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The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets

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The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets

Mateo J. de la Torre†

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Introduction

To say that “corruption” is an enemy to progress and development would strike many as tautology. But despite the obvious danger that corruption poses to a well-functioning society, in the United States and (more so) abroad, the law has only recently shifted toward regulating conduct that may be deemed corrupt where it occurs at the hands of domestic actors operating abroad. Indeed, until recently sums paid as foreign bribes were valid tax deductions in many countries.¹ In 1977, however, the United States passed the Foreign Corrupt Practices Act (FCPA) and thereby set what has become a global standard for regulating corrupt activities. Or at least what the United States deems “corrupt.”

Much of the difficulty that corruption presents from a regulatory standpoint is that activities that are considered improper in certain parts of the world would not be thought of as such in other regions. Indeed, commentators note that we should not analyze corruption in absolute moral terms; instead, we must address problems with the improper use of power in light of surrounding social, economic, and political contexts.² Practically speaking, what is a gift in one society may be a bribe in another. What may be corporate lobbying in one polity may be an unfair purchase of political power in another. And what may be the cost of doing business in one economy may be a systemic flaw in another.

In the face of these nuances, however, the United States government has vigorously enforced the FCPA across the world, bringing within its grasp activities that may carry only a tangential link to the states. With this in mind, whether the current approach to FCPA enforcement is a valid regulatory effort or, alternatively, an act of legal imperialism becomes an inevitable question. In this Note, I will explore these notions through a practical lens, arguing that U.S. courts, when given the opportunity to oversee an FCPA prosecution, should place limitations on its extraterritorial reach in light of the interests of foreign jurisdictions, business, and foreign relations. In Part I, I provide a brief history of the FCPA, including how it developed in Congress as well as how the government has interpreted the Act. In Part II, I propose a framework as to how courts should analyze personal jurisdiction in FCPA cases. In Part III, I discuss how courts should analyze prescriptive jurisdiction under the FCPA and the interests that courts should consider when (and if) they are deciding whether to limit the extraterritorial reach of the FCPA.

1. Sharon Eicher, *Introduction: What Corruption is and Why it Matters*, in *CORRUPTION IN INTERNATIONAL BUSINESS: THE CHALLENGE OF CULTURAL AND LEGAL DIVERSITY* 1, 2 (Sharon Eicher ed., 2009).

2. See, e.g., John Gledhill, *Corruption as the Mirror of the State in Latin America*, in *BETWEEN MORALITY AND THE LAW* 155, 156 (Italo Pardo ed., 2004) (“[C]orruption must not be analysed in a moralizing framework but must be seen as a mode of exercising power within complex social and political settings that must be analysed carefully and in their historical and cultural specificity.”).

I. Historical Development of the FCPA's Reach

A. Statutory Development

The FCPA regulates two illicit corporate activities: bribery and false or inaccurate accounting.³ The FCPA's antibribery provisions proscribe payments that are made with "corrupt intent" to obtain or retain business and are made to "foreign officials" operating in their "official capacity."⁴ These provisions include three jurisdictional hooks, which make them applicable to "domestic concerns" (U.S. persons and businesses), U.S. "issuers" (U.S. and foreign public companies listed on stock exchanges in the United States or that are required to file periodic reports with the Securities and Exchange Commission), and, under the FCPA's "territorial jurisdiction," foreign individuals and businesses committing certain acts within U.S. territories.⁵ The accounting provisions require maintenance of accurate books and records, as well as systems of internal accounting controls; they also prohibit knowingly falsifying books and records or failing to maintain internal control systems.⁶ The accounting provisions, however, have a much narrower jurisdictional reach than the antibribery regulations, applying only to U.S. issuers.⁷

Despite the broad jurisdictional reach that the FCPA's antibribery provisions now contain—allowing U.S. prosecution of almost entirely foreign conduct—Congress originally enacted the antibribery provisions in 1977⁸ in response to *foreign* mistrust of *American* corporations. This mistrust was due in no small part to the Watergate scandal, which led to public scrutiny of American corruption.⁹ In assessing the merits of the FCPA, the Senate reported that the SEC discovered over 400 U.S. corporations responsible for corrupt foreign payments, implicating hundreds of millions of U.S. dollars.¹⁰ In light of this, "[f]oreign governments friendly to the United States . . . ha[d] come under intense pressure from their own people," and "[t]he image of *American democracy* abroad ha[d] been tarnished."¹¹ Congress thus felt obligated to rein in American corporate corruption overseas out of self-interest, especially because of "the fact that [although] the payments which [the Act] would prohibit are made to for-

3. See 15 U.S.C. §§ 78dd-1 to -3 (2012); *id.* § 78m.

4. *Id.* §§ 78dd-1 to -3; CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012), www.justice.gov/criminal/fraud/fcpa [hereinafter DOJ & SEC GUIDE]. These provisions do not apply to "so-called grease or facilitating payments." H.R. REP. NO. 95-640, at 4 (1977); *see, e.g.*, 15 U.S.C. § 78dd-1(b) (exception for routine governmental action). They include two affirmative defenses for payments that are legal under the law of the foreign official's country or otherwise "reasonable and bona fide." 15 U.S.C. § 78dd-1(c).

5. DOJ & SEC GUIDE, *supra* note 4, at 10-11.

6. See 15 U.S.C. § 78m.

7. See *id.*

8. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.

9. See S. REP. NO. 105-277 (1998); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689, 694 (2000).

10. See S. REP. NO. 95-114, at 3 (1977) (emphasis added).

11. *Id.* (emphasis added).

eign officials, in many cases the resulting adverse competitive affects [sic] are *entirely domestic*.”¹²

The FCPA was thus enacted out of a fundamentally domestic concern, but that soon changed. Before 1998, the FCPA reflected Congress’s desire to regulate American businesses’ conduct overseas: the Act only bestowed jurisdiction over U.S. issuers and domestic concerns; it did not include a territorial jurisdictional hook and therefore did not bestow jurisdiction to prosecute foreign actors making foreign bribes that took place in part—if even tangentially—in the United States.¹³ Congress quickly realized, however, that under this scheme, the FCPA placed American businesses at a disadvantage in the international marketplace, where foreign businesses and individuals were not only able to bribe foreign officials in furtherance of business efforts but might even be able to reap tax deductions for such expenditures.¹⁴ Consequently, the United States sought to impose its definition of “corruption” on international markets in order to “level the playing field,”¹⁵ thereby going beyond the initial trust-instilling impetus behind the FCPA.

Against this backdrop, in 1988 Congress commanded the Executive Branch to negotiate with the United States’ prominent trading partners in the Organization of Economic Cooperation and Development (OECD) to pass legislation similar to the FCPA.¹⁶ Pursuant to these negotiations, in 1997 the United States and thirty-three other countries entered into the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).¹⁷ The OECD Convention requires signatory countries to criminalize the bribery of foreign public officials by “any person” and “to establish . . . jurisdiction . . . when the offence is committed in whole or in part in its territory.”¹⁸ The OECD Convention also required signatories to pass legislation with a geographically broad reach; indeed, OECD commentary provided that “[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.”¹⁹

Pursuant to the OECD Convention, in 1998 Congress amended the FCPA to bestow territorial jurisdiction over “any person other than an issuer . . . or a domestic concern . . . or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, *while in the territory of the United States*, corruptly to make use of

12. H.R. REP. NO. 95-640, at 4 (1977) (emphasis added).

13. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

14. See H.R. REP. NO. 105-802, at 10 (1998).

15. *Id.* at 9.

16. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 276-77 (2010).

17. *Id.*

18. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 1, 4, Nov. 21, 1997, 37 I.L.M. 1.

19. OECD, *THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS* 16 (2011).

the mails or any means or instrumentality of interstate commerce *or to do any other act in furtherance of* a prohibited payment.²⁰ Since the 1998 amendment, the DOJ and SEC have followed the OECD Commentary and have prosecuted foreign actors under the authority of this jurisdictional hook, perhaps beyond the OECD's intentions.

