Commission's (SEC) Foreign Corrupt Practices Unit and the United States Department of Justice's (DOJ) Criminal Division's Fraud Section. Having individuals within the government directly tasked with enforcing transnational anti-corruption law helps to ensure that the new "big" and "bold" era of FCPA enforcement will continue, rather than a return to a time similar to the initial decades of the FCPA's existence in which enforcement was a seldom occurrence.¹⁹⁸ Notably, the creation of the SEC's Foreign Corrupt Practices Unit in 2010 helps to confirm the existence of a "big" and "bold" era of FCPA, and if proper governmental support is provided, the Unit will help to guarantee that the new era will continue.¹⁹⁹

Fifth, the United States must continue to support and provide funding for the SEC's Office of International Affairs' International Technical Assistance Program and its efforts to spread transnational anti-corruption regulation throughout the world.²⁰⁰ The Technical Assistance Program provides training and support to approximately two thousand regulators in more than one hundred countries.²⁰¹ As evidenced by the fact that the FCPA was the first statute of its kind and that similar statutes have blossomed around the world,²⁰² the United States traditionally has been very good at exporting its theory of anti-corruption regulation and enforcement. With the relatively recent adoption of transnational anti-corruption laws in many countries, however, the United States needs to continue to be a leader in providing anti-corruption regulation, and it needs to

¹⁹⁸ See *supra* note 17 and accompanying text (discussing the current increased emphasis on FCPA enforcement in the United States).

¹⁹⁹ *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Sept. 21, 2012) (discussing the creation in 2010 of the SEC's Foreign Corrupt Practices Act Unit and noting that FCPA enforcement "continues to be a high priority area for the SEC").

²⁰⁰ *Securities and Exchange Commission's International Technical Assistance Program*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/offices/oia/oia_emergtech.shtml (last visited Sept. 21, 2012) (providing an overview of the SEC's Office of International Affairs' International Technical Assistance Program).

²⁰¹ *Id.* ("Utilizing a faculty of senior SEC and industry officials, and seasoned practitioners, the technical assistance program provides training to nearly 2000 regulatory and law enforcement officials from over 100 countries. The program is helping improve market development and enforcement capacity around the world . . .").

²⁰² See *supra* Part II.B–D (providing an overview of the international agreements that are helping to spread transnational anti-corruption laws, which are similar to the FCPA, around the world).

continue to provide robust technical assistance regarding anti-corruption regulation and enforcement. One way of doing that is ensuring that the SEC's International Technical Assistance Program offers robust assistance to other nations seeking to improve their anti-corruption regulation and enforcement efforts.

Sixth, the United States must continue to engage generally in offering technical assistance to, sharing information with, and providing legal assistance to national regulators throughout the world. Because transnational corruption is by definition an international event, international cooperation is imperative for developing a robust and comprehensive system of transnational anti-corruption law. The SEC's Office of International Affairs' International Technical Assistance Program is an important element of international cooperation, but it is no substitute for a pervasive philosophy throughout the United States government of international cooperation in the fight against transnational corruption. In addition, such cooperation is already a requirement of the anti-corruption conventions to which the United States is a party.²⁰³

Seventh, the United States must continue to support the efforts of international organizations that combat corruption. Most importantly, the United States must support the OECD's efforts relating to the OECD Anti-Bribery convention and the United Nations' efforts regarding the United Nations Convention Against Corruption.

Eighth, the United States should push for additional international organizations with a financial regulatory focus to undertake work to combat corruption. For example, the United States should push for the International Organization of Securities Commissions (IOSCO) to increase its efforts to directly combat and confront corruption because such efforts have been relatively sparse to date. From modest beginnings,²⁰⁴ IOSCO is currently composed of regulators from over one hundred jurisdictions who regulate more than ninety-five percent of the world's securities markets.²⁰⁵ Rather than being a centralized body for the creation and enforcement of securities law, IOSCO

²⁰³ See *supra* note 59 and accompanying text (noting that the OECD Anti-Bribery Convention strengthens international ties for purposes of fighting transnational corruption by requiring that parties cooperate on matters involving corruption); *supra* notes 78–83 (discussing the provisions of the United Nations Convention Against Corruption that require cooperation among parties to the agreement).

