

Rising to China's Challenge in the Pacific Rim: Reforming the Foreign Corrupt Practices Act to Further the Trans-Pacific Partnership

*Michael B. Runnels**

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* Associate Professor, Law & Social Responsibility Department, Sellinger School of Business and Management, Loyola University, Maryland. The author would like to thank Adam M. Burton, Jeremy A. Schiffer, and the editors of *Seattle University Law Review* for their helpful comments and suggestions.

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INTRODUCTION

It is a commonly held myth that the rise of U.S. global economic hegemony rests upon a free trade philosophy.¹ On the contrary, protectionist trade policies were central to galvanizing American industrialization.² This misconception lies at the heart of why the trade liberalization policies enforced under the U.S.-led Bretton Woods institutions, the World Bank and the International Monetary Fund (IMF), brought ruinous results to many poor countries.³ The subsequent decline in credibility of

1. See, e.g., Michael Lind, *The Cost of Free Trade*, AM. PROSPECT, Dec. 2011, at 52, available at <https://prospect.org/article/cost-free-trade> (explaining the fact vs. myth dynamic regarding the origins of U.S. economic power, Lind argues that "[t]he belief that greater liberalization of trade and investment must invariably benefit the American economy in the long run, no matter its short-term costs in terms of crippled industries and lost jobs, has become an article of faith for America's bipartisan establishment for more than 50 years"). After all, both major American political parties have made trade liberalization a major party platform in the post-Cold War era; indeed, the liberalization of trade has been one of the only policy issues that recent Republican and Democratic presidents have agreed upon writ large. *Id.*

2. The adoption of protectionist policies made much sense for an industrializing nation in the nineteenth century, and protectionist trade policies were central to galvanizing American industrialization, as U.S. manufacturers sought to insulate themselves from competition from more established British manufacturers. Thus, support for protectionist policies was a key plank of the Whig, then Republican, platform from the early nineteenth century until 1952. Indeed, Abraham Lincoln secured Pennsylvania's decisive electoral votes in the election of 1860 through his support of a tariff designed to aid Pennsylvania manufacturers. See RICHARD FRANKLIN BENDEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900*, at 457-509 (2000) (providing a detailed historical analysis of the importance of protectionist trade policies in spurring the American Industrial Revolution). See generally J. B. CONDLIFFE, *THE COMMERCE OF NATIONS* (1st ed. 1950); JOHN M. DOBSON, *TWO CENTURIES OF TARIFFS* 11, 15, 17, 35, 38, 89 (1976); ALFRED E. ECKES, JR., *OPENING AMERICA'S MARKET* (1995); PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION* 27 (2d ed. 1999).

3. See, e.g., Nancy Birdsall et al., *The Washington Consensus: Assessing a Damaged Brand* 20 (Ctr. for Global Dev., Working Paper No. 211, 2010), available at http://www.cgdev.org/sites/default/files/1424155_file_Birdsall_Torre_Caicedo_Assessing_the_WC_FINAL_0.pdf. The authors assess the negative impacts of Bretton Woods policies in the Latin American region, and note:

[W]ith the exception of Chile, outcomes during the 1990s generally fell significantly short of the reformers' expectations. Even if inequality is not considered, growth and poverty reduction outcomes were disheartening when compared to the intensity of the reform effort. . . . The sense of disenchantment with the Washington Consensus deepened dramatically in the late-1990s and early-2000s when the region was hit by a wave of financial turbulence that pushed several countries into crippling twin (banking and currency) crises, including Ecuador (1999-2000), Argentina (2001-2002), Uruguay (2002) and

these institutions challenges their continued relevance and opens a space for powerful nations to fashion alternative rules of trade.⁴

China is a member of the IMF but has only 3.8% of the voting share of the institution—the same power as Italy, whose economy is five times smaller.⁵ Consequently, China is now developing its own set of financial institutions to rival the Bretton Woods institutions⁶ and is building Free Trade Agreements (FTA) with countries in its emerging sphere of influence in the South China Sea.⁷

The reduction in credibility of the Bretton Woods regulatory order has affected the U.S.'s outsize ability to influence the economic architecture of global trade.⁸ As a result, the United States is seeking to meet the

the Dominican Republic (2003). Not surprisingly, during 2001–2003 per capita income growth in the region was negative even as other regions in the world enjoyed positive growth.

Id.

4. See Jeremy Tordjman, *China's Economic Rise Challenges the IMF's Relevance*, BUS. INSIDER (Oct. 12, 2014), <http://www.businessinsider.com/afp-chinas-economic-rise-challenges-the-imfs-relevance-2014-10>.

5. *Id.*

6. See Jane Perlez, *U.S. Opposing China's Answer to World Bank*, N.Y. TIMES (Oct. 9, 2014), <http://www.nytimes.com/2014/10/10/world/asia/chinas-plan-for-regional-development-bank-runs-into-us-opposition.html> (discussing China's efforts to create parallel institutions to the World Bank and IMF).