B. Prosecutorial Development

As FCPA enforcement has become more vigorous, the U.S. government continues to push the bounds of the FCPA's reach. Indeed, even if in furtherance of a wholly foreign payment between wholly foreign parties, so much as "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States" or "sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States" suffices to bring that conduct within the FCPA's scope, at least in the government's view.²¹

The DOJ and SEC's FCPA enforcement practices have operated substantially without judicial oversight,²² thereby leaving the contours of territorial jurisdiction under the FCPA largely undefined. The prosecutorial freedom that the government enjoys in this realm is due not only to the weighty criminal sanctions that the FCPA carries, which incentivize targets of FCPA investigations to enter into nonprosecution agreements or plea bargains, but also to lessened punishments for cooperative individuals or corporations that self-report or assist with government investigations.²³ Consequently, government prosecutors have almost unilaterally defined the scope of the FCPA's territorial jurisdiction.

Given the apathy that an FCPA defendant may have toward a jurisdictional challenge (and not to mention that plea agreements in criminal cases brought by the DOJ require court approval and thus jurisdiction²⁴), settlements with the government have effectively defined the bounds of the FCPA's territorial jurisdiction. These settlements reveal a drastically broad reach. Take *United States v. JGC Corp.*,²⁵ for example. In that case, the Japanese defendant, JGC Corporation (JGC), which is not a U.S. issuer nor a domestic concern for FCPA purposes, faced DOJ allegations of bribing

20. 15 U.S.C. § 78dd-3(a) (2012) (amended 1998) (emphasis added).

21. DOJ & SEC GUIDE, *supra* note 4, at 11.

22. See DEMING, *supra* note 16, at 4 ("Any analysis of the FCPA must begin with the understanding that its provisions have rarely been subject to judicial scrutiny."); Sean Hecker & Margot Laporte, *Should FCPA "Territorial" Jurisdiction Reach Extraterritorial Proportions?*, 42 INT'L L. NEWS (Winter 2013), http://www.americanbar.org/publications/international_law_news/2013/winter/should_fcpa_territorial_jurisdiction_reach_extraterritorial_proportions.html ("Entities, often under intense pressure to settle and get FCPA charges behind them, rarely challenge this aggressive jurisdictional position.")

23. See Heather Diefenbach, *FCPA Enforcement Against Foreign Companies: Does America Know Best?*, 2 CORNELL INT'L L.J. ONLINE 47, 49 (2014).

24. See FED. R. CRIM. P. 11.

25. No. 4:11-cr-00260, 2011 WL 1315939 (S.D. Tex.) (Deferred Prosecution Agreement).

Nigerian officials to obtain government contracts; the only jurisdictional ties to the United States were that JGC had conspired with an American joint-venture partner, and that wire transfers—originating in and arriving at wholly foreign bank accounts—passed through New York bank accounts.²⁶ Despite this near de minimis link to the United States, upon court approval, JGC entered into a deferred prosecution agreement, thereby admitting guilt to the allegations and requiring it to pay a \$218 million fine to the U.S. government, implement a comprehensive antibribery compliance program, and engage a corporate compliance consultant.²⁷

The following parts will endeavor to wrestle with the jurisdictional limitations that U.S. courts should impose on FCPA prosecutions. I will argue that courts should engage in rigorous analyses of both personal jurisdiction over particular FCPA defendants as well as prescriptive jurisdiction over foreign conduct. Generally, the slimmer the nexus between the United States and the defendant or conduct at issue, the less reason the U.S. government has to apply the FCPA.

II. Personal Jurisdiction Over FCPA Defendants

In order for a U.S. court to have personal jurisdiction over a defendant in an FCPA prosecution, due process requires that the defendant have some nexus with the United States such that the defendant has “minimum contacts” with the states and that the exercise of jurisdiction over the defendant is “reasonable.”²⁸ Although few courts have considered the issue, several have upheld the government’s exorbitant²⁹ assertion of jurisdiction as not violating due process; but others have limited the FCPA’s reach, particularly where the government asserts that a nonissuer, nondomestic concern is amenable to prosecution in the United States because it acted in furtherance of a bribe in U.S. territory. For example, in *United States v. Patel*, the District Court for the District of Columbia dismissed FCPA

26. See Information at 10, 13, 18-19, *United States v. JGC Corp.*, No. 11-cr-00260 (S.D. Tex. Apr. 6, 2011); Annalisa Leibold, *Extraterritorial Application of the FCPA Under International Law*, 51 WILLAMETTE L. REV. 225, 245 (2015).

27. Deferred Prosecution Agreement at 7-11, *JGC Corp.*, (S.D. Tex.) (No. 4:11-cr-00260).

28. *Int’l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316-17 (1945). “Section 27 of the [Securities and] Exchange Act, specifically 15 U.S.C. Section 78aa, governs the exercise of personal jurisdiction in securities cases” and “permits the exercise of personal jurisdiction to the limit of the Due Process Clause of the Fifth Amendment.” *SEC v. Sharef*, 924 F. Supp. 2d 539, 544 (S.D.N.Y. 2013) (quoting *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990), *abrogated on other grounds by Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2010)).

29. For a definition of “exorbitant jurisdiction,” see Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 476 (2006) (“[W]e might define exorbitant jurisdiction as jurisdiction exercised validly under a country’s rules that nevertheless appears unreasonable because of the grounds necessarily used to justify jurisdiction. But we can probably go farther than this subjective test and identify an objective standard on which accusations of exorbitance tend to rely. That standard seems to focus on whether a class of jurisdiction, as opposed to a single assertion of jurisdiction, is unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute.” (citations omitted)).

charges against a defendant who was a U.K. citizen and director of a nonissuer U.K. corporation.³⁰ The government argued that the court had jurisdiction because the defendant allegedly mailed an agreement related to the bribe from the United Kingdom to the states; the court rejected this argument, however, holding that “each act” in furtherance of the bribe must take place within U.S. territory to satisfy the FCPA’s jurisdictional hook.³¹ Thus, although the defendant’s conduct may have been *physically directed* toward the United States, it was not *directed toward impacting U.S. markets* in the sense that the FCPA should condemn.

Even without a robust analysis, the outcome in *Patel* is intuitively compelling; but two 2013 cases out of the Southern District of New York crystallize the limitations that due process places on the exercise of jurisdiction in the context of the FCPA. In *SEC v. Straub*, Judge Richard Sullivan upheld jurisdiction in an FCPA case against executives of a Hungarian telecommunications company who allegedly bribed Macedonian public officials through a Greek intermediary.³² Although the parties involved were wholly foreign actors, the telecommunication company was listed on the New York Stock Exchange, so even if the defendants’ alleged conduct was not “principally directed” at the United States, the conduct was still “designed to violate United States securities regulations.”³³

Conversely, in *SEC v. Sharef*, Judge Shira A. Scheindlin dismissed an FCPA case for lack of personal jurisdiction over the defendant, Herbert Steffen, a seventy-four year old former executive of a German manufacturing company’s Argentine subsidiary.³⁴ The government alleged that Steffen had encouraged another executive to authorize bribes to Argentinian officials, which in turn had resulted in falsified SEC filings to conceal the scheme.³⁵ The court held, however, that Steffen’s contacts with the United States were “far too attenuated” to satisfy due process, and even if they were sufficient, haling Steffen into a U.S. court and requiring him to defend would have been “unreasonable” given his “lack of geographic ties to the United States, his age, his poor proficiency in English, and the forum’s diminished interest in adjudicating the matter.”³⁶ The court distinguished this case from *Straub*, reasoning that the allegations in that case involved the defendants personally signing off on false SEC filings; Steffen, on the other hand, “neither authorized the bribe, nor directed the cover up, much

30. See Leibold, *supra* note 26, at 246-47 (citing, inter alia, Indictment at 9, *United States v. Patel*, No. 09-338 (D.D.C. Dec. 11, 2009), Order Granting Motion to Dismiss at 1, *United States v. Goncalves*, cr-003350RJL4 (D.D.C. Feb. 23, 2012)); Hecker & Laporte, *supra* note 22 (citing Trial Transcript at 5:11-14, 7:17-8:2, *United States v. Patel*, No. 1:09-cr-00335 (D.D.C. June 6, 2011)).

31. Leibold, *supra* note 26, at 246 n.110 (quoting *FCPA Summer Review 2011*, MILLER & CHEVALIER (July 13, 2011), <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=60408>)).

32. 921 F. Supp. 2d 244, 255 (S.D.N.Y. 2013).

33. *Id.*

34. 924 F. Supp. 539, 541 (S.D.N.Y. 2013).

35. *Id.* at 542, 546.