²⁰⁴ See *IOSCO Historical Background*, OICV–IOSCO, <http://www.iosco.org/about/index.cfm?section=background> (last visited Sept. 21, 2012) (“[IOSCO] was created in 1983 with the decision to change from an inter-American regional association (created in 1974) into a global cooperative body. Eleven securities regulatory agencies from North and South America took this decision in April 1983 at a meeting in Quito, Ecuador.”).

²⁰⁵ *Id.* (“Its membership regulates more than 95% of the world's securities markets and it is the primary international cooperative forum for securities market regulatory agencies. IOSCO members are drawn from, and regulate, over 100 jurisdictions and its membership continues to grow.”).

mainly serves a monitoring and coordinating function,²⁰⁶ and it could be doing substantially more to coordinate and monitor international anti-corruption efforts. Because the United States continues to be viewed as a leader in securities regulation, it could use this influence to help push for IOSCO's greater involvement in the fight against corruption.

Ninth, the United States obviously cannot create a robust and comprehensive global system of transnational anti-corruption law alone. Other nations and international bodies must continue or increase their emphasis on transnational anti-corruption regulation and enforcement. The OECD Anti-Bribery Convention, the United Nations Convention Against Corruption, and other international agreements have helped to spread anti-corruption law around the globe.²⁰⁷ This has led to the passage of transnational anti-corruption regulation in many nations and harmonization of that regulation among many countries. Even if that is the case, adoption and enforcement of such regulation remains incomplete. Efforts must be made to make sure that a robust and comprehensive system of anti-corruption regulation exists around the world.²⁰⁸

²⁰⁶ See *About IOSCO*, OICV-IOSCO, <http://www.iosco.org/about> (last visited Sept. 21, 2012) (offering an overview of IOSCO's central purposes).

²⁰⁷ See *supra* Part II.C-D (discussing the rise of transnational anti-corruption regulation around the world).

²⁰⁸ Elsewhere, I have argued extensively for the centralization of securities regulation under an international body. See, e.g., Eric C. Chaffee, *Contemplating the Endgame: An Evolutionary Model for the Harmonization and Centralization of International Securities Regulation*, 79 U. CIN. L. REV. 587 (2010); Eric C. Chaffee, *Finishing the Race to the Bottom: An Argument for the Harmonization and Centralization of International Securities Law*, 40 SETON HALL L. REV. 1581 (2010); Eric C. Chaffee, *The Internationalization of Securities Regulation: The United States Government's Role in Regulating the Global Capital Markets*, 5 J. BUS. & TECH. L. 187 (2010); Eric C. Chaffee, *A Moment of Opportunity: Reimagining International Securities Regulation in the Shadow of Financial Crisis*, 15 NEXUS 29 (2010); Eric C. Chaffee, *A Panoramic View of the Financial Crisis That Began in 2008: The Need for Domestic and International Regulatory Reform*, 35 U. DAYTON L. REV. 1 (2009). I am comfortable leaving anti-corruption regulation in the hands of national and regional regulators for two reasons. First, corruption is a difficult crime to detect, and national and regional regulators are often in the best place to detect transnational corruption. Second, the current patchwork of transnational anti-corruption regulation is not developed enough to allow for centralization at this time. Elsewhere, in fact, I have argued that evolving regulatory regimes should not be subject to international centralization until they have fully matured. See Eric C. Chaffee & Geoffrey C. Rapp, *Regulating Online Peer-to-Peer Lending in the Aftermath of Dodd-Frank: In Search of an Evolving Regulatory Regime for an Evolving Industry*, 69 WASH. & LEE L. REV. 485, 529 n.247 (2012) (arguing that peer-to-peer lending should continue to be regulated by national regulators until the industry and national regulation has fully matured). With that said, international oversight of all national and regional anti-corruption efforts is a key component to building a robust and comprehensive system of anti-corruption law.

V. CONCLUSION

The globalization of financial markets has created new risk, and this Article details nine courses of action to reduce that risk. With that said, any action that helps in the spread and enforcement of meaningful transnational anti-corruption regulation is a good thing. Corrupt public officials threaten the enactment and enforcement of a regulatory regime that will adequately regulate the global financial markets. A robust and comprehensive system of transnational anti-corruption law is required to create stable global financial markets, and in the absence of such a system, financial crises will occur with greater regularity and with greater severity.