7. As of early 2015, China had signed bilateral and multilateral FTAs with ten countries/regions: Hong Kong, Macau, Taiwan, Pakistan, Chile, New Zealand, Singapore, Peru, Costa Rica, and ASEAN10. ASEAN10 is a political and economic organization, organized under a FTA, of ten Southeast Asian countries. It was formed on August 8, 1967, by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Since then, membership has expanded to include Brunei, Cambodia, Laos, Myanmar, and Vietnam and whose aims include accelerating economic growth, social progress, sociocultural evolution among its members, protection of regional peace and stability, and opportunities for member countries to discuss differences peacefully. See *Overview*, ASS'N OF SE. ASIAN NATIONS, <http://www.asean.org/asean/about-asean> (last visited Apr. 13, 2015).

China is also negotiating with the following nations/regions on the possibility of signing bilateral FTAs: Australia, Iceland, South Korea, Norway, Switzerland, Gulf Cooperation Council (GCC), and Southern African Customs Union (SACU). Furthermore, the Chinese government is asking research centers within the central government and government-affiliated think tanks to conduct research on the possibility of negotiating FTAs with Japan and India. Jianmin Jin, *China's Concerns Regarding TPP No More than Empty Worries?*, FUJITSU RESEARCH INST. (Jan. 11, 2012), <http://www.fujitsu.com/jp/group/fri/en/column/message/2012/2012-01-11.html>.

8. See NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 223–31 (2007) (discussing the role of the Bretton Woods institutions and their negative impact on economic stability). Klein notes that this arrangement provided the U.S. with “effective veto power over all major decisions,” and argues that “when Reagan . . . came to power in the eighties, [his] highly ideological administration [was] essentially able to harness the two institutions for [the U.S.'s] own ends, rapidly increasing their power and turning them into the primary vehicles for the advancement of the corporatist crusade.” *Id.* at 223–24; see also Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 723 (1999) (noting that the World Bank's worldview has translated into a record of development failures); Daniel D. Bradlow, *Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of*

challenge of growing Chinese power by establishing its own network of FTAs. FTAs have become a key foreign-policy plank used to structure the architecture of global trade and increase geopolitical influence. Notably, FTAs contain provisions that maintain protective tariffs on imports from nonmember states, which run counter to the global free market philosophy of the Bretton Woods institutions.⁹ The U.S. and China are thus engaged in a zero-sum game to rewrite the rules of global trade for the post-Bretton Woods world. The goal is to establish enough FTAs to achieve regional economic hegemony.¹⁰ This “pivot to Asia”¹¹ animates U.S. interests¹² in leading ongoing negotiations among twelve Pacific

the IMF, 94 AM. SOC’Y INT’L L. 152, 155 (2000) (contending that the IMF governance structure vests power in decision makers “with accountability to people who do not have to live with the consequences of their decisions but without accountability to those most affected by their decisions”); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005) (noting NGOs’ views that the World Bank lacks accountability by not having to answer to those whom its policies affect); Joseph E. Stiglitz, *Capital-Market Liberalization, Globalization, and the IMF*, 20 OXFORD REV. ECON. POL’Y 63 (2004) (discussing how IMF-backed, capital-market liberalization led to economic instability); Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 INT’L AFF. 83, 83 (2001) (asserting that the IMF and World Bank are “secretive, unaccountable, and ineffective”).

9. See Lind, *supra* note 1 and accompanying text.

10. See Mireya Solis, *The Geopolitical Importance of the Trans-Pacific Partnership: At Stake, a Liberal Economic Order*, BROOKINGS (Mar. 15, 2015), <http://www.brookings.edu/blogs/order-from-chaos/posts/2015/03/13-geopolitical-importance-transpacific-partnership> (arguing that due the stagnation of the WTO, a member of the Bretton Woods international order, “we have moved to a system of decentralized competition where different clusters of countries seek to define the standards for economic integration); see also Jane Perlez, *Clinton Makes Effort to Rechanel the Rivalry With China*, N.Y. TIMES (July 8, 2012), <http://www.nytimes.com/2012/07/08/world/asia/for-clinton-an-effort-to-rechannel-the-rivalry-with-china.html> (reporting that China has now surpassed the United States to become ASEAN’s largest trading partner by going from being an inconsequential trading partner in the region as recently as the late 1990s to a two-way trade volume of \$293 billion in 2010); John Lee, *China’s ASEAN Invasion*, NAT’L INTEREST, May-June 2007, at 89 (providing a more detailed explanation of China’s FTA strategy by an Australian analyst who supports American military primacy in Asia).

11. See MARK E. MANYIN ET AL., CONG. RESEARCH SERV., R42448, PIVOT TO THE PACIFIC? THE OBAMA ADMINISTRATION’S ‘REBALANCING’ TOWARD ASIA (2012), available at <https://www.fas.org/sgp/crs/natsec/R42448.pdf> (discussing the TPP initiative as consistent with the Obama Administration’s articulation of its geopolitical objectives in the Chinese sphere of influence).