36. *Id.* at 546-48.

less played any role in the falsified filings.”³⁷

Thus, in bestowing personal jurisdiction over foreign defendants alleged to have violated the FCPA by bribing foreign officials, the dividing line between *Patel* and *Sharef* on the one hand, and *Straub* on the other, is where the alleged violation is *directed toward impacting U.S. securities markets* such that it would undermine reliance on those markets, thus creating the requisite minimum contacts between the defendant and the United States. To be sure, accepting the government’s allegations in *Sharef* as true and assuming that Steffen had encouraged another executive to bribe an Argentinian official would in itself not establish conduct directed towards impacting U.S. securities markets; it would remain wholly foreign conduct. But, as the analysis in *Sharef* implies, once falsified SEC filings enter the picture (which in *Sharef* were not at the hands of Steffen), the United States would have a valid jurisdictional basis to proceed against the party responsible for the falsified filings.³⁸ And so that we don’t miss the forest for the trees, we must keep in mind that this dividing line is consistent with the original rationale behind the FCPA: providing assurance in *domestic* markets and preventing *domestic* adverse effects.³⁹

If the due process limits over FCPA defendants depend on whether a violation is directed toward impacting U.S. markets, which in my view it should be, this would render unconstitutional many, if not most, FCPA prosecutions brought pursuant to the government’s expansive reading of the FCPA’s jurisdictional scope. For example, under this principle, the prosecution of the nonissuer, nondomestic concern in *United States v. JGC Corp.* would be beyond the limits of due process because the alleged bribery there was between a Japanese corporation and Nigerian public officials⁴⁰ and therefore did not pose the risk of any direct impact on U.S. markets. Opponents to this approach could argue that this would eviscerate the 1998 amendments to the FCPA and undermine the rationale behind those amendments. For instance, they would argue, the 1998 amendments were purported to “even the playing field” in foreign jurisdictions that are loath to pursue bribery prosecutions, and in a case such as *JGC Corp.*, a U.S. firm could have acquired the highly valuable government contract⁴¹ if not for the advantage that lax foreign bribery prosecution would provide to foreign firms. This argument, however, boils down to the ends justifying

37. *Id.* at 547.

38. See *id.* (“To be sure, there is ample (and growing) support in case law for the exercise of jurisdiction over individuals who played a role in falsifying or manipulating financial statements relied upon by U.S. investors in order to cover up illegal actions directed entirely at a foreign jurisdiction.” (citing *SEC v. Stanard*, No Civ. 7736 (S.D.N.Y. May 16, 2007) (unpublished transcript of ruling, Opp. Ex. 1, Tr. 3: 15-18); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 455 (S.D.N.Y. 2005); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 306 (E.D.N.Y. 2002)).

39. See *supra* notes 8-12 and accompanying text.

40. *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty*, DEP’T JUST. OFF. PUB. AFF. (Apr. 6, 2011), <http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188>.

41. The contracts at issue in the case were valued at over \$6 billion. *Id.*

the means; and for the sake of legitimacy and foreign relations, U.S. courts must not countenance such Machiavellian reasoning, especially where the “means” are unilaterally imposing criminal sanctions on foreign actors by unduly stretching the bounds of the Constitution, and the “ends” are easing U.S. firms’ ability to compete in foreign markets. Indeed, foreign businesses and governments could interpret this exercise of sovereign power abroad as an act of legal imperialism that could cripple any improvements to foreign perceptions of U.S. corporate, political, and jurisprudential culture resulting from the 1977 enactment of the FCPA.

The foregoing analysis has considered how U.S. courts should grapple with personal jurisdiction in FCPA cases involving predominately foreign parties and foreign conduct. As we’ve seen, this issue implicates notions of foreign relations, sovereign powers, and, ultimately, the role of the United States as a regulator of foreign corruption. But the courts can only do so much in this arena; in the next Part, I will address the more profound issue of prescriptive jurisdiction, which asks the question whether the United States as a sovereign may legitimately regulate foreign conduct as it has under the FCPA.

III. Prescriptive Jurisdiction Over Foreign Bribery

A. International Law’s Traditional Approach to Prescriptive Jurisdiction

Whereas personal jurisdiction seeks to answer whether a particular court may assert authority over a particular defendant, prescriptive jurisdiction seeks to answer whether a particular sovereign may validly apply its law to a given set of facts.⁴² International law recognizes five traditional bases for a sovereign to assert jurisdiction to prescribe law: 1) “territorial” jurisdiction over conduct occurring wholly or substantially within the sovereign’s territory; 2) “nationality” jurisdiction over the conduct of the sovereign’s nationals, whether or not such conduct occurs within its territory; 3) “passive personal” jurisdiction over foreign conduct by non-nationals that is directed against the sovereign; 4) “protective” jurisdiction over conduct that may injure national interests; and 5) “universal” jurisdiction over conduct that is considered so heinous that any jurisdiction would condemn it.⁴³ Beyond this, the sovereign’s exercise of prescriptive jurisdiction must also be “reasonable,” a standard upon which the *Restatement (Third) of Foreign Relations Law* § 403 imposes the following factors “where appropriate”:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the

42. See Anthony J. Colangelo, Essay, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1304-05, 1329-32 (2014).

43. See *United States v. Yunis*, 681 F. Supp. 896, 899-900 (D.D.C. 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (AM. LAW INST. 1987).

- activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.⁴⁴

Historically, U.S. courts have limited the extraterritorial reach of U.S. statutes if not doing so would be “unreasonable”; although the case law on this point may not have spoken in the language of section 403 per se, it aimed at the same concern: comity, or a decision to defer to another jurisdiction if that jurisdiction has a greater interest in regulating the underlying primary conduct.⁴⁵ “Comity” is not a rule of law nor a command from a higher authority; rather, it is a policy decision among sovereigns to “recogni[ze] legislative, executive, and judicial acts” of other sovereigns.⁴⁶ As the following section explains, however, the Supreme Court has replaced this nuanced approach with a strict presumption against extraterritoriality.

B. The Supreme Court’s Current Approach to Prescriptive Jurisdiction

In the context of the extraterritorial application of U.S. antitrust regulation, the U.S. Supreme Court has paid homage to comity, holding that the Sherman Act should only provide a remedy for domestic harms and therefore that the Act does not reach claims based solely on foreign injury.⁴⁷ The Court crafted a rule of statutory construction derived from section 403, which mandates interpreting “ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”⁴⁸ Reasoning that courts should assume that Congress accounts for the “sovereign interests of other nations when they write American laws,” the comity-based rule of construction “helps potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.”⁴⁹

44. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (AM. LAW INST. 1987).

45. See *id.* reporter’s note 2 to § 403 (discussing *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 382–83 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614 (9th Cir. 1976); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945)).

46. See *Comity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

47. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163–64 (2004).

48. *Id.* at 164.

49. *Id.* at 164–65.

Although the Court has retained an emphasis on statutory interpretation, it has moved away from a more nuanced, comity-based approach, instead adopting a one-sided “presumption against extraterritoriality,” which only considers whether Congress intended a statute to apply extraterritorially.⁵⁰ This analysis is “one-sided” because it only considers the U.S. interest at stake; it does not consider whether another jurisdiction may have a greater interest in regulating the primary conduct at issue or whether a foreign jurisdiction may be a more suitable regulator. The Court elucidated this rule in *Morrison v. National Australia Bank LTD.*, where the Court held that the antifraud provision of the Securities Exchange Act does not apply extraterritorially in favor of foreign plaintiffs bringing claims against foreign and domestic defendants for misstatements related to securities listed on foreign exchanges.⁵¹

In so holding, the Court overruled the Second Circuit’s longstanding conduct-and-effects test, which resulted in extraterritorial application of the antifraud provision if either “the wrongful conduct had a substantial effect in the United States or upon United States citizens,” or “the wrongful conduct occurred in the United States.”⁵² Given the Second Circuit’s familiarity with cases arising out of Wall Street, and its resulting expertise in federal securities law, the Third, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits had deferred to the Second Circuit and adopted the conduct-and-effects test.⁵³ That test sounded in fundamental principles of prescriptive jurisdiction under international law, such as territorial, passive, personal, and protective jurisdiction, as well as the *Restatement (Third) of Foreign Relation Law’s* additional reasonableness limitation.⁵⁴ Indeed, the *Morrison* Court acknowledged that the analysis under the conduct-and-effects test assumed that “[a]s long as [Congress had] prescriptive jurisdiction to regulate” when passing on the issue whether to apply the antifraud provision extraterritorially, a court would have to answer whether such application “would be reasonable” such that “even . . . ‘predominantly foreign’ transactions became a matter of whether a court thought Congress ‘wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.’”⁵⁵

The Court found the conduct-and-effects test to be problematic, however, arguing that it was unwieldy, unpredictable, and inconsistent in appli-

50. *Morrison v. Nat’l Austl. Bank LTD.*, 561 U.S. 247, 255-58 (2010).