12. See, e.g., *TPP = New World Order*, C-SPAN (Apr. 5, 2013), <http://www.c-span.org/video/?c4414245/tpp-new-world-order>. Characterizing the TPP and its benefits to the United States, Vice President Joseph P. Biden argues:

The Trans-Pacific Partnership is perhaps the most ambitious trade negotiation underway in the world. It will break new ground on important issues from the challenges of state-owned enterprises, to ensuring the free flow of data across borders, to enhancing regional supply chains, to ensuring transparency in cutting red tape. We’re also working to strengthen protections for labor and the environment. . . . Our goal is for high standards for the Trans-Pacific Partner-

Rim nations for the Trans-Pacific Partnership (TPP), which will operate in the Chinese sphere of influence and redesign the economic architecture for 40% of global trade.¹³

While traditional critics¹⁴ of FTAs highlight the potential negative effects on U.S. labor¹⁵ and the dangers of increasing corporate power,¹⁶ the animating force of the TPP is not built upon a free trade philosophy.¹⁷ Rather, the animating force rests upon the U.S.'s *realpolitik*¹⁸ goal of restraining the rise of Chinese hegemony and ensuring adherence to the international rule of law, customs, and norms established during the Bretton Woods regulatory order.¹⁹ Notably excluded from the TPP negotia-

ship to enter the bloodstream of the global system and improve the rules and norms.

Id.

13. See Lydia DePillis, *Everything You Need to Know About the Trans Pacific Partnership*, WASH. POST (Dec. 11, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/11/everything-you-need-to-know-about-the-trans-pacific-partnership/>.

14. See, e.g., Kevin Zeese & Margaret Flowers, *Civil Society, Environmentalists Firmly Opposed to the Trans-Pacific Partnership (TPP)*, GLOBAL RES. (Apr. 8, 2015), <http://www.globalresearch.ca/civil-society-environmentalists-firmly-opposed-to-trans-pacific-partnership-tp/5441486>.

15. See David Nakamura, *AFL-CIO Head on Obama's Trade Push: 'We Are Going All Out to Oppose It'*, WASH. POST (Mar. 10, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/03/10/afl-cio-boss-on-obamas-trade-push-we-are-going-all-out-to-oppose-it/>.

16. See Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html ("ISDS [Investor-State Dispute Settlement clause] would allow foreign companies to challenge U.S. laws—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court. . . . Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations.").

17. See IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS (2015), available at <http://fas.org/spp/crs/row/R42694.pdf>. Highlighting the TPP's potential implications beyond U.S. economic interests in the Pacific Rim, the report notes:

Throughout the post-World War II period, the region has served as an anchor of U.S. strategic relationships, first in the containment of communism and more recently as a counterweight to the rise of China. This trend has recently been accentuated by the Obama Administration's 'pivot to Asia,' along with the perception that the center of gravity of U.S. foreign, economic, and military policy is shifting to the Asia-Pacific region. The TPP is viewed as an important element in the U.S. "rebalancing" toward Asia.

Id. at 7.

18. See *Realpolitik: Philosophical Perspective*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/realpolitik> (last visited June 12, 2015). *Realpolitik* is a brand of politics based on practical objectives rather than on ideals. The word does not mean "real" in the English sense but rather connotes "things"—hence a politics of adaptation to things as they are. *Realpolitik* thus suggests a pragmatic, no-nonsense view and a disregard for ethical considerations. In diplomacy, it is often associated with relentless, though realistic, pursuit of the national interest. *Id.*

19. See FERGUSSON ET AL., *supra* note 17 and accompanying text.

tions is China, which covets regional economic hegemony.²⁰ China's exclusion from the TPP negotiations is not an accident, as recent Chinese initiatives aimed at creating parallel financial institutions²¹ represent an unambiguous effort to displace Western institutions and ideologies.²² These actions are consistent with the public statements²³ of China's paramount leader, President Xi Jinping, who cares little for the Bretton Woods regulatory order,²⁴ which China played no role in establishing,²⁵ and even less for its Western principles.²⁶

The success of the U.S.'s geopolitical strategy, however, is threatened by the overzealous, extraterritorial application of a U.S. criminal law designed to curtail corporate bribery of foreign officials: the Foreign Corrupt Practices Act (FCPA). The Obama Administration interprets the FCPA in a way that criminalizes the giving of gifts to foreign business persons employed by state-run enterprises.

20. See Naazneen Barma et al., *Wishing Away the World Without the West*, WASH. POST (Nov. 19, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/11/19/wishing-away-the-world-without-the-west/>. Countering arguments that China is merely augmenting the Bretton Woods regulatory order, the authors argue:

[W]e think it's overly optimistic to assume that Chinese interests and behavior will conform quite so neatly to the post-WWII system. And, to put a finer point on it, we believe both logic and evidence are now frequently pointing in the opposite direction. The world already has an Asian Development Bank. It already has ASEAN.

Id. The authors go on to argue:

The point is to create an alternative set of ideas, institutions and rules that are aligned with a Chinese vision of how political economy and state power come together. And while that vision is very much a work in progress, our bet is that it'll be sufficiently different from what you'll find in "the West." In fact, we think China and its friends in the emerging world have started espousing and living it.

Id.

21. *Id.*

22. *Id.*

23. See Carrie Gracie, *The Credo: Great Rejuvenation of the Chinese Nation*, BBC NEWS (Nov. 6, 2014), <http://www.bbc.com/news/world-asia-china-29788802>.

24. *Id.*

25. See Perlez, *supra* note 6. Perlez quotes He Fan, Assistant Director of the Institute of World Economics and Politics in Beijing, as saying, "China is more suspicious of the existing international institutions because China feels it was not one of the founders. . . . China feels a lack of ownership." *Id.*

26. See, e.g., CHRISTOPHER K. JOHNSON ET AL., CTR. FOR STRATEGIC & INT'L STUDIES, *DECODING CHINA'S EMERGING "GREAT POWER" STRATEGY IN ASIA* (2014), available at http://csis.org/files/publication/140603_Johnson_DecodingChinasEmerging_WEB.pdf (offering a comprehensive analysis on the rise of Chinese hegemony and the strategic challenges it presents to the U.S. and the Pacific region). President Xi Jinping allegedly does not believe in "Western-style liberal democracy," and regrets "the collapse of communist rule in Moscow." See Gracie, *supra* note 23. When asked why the Soviet Empire collapsed, Jinping responded, "No one had the balls to stand up for it." *Id.*

The Obama Administration's draconian enforcement of the FCPA threatens to undermine the success of the U.S.'s TPP policy objective, which is to design an economic architecture to counterbalance China's regional and even global economic ambitions.²⁷ It does so by disincentivizing U.S. corporations from investing in the Chinese sphere of influence.²⁸ The FCPA prohibits U.S. citizens, corporations, and their employees from giving "anything of value" to "foreign officials" in order to secure business advantages.²⁹ The policy objective of the FCPA is to deter bribery to better aid the U.S. in building international economic and diplomatic alliances³⁰—an objective similar to that of the TPP.³¹ However, deeply-rooted cultural norms of gift-giving and the maintenance of personal relationships³² in many Asian TPP member states³³ create a

27. See FERGUSSON ET AL., *supra* note 17, at 1. ("[The TPP] is a manifestation of the Administration's 'rebalance' to the Asia-Pacific, and if concluded, may serve to shape the economic architecture of the region. . . . It has the potential to . . . establish regional rules on new policy issues facing the global economy . . .").

28. See Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 421–22 (1999) [hereinafter Salbu, *Foreign Corrupt Practices Act*] (casting anti-bribery legislation as a form of cultural imperialism); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 280 (1997) [hereinafter Salbu, *Bribery in the Global Market*] (characterizing such legislation as culturally insensitive); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 351–56 (2010) (detailing the genesis of the FCPA); Christopher J. Duncan, Comment, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?*, 1 ASIAN-PAC. L. & POL'Y J. 16, 1, 3–6, 4 n.14 (2000) (exploring, generally, the cultural clash that anti-bribery enforcement creates in developing countries).

29. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2006).

30. See Spalding, *supra* note 28, at 357–58.

31. See FERGUSSON ET AL., *supra* note 17 and accompanying text.

32. See, e.g., Thomas W. Dunfee & Danielle E. Warren, *Is Guanxi Ethical? A Normative Analysis of Doing Business in China*, 32 J. BUS. ETHICS 191, 192 (2001) (discussing how "guanxi" is a complex term that represents the ancient Chinese belief in only doing business with those whom one already knows or has connections—and is the necessity of forming and maintaining these relationships through a variety of means); Frederick Balfour, *You Say Guanxi, I Say Schmoozing*, BUS. WK., Nov. 19, 2007, at 84 ("Guanxi. It's the first word any businessperson learns upon arriving in China. Loosely translated, guanxi means "connections" and, as any China veteran will tell you, it is the key to everything: securing a business license, landing a distribution deal, even finding that coveted colonial villa in Shanghai. Fortunes have been made and lost based on whether the seeker has good or bad guanxi, and in most cases a positive outcome has meant knowing the right government official, a relationship nurtured over epic banquets and gallons of XO brandy.").

33. See JAMES C. SCOTT, *COMPARATIVE POLITICAL CORRUPTION* 10 (1972); Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 292–97 (1999); Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?*, 24 YALE J. INT'L L. 223, 232–39 (1999). "According to Chris Pash, CEO of Asia Pulse, great ceremonial significance is attached to the giving and receiving of gifts in Asia, such that it's extremely important to be familiar with the customs, nuances, and cultural taboos in various coun-

business culture where the FCPA's overly-broad conception of bribery occurs in the regular course of business. Gift-giving that would be termed bribery under the FCPA is not only common in the Pacific Rim, but is accepted as a valid means of doing business.³⁴ Thus, the vague language of the statute creates a compliance minefield for U.S. businesses operating in the Chinese sphere of influence.