51. *Id.* at 266-67.

52. *Id.* at 257-58 (quoting *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003)) (emphasis added).

53. Alex Reed, *But I’m an American! A Text-Based Rationale for Dismissing F-Squared Securities Fraud Claims After Morrison v. National Australia Bank*, U. PA. J. BUS. L. 515, 516 (2012) (citing Danielle Kantor, Note, *The Limits of Federal Jurisdiction and the F-Cubed Case: Adjudicating Transnational Securities Disputes in Federal Courts*, 65 N.Y.U. ANN. SURV. AM. L. 839, 866-68 (2010)).

54. See *supra* text accompanying note 43.

55. *Morrison*, 561 U.S. at 257.

ation.⁵⁶ More fundamentally, the Court asserted that the test required courts to engage in a difficult mental exercise of attempting to determine what Congress would have said had it confronted extraterritoriality in the first instance, when a “more natural inquiry might be what jurisdiction Congress in fact thought about and conferred.”⁵⁷ In light of these concerns, the Court eschewed the sophistication of the conduct-and-effects test, declaring “rather than guess anew in each case, we apply the presumption [against extraterritoriality] in all cases, preserving a stable background against which Congress can legislate with predictable effects.”⁵⁸

C. The Current Approach and its Implications for the FCPA

Although the Court has not ruled on the issue of the FCPA’s extraterritorial application, given *Morrison*’s presumption against extraterritoriality along with the plain language of the FCPA (i.e., its coverage of U.S. issuers, domestic concerns, and any conduct in furtherance of a foreign bribe occurring within U.S. territory), a litigant challenging the extraterritorial application of the FCPA would likely face an uphill battle. But the battle wouldn’t be unwinnable; indeed, countervailing interests could limit the extraterritorial application of the FCPA.

The FCPA invokes two traditional bases of prescriptive jurisdiction under international law: nationality jurisdiction and territorial jurisdiction.⁵⁹ The FCPA’s nationality jurisdiction is embodied in sections 78dd-1 and 78dd-2; as discussed above, its territorial jurisdiction is embodied in section 78dd-3.⁶⁰ Given that these jurisdictional hooks would bestow prescriptive jurisdiction to Congress to regulate foreign bribery, a facial application of *Morrison* to the FCPA could result in the statute applying extraterritorially because it communicates an “‘affirmative intention [that] the Congress clearly expressed’ to give [the] statute extraterritorial effect.”⁶¹ But without considering whether such an application would also be reasonable, the analysis is incomplete. Moreover, this further analytical step does not conflict with *Morrison*—there, a provision of the federal securities laws that was *ambiguous* as to its extraterritorial reach did *not* apply abroad in light of the presumption against extraterritoriality. The Court pronounced that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,”⁶² but the Court did not hold that when a statute indicates the possibility of extraterritorial application, courts may not second-guess such an application where it would be unreasonable. Indeed, *Morrison* itself “rests on the perception that Congress

56. *Id.* at 259–60.

57. *Id.* at 260 (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (1987)).

58. *Id.* at 261.

59. See Developments in the Law—Extraterritoriality, VI. *Extraterritorial Law and International Norm Internalization*, 124 HARV. L. REV. 1280, 1286 (2011).

60. See *supra* notes 3–7 and accompanying text.

61. *Morrison*, 561 U.S. at 255 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (2006)).

62. *Id.*

ordinarily legislates with respect to domestic, not foreign matters.”⁶³

Thus, although a court may end its analysis where a statute has no extraterritorial application on its face, if a statute such as the FCPA communicates a Congressional intention to apply extraterritorially, courts should determine whether a particular application abroad would nevertheless be unreasonable. In such case, courts should look to the section 403 factors. In the context of the FCPA, six of the section 403 factors are particularly important: 1) the link of the activity to the territory of the regulating state; 2) the connections between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; 3) the existence of justified expectations that might be protected or hurt by the regulation; 4) the importance of the regulation to the international political, legal, or economic system; 5) the extent to which another state may have an interest in regulating the activity; and 6) the likelihood of conflict with regulation by another state. The following sections will analyze these factors with respect to the FCPA.

1. *The Link of the Activity to the Territory of the Regulating State, i.e., the Extent to Which the Activity Takes Place Within the Territory, or has Substantial, Direct, and Foreseeable Effect Upon or in the Territory*

Beyond the threshold question of whether a sovereign may exercise prescriptive jurisdiction to regulate foreign conduct, the reasonableness of exercising such jurisdiction should sound in more real-world, boots-on-the-ground terms.⁶⁴ And, indeed, the degree to which a potential FCPA violation occurs within a foreign territory bears heavily on such practical considerations because of evidentiary and investigatory hurdles.⁶⁵ These difficulties not only burden the government in investigating and prosecuting FCPA cases but may also systemically disadvantage the target of such a case.⁶⁶

Government prosecutors rely on three principal methods for obtaining evidence in FCPA cases: Mutual Legal Assistance Treaties (MLATs); Memoranda of Understanding (MOUs); and letters rogatory.⁶⁷ In theory, MLATs are intergovernmental agreements that require signatory countries to assist in government investigations;⁶⁸ in practice, however, “[t]he United States has experienced the gamut of cooperation - from full-scale sharing of

63. *Id.*

64. Though this factor might also suggest a conduct-and-effects type analysis, the *Morrison* Court rejected this approach. See *supra* notes 50-58 and accompanying text. For doctrinal consistency, my view does not incorporate a similar analysis at this step.

65. See generally Mike Koehler, *Navigating the Arcane World of Mutual Legal Assistance Treaties, Letters Rogatory and Evidence-Gathering from Abroad*, FCPA PROFESSOR (May 21, 2014), <http://www.fcpaprofessor.com/navigating-the-arcane-world-of-mutual-legal-assistance-treaties-letters-rogatory-and-evidence-gathering-from-abroad>.

66. See Hecker & Laporte, *supra* note 22.

67. See Koehler, *supra* note 65; Nicholas M. McLean, Note, *Cross-National Patterns in FCPA Enforcement*, 121 *YALE L.J.* 1970, 1987-88 (2012).

68. McLean, *supra* note 67, at 1987.

domestic investigative files on short notice to outright non-compliance.”⁶⁹ MOUs, on the other hand, are not binding but instead provide terms upon which intergovernmental regulators will assist in investigations.⁷⁰ Conversely, letters rogatory are requests from U.S. federal and state courts to foreign courts to obtain evidence; foreign courts may also issue these requests to U.S. courts, and compliance on either end is based on a notion of comity.⁷¹

Thus, the burdens on the prosecution in gathering foreign evidence in an FCPA case is manifest: the only binding method of doing so is through the use of MLATs, and even those are far from a guaranteed source of proof. From the perspective of the target of such an investigation, the outlooks for conducting discovery abroad are even drearier: MLATs and MOUs are only available to government prosecutors, and letters rogatory only become available once the government has initiated a formal proceeding.⁷² In this instance, the benefits of U.S. regulators deferring to foreign jurisdictions to investigate and prosecute conduct that would otherwise fall within the ambit of the FCPA makes immensely practical sense, tipping the scales toward finding that the extraterritorial application of the FCPA in such a case would be unreasonable.

2. *The Connections Between the Regulating State and the Person Principally Responsible for the Activity to be Regulated, or Between That State and Those Whom the Regulation is Designed to Protect*

Considering the connections between the United States and an FCPA defendant, as well as between the United States and whom the FCPA is designed to protect, courts should bear in mind that the FCPA carries criminal penalties, including terms of imprisonment for individuals and hefty fines for both corporate defendants and individuals.⁷³ In general, the jurisdiction in which certain conduct occurs should determine whether conduct is sufficiently odious to be criminalized.⁷⁴ From a theoretical perspective, applying antibribery laws extraterritorially may impinge on another sovereign’s ability to regulate its citizens and conflict with its

69. U.S. DEP’T OF JUSTICE, RESPONSE OF THE UNITED STATES: QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY §10.2 (2010), <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf>.