The FCPA, which calls for criminal fines of up to \$2 million per violation, is strictly enforced by the courts.³⁵ Recent cases have resulted in fines of over \$1.6 billion, and courts have sentenced Americans to prison terms of up to fifteen years for major violations.³⁶ Moreover, an indictment alone, not even a conviction, can lead to suspension of the right to transact business with the U.S. government.³⁷ The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have significantly increased enforcement efforts in recent years. Between 2003 and 2006, for example, the DOJ and SEC brought a total of thirty-

tries." *Id.* at 235 (internal quotation marks omitted). Moreover, "[i]n Japan, failure to tender appropriate summer and year end business gifts is considered 'a terrible breach of etiquette.'" See Salbu, *supra*, at 237 (quoting DIANA ROWLAND, JAPANESE BUSINESS ETIQUETTE: A PRACTICAL GUIDE TO SUCCESS WITH THE JAPANESE 81 (1985)); see also Kenneth U. Surjadinata, *Revisiting Corrupt Practices From a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1082-83 (1998) (arguing that "[w]hen gift-giving is practiced universally, the whole society becomes inextricably networked in gift-giving practices, and such activities become an expected, customary gesture governing many activities"). Furthermore, "Korean culture stresses reciprocation as the foundation to interpersonal relationships." Daniel Y. Tun, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT'L L. 1071, 1084 (1996). Korean reciprocation comes in the form of *chonji*, an expression of gratitude usually in the form of gifts. See *Agenda for a New Leader*, ASIA WK., Mar. 13, 1998, at 14.

34. See *supra* note 33 and accompanying text; see also Minxin Pei, *Corruption Threatens China's Future 2* (Carnegie Endowment for Int'l Peace, Policy Brief No. 55, 2007), available at http://carnegieendowment.org/files/pb55_pei_china_corruption_final.pdf (discussing the endemic nature of bribery in Chinese business practices, Pei notes that roughly "10 percent of government spending, contracts, and transactions is used as kickbacks and bribes or simply stolen").

35. See, e.g., Press Release, U.S. Dep't of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay \$2 Million Criminal Fine (Apr. 7, 2009), available at <http://www.justice.gov/opa/pr/2009/April/09-crm-318.html>; see also Press Release, U.S. Dep't of Justice, Control Components, Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine (July 31, 2009), available at <http://www.justice.gov/opa/pr/2009/July/09-crm-754.html>.

36. See Siemens Aktiengesellschaft, Exchange Act Release No. 2911, 94 S.E.C. Docket 2869 (Dec. 15, 2008), available at 2008 WL 5221040; see also Edward Wyatt, *Former Siemens Executives Are Charged with Bribery*, N.Y. TIMES, Dec. 14, 2011, at B4; Press Release, U.S. Dep't of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 15, 2011), <http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html>.

37. U.S. DEP'T OF JUSTICE & SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 69-70 (Nov. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>; see also Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 147 (2011).

two enforcement actions.³⁸ By contrast, in 2010 alone, the DOJ and SEC brought seventy-four enforcement actions, up 85% from 2009.³⁹ In addition, the amount of fines has increased dramatically over the past five years. In 2007, U.S. authorities levied FCPA-related fines of \$87 million.⁴⁰ In 2010, the DOJ assessed \$1.8 billion in aggregate FCPA penalties, including fines and disgorgements.⁴¹ Moreover, a company cannot pay fines levied against individuals.⁴²

The vague language and strict enforcement of the FCPA conspire to disincentivize corporations from entering those TPP markets that the U.S. perceives to be more corrupt,⁴³ and thus where it enforces the FCPA most strictly. One of the most negative ways in which FCPA enforcement undermines the TPP is in its definition of what constitutes a “foreign official.” A federal court recently ruled that the question of whether an employee of a state-owned enterprise (SOE)⁴⁴ is a foreign official is a fact-based inquiry based on the totality of the circumstances.⁴⁵ Because SOEs are a primary feature of many TPP members’ economies,⁴⁶ potentially labeling all employees of an SOE as “foreign officials” disincentivizes U.S. corporations from investing in the region, because all such individuals could be potential sources of FCPA liability.

The purpose of this Article is to provide a *realpolitik* argument for why the TPP furthers the U.S.’s geopolitical objectives in the Pacific Rim, to define how the U.S.’s enforcement of the FCPA undercuts those

38. See SHEARMAN & STERLING LLP, FCPA DIGEST, at i (2011), available at <http://www.shearman.com/~media/Files/Old-Site-Files/FCPADigestJan2011.pdf>.

39. Paul T. Friedman et al., 2010: *Another Record-Breaking Year for FCPA Enforcement, Confirming “New Era”*, MORRISON & FOERSTER LLP (Jan. 12, 2011), <http://www.mofo.com/files/Uploads/Images/110112-FCPA-Enforcement.pdf>.

40. Kevin Lombardo & Ginny Gomez, *Anti-Corruption Programs are Critical for All Companies Doing Business Internationally*, in INTERNATIONAL BRIBERY: FCPA UPDATE 2011, at 1 (2011).

41. *Hearing on the Foreign Corrupt Practices Act Before the H. Jud. Comm., Subcomm. on Crime, Terrorism & Homeland Sec.*, 112th Cong. 1 (2011) (testimony of George J. Terwilliger III, Esq.), available at http://judiciary.house.gov/_files/hearings/pdf/Terwilliger06142011.pdf.

42. U.S. DEP’T OF JUSTICE & SEC. & EXCH. COMM’N, *supra* note 37, at 5.

43. The markets in question for the purposes of this article are the majority of the Asian countries negotiating the TPP: Brunei, Japan, Malaysia, South Korea, and Vietnam. See also TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX 2014 (2014), available at <http://www.transparency.org/cpi2014/results>. Transparency International’s perceptions index is considered the gold standard for tracking global corruption.

44. SOEs are “business entities established by central and local governments and whose supervisory officials are from the government.” See OECD WORKING GROUP ON PRIVATISATION & CORPORATE GOVERNANCE OF STATE OWNED ASSETS, STATE OWNED ENTERPRISES IN CHINA: REVIEWING THE EVIDENCE 3 (2009), available at <http://www.oecd.org/daf/ca/corporategovernance/ofstate-ownedenterprises/42095493.pdf>.

45. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2006).

46. See JOHNSON ET AL., *supra* note 26, at 42.

objectives, and to recommend reforms to the FCPA that will align its enforcement with the policy objectives of the TPP. This Article proceeds in four parts. Part I establishes the basis of U.S. economic hegemony show why the U.S. is moving away from the Bretton Woods regulatory order toward FTAs. It also establishes why the rise of Chinese hegemony is a challenge to U.S. interests in the region. Part II contextualizes competing U.S. and Chinese strategies that use FTAs to design the economic architecture of regional trade, and establishes the basis for why the TPP is a critical tool for achieving the U.S.'s geopolitical objective of forestalling Chinese hegemony. Part III establishes how the U.S.'s enforcement of the FCPA undercuts this geopolitical objective and, therefore, argues that the language of the FCPA should be amended to align its enforcement with this objective. Part III thus proposes the following recommendations for fixing the FCPA: (1) amend the FCPA to provide a safe harbor provision for those companies who voluntarily conduct internal investigations, disclose potential violations, and cooperate with government investigations; (2) prohibit the barring of an indicted company from doing business with the U.S. without a conviction; and (3) clarify the FCPA's definitions of "anything of value," "instrumentality," and "foreign official." These reforms would align the FCPA's enforcement regime with the geopolitical objective of the TPP, which is to counterbalance China's efforts to create a hegemonic alternative to the U.S. in the Pacific Rim.

I. THE VISIBLE HAND OF THE MARKET

A. *The Rise of American Hegemony*

There is consensus that protectionist trade policies distort markets and are anathema to the global free trade⁴⁷ ideology that lies at the heart of American power.⁴⁸ However, there is little acknowledgment that the rise of American hegemony is rooted in intentionally designed protectionist trade policies that distorted global markets in favor of U.S. economic interests.⁴⁹ Indeed, in the mid-nineteenth century, the U.S. was one of the most protectionist nations in the world.⁵⁰ Speaking to a crowd of Pennsylvania citizens and their representatives on the way to his inauguration in February 1861, then-President-elect Lincoln advocated for the protective tariff:

47. For the purposes of this Article, "free trade" is synonymous with "trade liberalization."

48. See Lind, *supra* note 1.

49. See *id.*

50. See *id.*

[I]f I have any recommendation to make, it will be that every man who is called upon to serve the people in a representative capacity, should study this whole subject thoroughly, as I intend to do myself, looking to all the varied interests of our common country, so that when the time for action arrives adequate protection can be extended to the coal and iron of Pennsylvania, the corn of Illinois and the “reapers of Chicago.” Permit me to express the hope that this important subject may receive such consideration at the hands of your representatives, that the interests of no part of the country may be overlooked, but that all sections may share in common the benefits of a just and equitable tariff.⁵¹

While Lincoln occupied the White House, Congress passed tariff increase after tariff increase, and Lincoln signed each increase into law.⁵² Rates reached unprecedented heights, which galvanized American industry.⁵³ One repercussion of the confluence between the protective tariff and American industrialization was a dramatic increase in the manufacturing capacity of the North as it labored to meet growing military needs during the American Civil War.⁵⁴ Protectionist policies were so firmly fixed in the U.S. political zeitgeist that premiere academic institutions often zealously promoted them. For instance, Philadelphia industrialist Joseph Wharton founded the nation’s first business school in 1881. Providing his rationale for founding the school, Wharton argued that antiprotectionist, global free trade was a “fungus . . . a source of infection which healthy political organisms can hardly afford to tolerate.”⁵⁵ In the deed of his gift to the Wharton School of Finance and Economy at the University of Pennsylvania, Wharton specified that the school must teach “how by craft in commerce one nation may take the substance of a rival and maintain for itself [a] virtual monopoly of the most profitable and civilizing industries.”⁵⁶ Furthermore, Wharton made his gift conditional:

51. 4 ROY P. BASLER, *COLLECTED WORKS OF ABRAHAM LINCOLN* 210–15 (New Brunswick: Rutgers Univ. Press, 1953).

52. See *Abraham Lincoln and the Tariff*, ABRAHAM LINCOLN’S CLASSROOM, <http://abrahamlincolnclassroom.org/abraham-lincoln-in-depth/abraham-lincoln-and-the-tariff/> (last visited June 1, 2015).