70. See McLean, *supra* note 67, at 1988 & n.60.

71. See “Letters Rogatory” Defined, 22 C.F.R. § 92.54 (2006).

72. See Koehler, *supra* note 65.

73. “For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$2 million. Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to \$250,000 and imprisonment for up to five years. For each violation of the accounting provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$25 million. Individuals are subject to a fine of up to \$5 million and imprisonment for up to 20 years.” DOJ & SEC GUIDE, *supra* note 4, at 68 (footnote call numbers omitted).

74. See CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1 & n.1 (2010) (quoting *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)).

notions of appropriate relations between business and government;⁷⁵ and from a practical standpoint, U.S. intervention in foreign bribery may have a deleterious impact on a foreign jurisdiction's abilities and incentives to regulate bribery within its boundaries.

An example that crystallizes these concerns is the United States' collection of fines related to FCPA violations, all of which accrue to the U.S. Treasury.⁷⁶ Thus, the United States may apply the FCPA to foreign conduct that only tangentially touches the states, and in doing so the government may not only stamp a foreign corporation or individual as a convicted criminal but also unilaterally convert foreign funds to U.S. dollars for government use. This is so even if a foreign jurisdiction prohibits the same bribery that the FCPA covers and if that jurisdiction (rather than the states) would collect fines from a bribery prosecution, not to mention that once that jurisdiction collected such fines it might distribute the monies collected in a manner much differently than the U.S. government would.⁷⁷

Underscoring this is the sheer amount of money that the U.S. government has collected from foreign firms as a result of FCPA violations, an amount that is disproportionate to fines collected from domestic firms. Indeed, out of the top ten FCPA settlements through 2014, eight were from foreign firms, and although thirty percent of FCPA cases are against foreign firms, those cases made up sixty-seven percent of all FCPA fines.⁷⁸ As an example of just how much an FCPA prosecution can cost a foreign firm, Siemens AG, a German corporation, settled FCPA charges with the DOJ for \$800 million.⁷⁹ The allegations were that Siemens violated the FCPA's accounting and antibribery provisions, and although the DOJ obtained jurisdiction over Siemens because the company was an issuer that was listed on the New York Stock Exchange, the alleged bribery did not carry a strong nexus to the United States.⁸⁰ Moreover, foreign prosecutors from Italy and Germany also investigated Siemens,⁸¹ and on top of the FCPA fines, Siemens paid €395 million to German authorities for related charges.⁸²

FCPA fines from foreign defendants resulting from foreign conduct are amounts that could otherwise strengthen the capabilities of foreign prosecutors to regulate the same conduct. Moreover, if U.S. prosecutors were to defer to foreign regulators in such cases, it could allow those regulators to

75. See Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1114-16 (1982).

76. *FCPA Fines: Where Does All the Money Go?*, TRACE BLOG, <http://www.traceinternational.org/fcpa-fines-where-does-all-the-money-go/> (last visited Nov. 8, 2015).

77. See, e.g., DAVID LAWLER, FREQUENTLY ASKED QUESTIONS ON ANTI-BRIBERY AND CORRUPTION 233-34 (2012) (discussing the differences in fine collection between U.S. and U.K. antibribery regimes).

78. Leibold, *supra* note 26, at 234-36.

79. *Id.* at 235.

80. *Id.* at 242.

81. Information at 13, *United States v. Siemens Aktiengesellschaft* (D.D.C. 2008) (08-CR-367-RJL), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-12-08siemensakt-info.pdf>.

82. Leibold, *supra* note 26, at 243.

take into account the appropriate degree of government interference in light of the needs and nuances of the foreign jurisdiction's social, political, and economic condition. The global reach of the FCPA, however, may have hampered any such development.

3. *The Existence of Justified Expectations That Might be Protected or Hurt by the Regulation*

In matters of contract and business, justified expectations that a particular jurisdiction governs a certain transaction have traditionally provided a basis for applying that jurisdiction's law.⁸³ The rationale was that "parties enter into contracts with forethought and are likely to consult a lawyer before doing so."⁸⁴ And although this rationale may seem deceptively simple, it remains true today, especially in the complex, global marketplace. For instance, cross-jurisdictional transactions, such as complex mergers and acquisitions, may require mountains of due diligence by teams of lawyers. Applying the FCPA abroad may (and, indeed, has) complicated such transactions to the extent that the associated FCPA risks become cost prohibitive.

The central danger that the FCPA poses to cross-jurisdictional M&As is that it allows an acquiring company to be held liable for the target's prior FCPA violations through successor liability.⁸⁵ Given the broad reach of territorial jurisdiction under the FCPA and that the FCPA allows liability through the activity of a firm's agent, the operators of targets who may never have expected that they would be subject to liability under the FCPA may find themselves unable to do business with western companies that are more FCPA savvy or, alternatively, an acquiring company that is unaware that the FCPA covers a target (or that the target has violated the FCPA) may find itself in hot water with U.S. regulators.⁸⁶ Moreover, successor liability may leave a foreign acquirer of *another* foreign company doubly flummoxed because it may not only be unforeseeable that the target had engaged in bribery but also that the FCPA would apply to either foreign corporation.

Given the costs of FCPA due diligence, the accumulation of these risks may detrimentally affect business before the U.S. government even begins an FCPA investigation. And aside from the costs associated with due dili-

83. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971).

84. *Id.*

85. See DOJ & SEC GUIDE, *supra* note 4, at 28-30; see also *M&A Due Diligence and Successor Liability*, ALLEN & OVERY, <http://www.allenoverly.com/publications/en-gb/FCPA/Pages/M-and-A-due-diligence-and-successor-liability.aspx> (last visited Nov. 9, 2015) ("The overarching corruption risk in the M&A context is, of course, successor liability: The risk of buying a company that is already covered by the FCPA and that has already violated it, leading potentially to liability for the purchaser based on pre-acquisition acts over which it had no control.").

86. Cf. DOJ & SEC GUIDE, *supra* note 4, at 31 (discussing a hypothetical situation where an acquiring firm could not be held liable for a target's "potentially improper payments" where the target was not previously subject to the FCPA because it "was neither an issuer nor a domestic concern and was not subject to U.S. territorial jurisdiction").

gence itself, the resulting information may result in companies abandoning deals in light of an insurmountable likelihood of successor liability,⁸⁷ even if the acquiring company would have installed a noncorrupt corporate culture. Moreover, FCPA concerns will commonly inhere to transactions involving firms with cross-border business dealings, and this itself will make adequate due diligence all the more difficult because the target may have complex organizational structures with multifaceted corporate cultures and the necessary documentation may be difficult to access.⁸⁸

In light of these difficulties and the traditional importance that justified expectations have played in matters of choice of law, U.S. courts should be hesitant to apply the FCPA extraterritorially if doing so would cause undue surprise to the defendant in an FCPA case. Although this factor may not be present in every case, the uncertainty that potential successor liability may have in foreign markets represents an external effect of the FCPA's broad jurisdictional scope. Thus, paying heed to this factor in individual cases could bring about a more wide ranging positive impact.

4. *The Importance of the Regulation to the International Political, Legal, or Economic System*

No doubt regulating bribery is important; indeed, the public in both developed and emerging countries views corruption as a significant hindrance to progress.⁸⁹ Regulators have recognized this: across the globe, nations have followed the United States' lead in passing the FCPA and have entered into conventions requiring them to enact antibribery laws, leading to the conclusion that "[i]t is only a matter of time before most of the world will have adopted domestic legislation similar in nature to the FCPA's anti-bribery provisions."⁹⁰ With this in mind, the importance of enforcing the FCPA extraterritorially becomes questionable, and although such extraterritoriality may have been defensible when the United States passed the FCPA and became a world leader in regulating corporate bribery, the newly minted antibribery regulations in foreign jurisdictions give reason to dial back the United States' vigorous FCPA enforcement abroad.

87. See Adam Prestidge, Note, *Avoiding FCPA Surprises: Safe Harbor From Successor Liability in Cross-Border Mergers and Acquisitions*, 55 WM. & MARY L. REV. 305, 313-15 (2013).

88. See KPMG, M&A DUE DILIGENCE AND THE FOREIGN CORRUPT PRACTICES ACT (2009), <https://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/Foreign-Corrupt-Practices-Act-200911.pdf> ("Acquisition targets with complex organisational structures, multiple reporting lines and overseas business units exercising a degree of autonomy may also imply that an investor has to deal with multiple cultures and an increased likelihood of the occurrence of corruption and bribery, and financial frauds."); Prestidge, *supra* note 87, at 314-15 ("Proper diligence can be even more expensive and time-consuming in foreign countries where important business information is not as easily accessible because information may only be available from unwilling parties, from closed government records, or from outdated public records." (footnote call number omitted)).

89. See Gledhill, *supra* note 2, at 156 (quoting Coatsworth, J. et al., *Strategies for Addressing Corruption in the Americas* (1999)).

90. DEMING, *supra* note 16, at 306.

As discussed above, the OECD Convention was a crucial step toward global regulation—at the domestic level—of corruption under frameworks similar to the FCPA.⁹¹ Other international conventions with similar objectives include the Inter-American Convention Against Corruption, the Council of European Criminal and Civil Law Conventions, the Council of European Criminal Law Convention, the Council of Civil Law Convention, and the United Nations Convention Against Corruption.⁹² Various countries have signed on to these conventions, and as of 2015, forty-one countries have signed on to the OECD Convention;⁹³ but while some countries have expanded their enforcement activity, others have lagged behind. Since 2005, Transparency International, a nonprofit, nonpartisan organization with the objective of “combat[ing] corruption in government and international business and development,”⁹⁴ has assembled an annual report of the enforcement levels that OECD signatory countries have maintained. The report categorizes countries’ enforcement activity as ranging from “Active Enforcement” to “Little or No Enforcement,” depending on the time period of enforcement (the 2015 report includes enforcement actions from 2011 to 2014), a country’s share of world exports, and a point system that weighs different enforcement activities relative to the magnitude of the cases that a country prosecutes.⁹⁵ The report provides that four countries comprising 22.8 percent of world exports—the United States, Germany, the United Kingdom, and Switzerland—maintain “Active Enforcement” levels.⁹⁶ Conversely, twenty countries comprising 20.5 percent of world exports engage in little or no enforcement.⁹⁷

Because the “reasonableness” analysis that I propose allows case-by-case inquiry into whether the United States should pursue largely foreign bribery under the FCPA, courts could take into account the extent of antibribery enforcement in a foreign jurisdiction to determine how important U.S. intervention may or may not be. This factor could therefore tip the scales toward pursuing FCPA prosecution in countries that have only nominally signed on to the OECD Convention while deferring to other jurisdictions engaged in active antibribery enforcement, with an eye toward settling on a sufficient degree of deterrence. Although the statistics dis-

91. See *supra* notes 14-18.

92. See generally DEMING, *supra* note 16, at 309-43.

93. See TRANSPARENCY INT’L, EXPORTING CORRUPTION-PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATTING FOREIGN BRIBERY (2015), http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd.

94. Press Release, Transparency Int’l USA, TI-USA and CIPE Release Country Reports on Implementing APEC Public Procurement Transparency Standards in Mexico, Peru, Vietnam, Indonesia, and the Philippines (July 16, 2011), http://www.transparency.org/news/pressrelease/20110716_APEC_standards.

95. TRANSPARENCY INT’L, *supra* note 93, at 15-17.

96. *Id.* at 7. “A country that is an Active enforcer initiates many investigation [sic] into foreign bribery offences, these investigations reach the courts, the authorities press charges and courts convict individuals and/or companies both in ordinary cases and in major cases in which bribers are convicted and receive substantial sanctions.” *Id.* at 11.

97. *Id.* at 7. “Where there is ‘Little or No Enforcement’ there is no deterrence.” *Id.* at 15.

cussed above are limited to OECD Convention signatory countries, a similar analysis would be available in the case of other countries by measuring the levels of domestic antibribery enforcement in a foreign jurisdiction as a proxy for the importance of U.S. antibribery enforcement in that jurisdiction.

5. *The Extent to Which Another State may Have an Interest in Regulating the Activity*

Although “interest analysis” derives from U.S. conflict-of-laws doctrine, section 403’s consideration of the competing regulatory interests of various jurisdictions reflects international law’s adoption of such an approach.⁹⁸ The traditional American form of interest analysis, however, introduced in Professor Brainerd Currie’s *Married Women’s Contracts*,⁹⁹ is distinguishable from the form of “interest analysis” put forth in section 403. Specifically, Currie’s interest analysis only asked whether a jurisdiction has an interest in applying its law to a set of facts in light of the purpose of the law and the nexus that a given set of facts has to that purpose.¹⁰⁰ Currie’s approach therefore did not propose *balancing* competing interests but asked only if a given jurisdiction had an interest in regulating a set of facts, in which case that law should apply; if multiple jurisdictions had actual interests in applying their law, this presented a true conflict, in which case “[t]he sensible and clearly constitutional thing for any court to do,” Professor Currie espoused, “is to apply its own law.”¹⁰¹

Conversely, section 403(2)(g) by its very terms invites determining whether other jurisdictions may have an interest in regulating a particular set of facts. Thus, section 403 has embraced interest balancing where two jurisdictions may have competing interests in regulating the same set of facts, which for our purposes would involve corrupt payments to public officials. In such a case, whether the payment is prohibited and, if so, what penalty may attach to that payment, may very well depend on which jurisdiction’s law applies. Moreover, balancing interests may allow a court to account for cultural nuances that would render another jurisdiction’s law more appropriate to handle a certain set of facts. Although the next section will consider how to approach cases where two competing jurisdictions have conflicting law, this section proposes that to determine whether applying the FCPA extraterritorially would be reasonable, courts should follow section 403’s approach and conduct a searching analysis of whether another jurisdiction may have an interest in regulating bribery rather than the United States.

98. See ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW* 259 (2009).

99. See Brainerd Currie, *Married Women’s Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958).

100. See *id.* at 231–33.

101. *Id.* at 261.

From a theoretical standpoint, U.S. courts have grappled with whether the FCPA prohibits certain payments because of definitional difficulties that another jurisdiction may otherwise have an interest in and may be more adept at defining. For instance, the FCPA prohibits payments to “foreign officials” including government “instrumentalities,”¹⁰² but whether this encompasses employees of state-owned enterprises (SOEs)¹⁰³ is unclear from the face of the statute. Indeed, given the complex policy decisions and practical implications that a system of government favoring state ownership over corporations presents,¹⁰⁴ a foreign government would likely have an interest in determining whether SOE employees should be considered government officials such that certain payments to them constitute illicit bribery.

Nevertheless, U.S. courts have agreed with the government’s position that SOEs are government instrumentalities for FCPA purposes.¹⁰⁵ But a recent case out of the Eleventh Circuit Court of Appeals created a more complicated standard for determining whether any given commercial enterprise is a government instrumentality subject to the FCPA. In *United States v. Esquenazi*, the court noted that it was the first court of appeals to address the issue and held that “an entity must be under the control or dominion of the government to qualify as an ‘instrumentality’ within the FCPA’s meaning,” and in addition, “an instrumentality must be doing the business of the government.”¹⁰⁶ As to the first requirement, government “control” over the entity turns on the following factors:

the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental fisc, and . . . the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.¹⁰⁷

The court interpreted the second element, “doing the business of the government,” to turn on whether “the entity performs a function the government treats as its own.”¹⁰⁸ In turn, this depends on yet an additional set of factors:

whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that for-

102. 15 U.S.C. § 78-dd-1 (f)(1)(A) (2012).

103. Generally, a state-owned enterprise is “any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership.” ORGANISATION FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 14 (2015).

104. See *id.* at 17 (discussing the rationales for state ownership).

105. See “State-Owned Enterprises” *Under the FCPA*, STEPTOE & JOHNSON LLP (June 3, 2011), http://www.steptoel.com/publications-newsletter-pdf.html/pdf/?item_id=209.

106. *United States v. Esquenazi*, 752 F.3d 912, 922 (11th Cir. 2014).

107. *Id.* at 925.