53. GABOR S. BORITT, *LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM* 209 (Gabor S. Boritt ed., 1988).

54. See *Abraham Lincoln and the Tariff*, *supra* note 52.

55. ECKES, JR., *supra* note 2, at 34.

56. LIAH GREENFELD, *THE SPIRIT OF CAPITALISM: NATIONALISM AND ECONOMIC GROWTH* 469 (2001).

“[t]he right and duty of national self-protection must be firmly asserted and demonstrated” by the school.⁵⁷

Despite the free trade ideology accepted as an article of faith⁵⁸ by America’s political establishment over the past fifty years,⁵⁹ the objective of American trade policy has never been the creation of a global free market as such. Rather, the objective has been the creation of an integrated global system that reinforces American economic power⁶⁰—a goal that is as “constant as the northern star.”⁶¹ Indeed, since World War II, this agenda manifested on both an economic and geopolitical scale.⁶² The U.S. exhibited one of the most important characteristics required of an economic hegemon at the end of World War II.⁶³ Namely, it possessed the financial dominance that provides a rising power with both the greatest incentive and the greatest capacity to advance a global trade agenda.⁶⁴ As the world’s most productive economy, it was the most likely to benefit from global market penetration.⁶⁵ As the world’s largest source of both supply and demand for capital, it was also the most likely to exploit open capital markets.⁶⁶ With these attributes, American power could be used to enfold the economies of a majority of the world’s nations, compel most of the remainder, and isolate the dissenting few.⁶⁷ It was in this context that the Bretton Woods regulatory order was forged.

57. WILLIAM J. BARBER, *ECONOMISTS AND HIGHER LEARNING IN THE NINETEENTH CENTURY* 227 (1993).

58. See Renata Salecl, *Worries In A Limitless World*, 26 *CARDOZO L. REV.* 1139, 1150 (2005) (arguing that “some today are stating that the Market appears as a new God and anyone opposed to the dogma of the free market economy is quickly called a heretic”).

59. See Lind, *supra* note 1.

60. See generally KLEIN, *supra* note 8.

61. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* act 3, sc. 1; see also ANDREW J. BACEVICH, *AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY* (2002); ANDREW J. BACEVICH, *WASHINGTON RULES: AMERICA’S PATH TO PERMANENT WAR* (2010); CHRISTOPHER LAYNE, *THE PEACE OF ILLUSIONS: AMERICAN GRAND STRATEGY FROM 1940 TO THE PRESENT* (2006); JAMES PECK, *IDEAL ILLUSIONS: HOW THE U.S. GOVERNMENT CO-OPTED HUMAN RIGHTS* (2011); Michael Desch, *America’s Liberal Illiberalism: The Ideological Origins of Overreaction in U.S. Foreign Policy*, 32 *INT’L SECURITY* 7 (2008).

62. See sources cited *supra* note 61.

63. John Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *INT’L ORG.* 379, 382 (1982); see also Bruce E. Moon, *The United States and Globalization: Struggles with Hegemony*, in *POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER* 431–32 (Richard Stubbs & Geoffrey R. D. Underhill eds., 3d ed. 2005).

64. Ruggie, *supra* note 63.

65. *Id.*

66. *Id.*

67. *Id.* For a characterization of the free market character of “Anglo-Saxon” capitalism, see James Fallows, *How the World Works*, *ATLANTIC MONTHLY*, Dec. 1993, at 61–87, available at <http://www.theatlantic.com/magazine/archive/1993/12/how-the-world-works/305854/>; see also *infra*

B. The Rise and Fall of the Bretton Woods Regulatory Order

In response to the desolation of World War II, the Bretton Woods institutions were created to prevent future economic crises by providing the regulatory scaffolding necessary to bolster the global economy.⁶⁸ The World Bank was created to make “long-term investments in development” to liberate countries from the conditions of poverty, while the IMF promoted economic policies calculated to reduce the “financial speculation and market volatility” at the root of economic crises.⁶⁹ In this new paradigm, when a country teeters on economic collapse, the IMF provides the stabilizing grants and loans necessary to ward it off.⁷⁰ One of the founders of the Bretton Woods institutions, John Maynard Keynes,⁷¹ believed that as long as the institutions adhered to these founding principles, “the brotherhood of man will have become more than a phrase.”⁷² That brotherhood, however, soon proved to be dysfunctional.

From the beginning, the Bretton Woods institutions did not allocate decisionmaking power based upon egalitarian principles such as “one country, one vote,” as is the case in the United Nations General Assembly.⁷³ Rather, they allocate power based upon the size of each member country’s economy. This places the U.S. at the top of the decisionmaking hierarchy. Indeed, the effect of this arrangement provides the U.S. with

Part I.B. (discussing how the Bretton Woods international order affected the relationship between nations).