108. *Id.* at 926.

eign country generally perceive the entity to be performing a governmental function.¹⁰⁹

Given this complex analysis, whether an SOE counts as a “government instrumentality” remains vague, but what is as clear as day is that courts, regulators, and businesses will continue to struggle with determining (before facing FCPA charges) whether the FCPA applies to any given payment in the context of SOEs or other commercial enterprises with a link to government.¹¹⁰ And by applying the FCPA abroad to the extent that the U.S. government has, it has usurped, overridden, and undermined other jurisdictions’ ability to define what payments the law should proscribe.

Furthermore, U.S. prosecution of bribery cases abroad may have created a free rider problem whereby foreign jurisdictions have become rationally apathetic to prosecuting those same cases. This therefore may have diluted any interest foreign jurisdictions may have had in creating robust antibribery enforcement schemes. Indeed, just as the Kyoto Protocol, a treaty calling for multinational environmental legislation, has suffered from “free rider problems [that] make it unlikely that adequate participation and compliance will be achieved,”¹¹¹ it is not implausible that U.S. antibribery enforcement abroad has removed an incentive from foreign OECD Convention signatories to self-regulate.

Thus, we’ve seen not only that foreign jurisdictions may be better suited to regulate bribery that occurs within its bounds but also that expansive foreign antibribery enforcement at the hands of U.S. prosecutors may result in regulatory free riding by other nations. The better approach in such a case is to determine whether another state has an interest in applying its own antibribery provisions. As we will see in the next section, this analysis leans even further toward deferring to another jurisdiction’s antibribery regulations when they conflict with the FCPA.

6. *The Likelihood of Conflict with Regulation by Another State*

Whereas the previous section considered how courts should determine whether a jurisdiction aside from the United States has an interest in regulating bribery that occurs within its bounds, this section considers how courts should decide what to do if both the United States and a foreign jurisdiction have an interest in regulating foreign bribery, and if each jurisdictions’ regulations conflict. The *Restatement (Third) of Foreign Relations Law* deals directly with this issue—section 403(3) provides that:

109. *Id.*

110. See Recent Cases, *Foreign Corrupt Practices Act—“Foreign Official”*—Eleventh Circuit Defines “Government Instrumentality” Under the FCPA, 128 HARV. L. REV. 1500, 1500 (2015) (“Unfortunately, the court’s indeterminate and unwieldy two-pronged instrumentality test fails to provide much-needed judicial guidance to businesses and regulators interpreting the Act.”).

111. Scott Barrett & Robert Stavins, *Increasing Participation and Compliance in International Climate Change Agreements*, 3 INT’L ENVTL. AGREEMENTS: POL. LAW & ECON. 349, 350 (2003).

When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, [including those set out in] Subsection (2); a state should defer to the other state if that state's interest is clearly greater.¹¹²

Thus, as opposed to Currie's default position requiring U.S. courts to apply the FCPA to largely foreign conduct even if the FCPA conflicted with the foreign jurisdiction's regulatory regime,¹¹³ section 403(3) provides a more nuanced approach, suggesting that U.S. courts should defer to another jurisdiction with a conflicting antibribery regime. Nevertheless, because this is only one of many factors that courts should consider when deciding whether to allow an extraterritorial FCPA prosecution, courts may lessen the weight that they give to this factor where a foreign jurisdiction enacts a conflicting antibribery law but underenforces it. Given the complex problems that regulating foreign bribery creates, the best approach to interest balancing in this context would consider both (a) the degree of conflict that a foreign law presents *on its face*, and (b) the level of enforcement as a proxy for the degree of *actual conflict* with the FCPA.

Three foreign jurisdictions have recently enacted regimes that stand in fundamental conflict with the FCPA: Brazil, China, and the United Kingdom. The remainder of this section will comparatively analyze these regulations against the FCPA.

1. Brazil's Clean Companies Act

Brazil's economy has faltered in recent years, and corruption has played a role in this downturn.¹¹⁴ For instance, Brazil's largest investor—the state-owned oil company, Petrobras—has recently become embroiled in corruption charges, spurring an FCPA investigation by the SEC that could result in fines of over \$1.6 billion, which if paid would be the largest FCPA settlement to date.¹¹⁵ Analysts estimate that the lessened spending as a result of the Petrobras investigation may reduce Brazil's GDP by a full percentage point.¹¹⁶ In addition, the Federation of Industries of the State of São Paulo reports, "Brazil loses 1.38% to 2.3% of its GDP in kickbacks and bribes."¹¹⁷

Despite these calls for government intervention, Brazil's regulation of bribery involving foreign officials has been remarkably low. Specifically,

112. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (AM. LAW INST. 1987).

113. See *supra* notes 99-101 and accompanying text.

114. See The Data Team, *Economic Backgrounder: Brazilian Waxing and Waning*, ECONOMIST (Oct. 30, 2015, 4:26 PM), <http://www.economist.com/node/21645402/>.

115. Jeb Blount & Mica Rosenberg, *Exclusive: U.S. Graft Probes May Cost Petrobras Record \$1.6 Billion or More - Source*, REUTERS (Aug. 18, 2015, 6:58 PM), <http://www.reuters.com/article/2015/08/18/us-brazil-petrobras-corruption-idUSKCN0QN0B20150818#rEXAMjMmtFtrEeGo.97>.

116. See The Data Team, *supra* note 114.

117. OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL 9 (Oct. 2014).

although fourteen allegations of bribery of foreign public officials have come to light, since agreeing to the OECD Convention, Brazil has only prosecuted one case as of October 2014.¹¹⁸ Indeed, Transparency International's ranking Brazil as a country engaged in "Little or no enforcement" since becoming a member to the OECD convention reflects this under-enforcement.¹¹⁹ But this is not to say that Brazil does not have laws on the books enabling bribery prosecutions: in 2013, President Dilma Rousseff passed an anticorruption law known as the "Clean Company Act,"¹²⁰ which imposes strict liability on legal entities engaged in foreign and domestic bribery of public officials.¹²¹

The substantive differences between the Clean Company Act and the FCPA are numerous but two particular differences present fundamental conflicts between the laws. First, whereas the FCPA requires proof of "corrupt intent," the Clean Company Act is a strict liability offense that imposes liability regardless of a defendant's motives.¹²² In practice, this makes the Clean Company Act broader than the FCPA insofar as conduct that may create liability; moreover, this suggests that Brazil's legislative intent in passing the Clean Company Act was to reach more activity, and thus spur more rigorous enforcement than the United States would impose under the FCPA. A second area of conflict between the Clean Company Act and the FCPA further supports the notion that the Clean Company Act demonstrates a legislative intent to apply more broadly and be enforced more rigorously than the FCPA: the Clean Company Act applies to bribery of both foreign *and domestic* public officials.¹²³ Brazil's affirmative decision to prohibit corrupt payments to its own public officials indicates that the country wishes to clean up the manner and culture in which corporations interact with the country as a sovereign; given the corruption that has plagued Brazil, vigorous domestic antibribery enforcement *without the need of foreign intervention* could reaffirm the Brazilian public's confidence in its domestic government.

Thus, Brazil's Clean Company Act exemplifies a sovereign decision to regulate corruption independently—a decision that U.S. intervention could compromise. Indeed, if Brazil were able to recover fines that the U.S. commonly seeks in its FCPA prosecutions, the country would be better able to pursue bribery investigations and prosecutions. But FCPA enforcement could decrease Brazil's incentive to do so, creating a crutch for Brazilian regulators.¹²⁴ Thus, in FCPA cases involving Brazilian corporations or officials, U.S. courts should consider the interest that Brazil may have in prose-

118. *Id.*

119. TRANSPARENCY INT'L, *supra* note 93, at 12.

120. Richard C. Smith, *A Comparison of Anti-Corruption Laws in US, UK, BRAZIL*, LAW360 (Apr. 3, 2015, 9:15 AM), <http://www.law360.com/articles/638561/a-compari-son-of-anti-corruption-laws-in-us-uk-brazil>.

121. Lei No. 12,846/2013, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Agosto 2013 (Braz.).

122. *See* Smith, *supra* note 120.

123. *Id.*

124. *See supra* note 111 and accompanying text.

cuting cases independently and defer to Brazil when doing so would further that interest.

2. *China's Anticorruption Regulations*

China's economic, political, and cultural characteristics present prickly issues for regulating corruption and bribery. Given its communist foundations, many corporations in China are state owned, making such companies' officials potential recipients of bribes; additionally, Chinese business culture is traditionally rooted in developing relationships via gift giving, a practice known as *guanxi*.¹²⁵ The confluence of these factors has resulted in China's public condemnation of corruption but only to a degree that tolerates low-level payments that might otherwise be considered corrupt.¹²⁶ And although commentators have recognized increased supply-side anticorruption enforcement by the People's Republic of China (PRC), most notably the commercial bribery conviction of a Chinese subsidiary of pharmaceutical company GlaxoSmithKline,¹²⁷ others have questioned whether demand-side anticorruption enforcement, i.e., prosecutions of corrupt government officials, has been a product of political strategy rather than public interest.¹²⁸

Against this complex backdrop, the PRC regulates corruption with a web of regulations, the two most important of which are the Anti-Unfair Competition Law of the PRC (AUCL) and certain sections of the PRC Criminal Law.¹²⁹ In an interesting divergence from many other anticorruption regulations, China bifurcates its regulations to cover two different sorts of corruption: whereas Article 8 of the AUCL and Article 163 of the PRC Criminal Law cover "commercial bribery" between private persons, PRC Criminal Law Articles 389-95 cover "official corruption, defined as payments to state officials."¹³⁰ But because many "private persons" will also be employees of state-owned entities, the FCPA may also apply to conduct under both categories of corruption.¹³¹

Given the potential overlap between the FCPA and Chinese anticorruption regulations, conflicts between the laws are readily apparent. First, as opposed to solely government enforcement under the FCPA, the AUCL pro-

125. See Daniel Chow, *The Interplay Between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 1015, 1017 (2012); F. Joseph Warin, Michael S. Diamant & Jill M. Pfennig, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VIRGINIA L. & BUS. REV. 33, 58-61 (2010).

126. See Chow, *supra* note 125, at 1017.

127. See *Trends and Developments in Anti-Corruption Enforcement 10*, COVINGTON & BURLING LLP (2015), https://www.cov.com/files/Publication/446fa508-b853-4f88-a902-615eb62a28aa/Presentation/PublicationAttachment/1c4f86eb-6ce7-4115-aed6-67bd2d1e5ee6/Trends_and_Developments_in_Anti-Corruption_Enforcement_Winter_2015.pdf.

128. See generally Teresa Welsh, *China's Corruption Crackdown: Progress or Politics?*, U.S. NEWS & WORLD REP. (June 11, 2015, 7:07 PM), <http://www.usnews.com/news/articles/2015/06/11/chinas-corruption-crackdown-progress-or-politics>.

129. See Chow, *supra* note 125, at 1025-26.

130. *Id.*

131. See, e.g., *id.* at 1029-33 (discussing common scenarios where both the FCPA and China's commercial bribery regulations may apply).

vides a private right of action for entities that allege harm resulting from commercial bribery.¹³² Assuming that a private AUCL plaintiff would be able to accurately monetize the harm resulting from commercial bribery, a parallel FCPA and private AUCL prosecution could result in double recovery against the offending entity; deferring to a solely Chinese resolution of the case could therefore be a more efficient enforcement mechanism than a dual prosecution because it could provide an accurate remedy for a harmed Chinese entity while saving U.S. prosecutorial resources. Second, whereas an FCPA charge may result in a maximum term of imprisonment of up to twenty years, a violation in the form of bribery under the PRC Criminal Law may result in a lifetime sentence for the bribe payor.¹³³ Thus, the potential remedial effects that Chinese corruption prosecutions may provide, if fully imposed, could suffice to deter future violations. Thus, even if a U.S. court may have prescriptive jurisdiction to regulate such conduct under the FCPA, it may find that in light of the magnitude of the actions that Chinese prosecutors and plaintiffs bring, the application of the FCPA would be unreasonable.

3. *The U.K. Bribery Act of 2010*

Passed in 2010, the U.K. Bribery Act bears a close resemblance to the FCPA, applying extraterritorially and prohibiting bribery to foreign officials, but it presents various important differences.¹³⁴ The United Kingdom's level of enforcement is also comparable to that of the United States; indeed, Transparency International places the United Kingdom among the four OECD signatory countries with "active enforcement" levels.¹³⁵ At the outset, this therefore increases the degree of *actual* conflict between the FCPA and the Bribery Act. For companies doing business in both the United States and the United Kingdom, the threat of liability under both the Bribery Act and the FCPA presents grave risks and incentives to implement comprehensive compliance programs. But given a number of facial conflicts between the laws, cases that are amenable to both FCPA and Bribery Act prosecutions may present reason for the United States to dial back a vigorous application of the FCPA where the Bribery Act also applies.

The Bribery Act creates three separate offenses for 1) bribing another person (including offenses for both the payor and payee), 2) bribing a foreign official, and 3) failing to prevent bribery.¹³⁶ The third offense presents an important dissimilarity from the FCPA: a commercial organiza-

132. Lei Li, *Anti-Commercial Bribery Laws in China and Their Enforcement in the Pharmaceutical Industry*, 2 BLOOMBERG L. REPS.—WHITE COLLAR CRIME (2010), http://www.sidley.com/~media/Files/Publications/2010/11/AntiCommercial%20Bribery%20Laws%20in%20China%20and%20Their%20E_/Files/View%20Article/FileAttachment/sidley_lei_li_article.

133. See Wantao Yang et al., *Understanding China's Approach to Anticorruption*, CORP. COUNSEL (Jan. 28, 2014), <http://www.mmlawus.com/Data/Files/Articles/Corporate%20Counsel%20China%20article.pdf>.

134. See Bribery Act of 2010, c. 23 (U.K.).

135. See TRANSPARENCY INT'L, *supra* note 93, at 12.

136. Bribery Act of 2010, c. 23 (U.K.).

tion may be liable under the Bribery Act “if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization”; however, an affirmative defense for the organization is available if it can “show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.”¹³⁷ A further difference between this offense and the FCPA is that it imposes strict liability for failure to prevent bribery, whereas the FCPA requires corrupt intent.¹³⁸ And two other conflicts are present where the FCPA provides defenses that the Bribery Act does not include: 1) the FCPA creates an exception for facilitating payments intended to “expedite or secure the performance of a ‘routine governmental action,’” and 2) the FCPA provides an affirmative defense for promotional expenses that are “reasonable and bona fide business expenses that are directly related to the promotion, demonstration or explanation of products or services.”¹³⁹

Given these differences in what conduct may or may not create liability, the extraterritorial application of either the FCPA or the Bribery Act, albeit a permissible exercise of prescriptive jurisdiction, may nonetheless be unreasonable. For example, in cases involving firms operating in both the United States and United Kingdom, where an initial investigation by U.S. regulators turns up evidence that the target of an investigation either made a permissible facilitating payment or promotional expenditure, further investigatory resources need not be expended if U.K. regulators are also pursuing the same activity because that activity would not likely escape the grasp of the Bribery Act. And more generally, because the Bribery Act applies more broadly than the FCPA by allowing prosecutions of both bribers and bribees, a Bribery Act prosecution may be more efficient than bringing parallel FCPA charges against only the briber.

Conclusion

Given the current state of FCPA enforcement, decreased prosecutorial vigilance is unlikely. But the answer to the complex issues that the extraterritorial application of the FCPA presents is not to give in to the U.S. government’s aggressive application of the FCPA but rather to challenge this approach in court. Successful challenges would allow other jurisdictions to develop regulatory regimes that could take into account the nuances of their respective cultures, politics, economies, and societies, while continuing to provide cross-jurisdictional cooperation and assistance where necessary. In the short term, this may call for more attention to bribery and corruption from jurisdictions that have historically relied on the efforts of U.S. prosecutors; in the long term, however, governmental investment in the regulation of corruption will become a self-sustaining

137. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 15 (2011).

138. See TRANSPARENCY INT’L, THE 2010 UK BRIBERY ACT: ADEQUATE PROCEDURES 12 (2010).

139. *Id.*

task and will allow foreign countries to define corruption and its consequences in light of their particular social, economic, and political needs.

Although a global approach to the FCPA may have been appropriate at one point in time, given the development of competing legislation abroad, the time has come to sunset the FCPA's vigorous enforcement platform. From the perspective of the United States, this will allow more focus on domestic issues by freeing up prosecutorial resources that were otherwise invested in prosecuting cases with only tangential links to or effects on the United States. Moreover, easing off of such cases and deferring to other jurisdictions would fulfill the original purpose of the FCPA—fostering trust and beneficial relations between the United States and foreign countries.