68. Protectionism began to lose its luster in the wake of the Great Depression and World War II. American and other Western economists, diplomats, and politicians blamed economic nationalist policies, particularly the Smoot-Hawley Tariff of 1930 and protectionist measures enacted in response in other countries, for creating a trade war at a time when international cooperation was necessary to stave off world-wide financial collapse. Economic nationalism led to militarism and eventually war, so the argument went. That argument led to the adoption of a liberal trade policy among Western nations first coherently institutionalized under the Bretton Woods institutions, which sought to stabilize the international monetary system and promote freer trade. As Harry Dexter White, the architect of the Bretton Woods system, put it, “The absence of a high degree of economic collaboration among the leading nations will . . . inevitably result in economic warfare that will be but the prelude and instigator of military warfare on an even vaster scale.” See BRUCE JONES ET AL., *POWER AND RESPONSIBILITY: BUILDING INTERNATIONAL ORDER IN AN ERA OF TRANSNATIONAL THREATS* 234 (2009); KLEIN, *supra* note 8, at 222–23 (noting that the Bretton Woods institutions were “financed through contributions by their initial forty-three member countries, [and] were given the explicit mandate to prevent future economic shocks”); see also Lind, *supra* note 1 and accompanying text; *supra* note 2 and accompanying text.

69. See KLEIN, *supra* note 8.

70. *Id.* at 223–24.

71. *Id.* at 224.

72. JOHN MAYNARD KEYNES, *Speech by Lord Keynes in Moving to Accept the Final Act at the Closing Plenary Session, Bretton Woods, 22 July 1944*, in 26 *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES* 103 (Donald Moggridge ed., 1980).

73. See KLEIN, *supra* note 8, at 223.

the singular ability to influence global trade to enhance its economic position relative to other nations.⁷⁴ This frame of reference is called “the Washington Consensus” (Consensus).⁷⁵ The Consensus enabled the promulgation of antiprotectionist, global free trade policies that Joseph Wharton believed constituted a “fungus”⁷⁶ that then spread uninhibited across the globe.⁷⁷ Indeed, the former chief economist of the World Bank, and one of the last to fall in line with this antiprotectionist ideology, Joseph Stiglitz, argued that “Keynes would be rolling over in his grave were he to see what has happened to his child.”⁷⁸

For example, each Latin American and African country that approached the IMF for a major loan was informed that it needed to restructure its entire economy.⁷⁹ Operating under the auspices of trade liberalization, privatization and antiprotectionist trade policies were packaged into the requested loans.⁸⁰ Given the weaker bargaining position of the poorer countries, this practice was highly effective in compelling them to accept the policies selected for them by the Consensus.⁸¹ In country after country, international debt crises were methodically leveraged to advance trade liberalization.⁸²

Strikingly, economists at the Bretton Woods institutions admitted during this period that the trade liberalization ideology had nothing to do with ending economic crises—all the while claiming that these poorer countries freely converted to this ideology, accepting the Consensus as

74. See KLEIN, *supra* note 8 and accompanying text.

75. See KLEIN, *supra* note 8, at 223–25 (noting that what constituted these economic policies was considered to be the bare minimum for the economic health of nations, such as the principle that “state enterprises should be privatized” and that “barriers impeding the entry of foreign firms should be abolished”). The completed list of policies firmly established the principles of “privatization, deregulation/free trade, and drastic cuts to government spending.” *Id.*

76. See ECKES, JR., *supra* note 55; see also KLEIN, *supra* note 8, at 224–25. Klein characterizes these policies as a type of shock therapy to countries seeking debt relief and emergency loans:

Officials with the World Bank and the IMF had always made policy recommendations when they handed out loans, but in the early eighties, emboldened by the desperation of developing countries, those recommendations morphed into radical free-market demands. When crisis-struck countries came to the IMF seeking debt relief and emergency loans, the fund responded with sweeping shock therapy programs.

Id.

77. KLEIN, *supra* note 8, at 224–25.

78. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 13 (2002).

79. See KLEIN, *supra* note 8, at 224–25.

80. *Id.* at 225–26.

81. *Id.*

82. *Id.*

the one true path to economic stability and democracy.⁸³ Indeed, the IMF senior economist who designed the trade liberalization policies of Latin America and Africa throughout the eighties, Davison Budhoo, later admitted that “everything we did from 1983 onward was based on our new sense of mission to have [poorer countries] ‘privatised’ or die; towards this end we ignominiously created economic bedlam in Latin America and Africa.”⁸⁴ Quite often, these policies had the effect of further destabilizing the societies of poorer nations.⁸⁵ By the turn of the twenty-first century, however, the Consensus began to lose its ability to design and enforce rules that maintained American economic hegemony.⁸⁶ Indeed, unlike the U.S. that existed after World War II, the U.S. of the twenty-first century no longer found itself as the sole “Great Power,”⁸⁷ free to write the rules of the game to enhance its economic position relative to other nations.⁸⁸

83. *Id.* Detailing the differences between the rhetoric and reality of rescuing poor countries from economic collapse, Klein summarizes the economists’ acknowledgement of the modus operandi of the Bretton Woods institutions: “Here was an acknowledgement, made inside the Washington establishment, that developing countries were submitting to them only through a combination of false pretenses and bald extortion: Want to save your country? Sell it off.” *Id.*

84. See DAVISON L. BUDHOO, ENOUGH IS ENOUGH: DEAR MR. CAMDESSUS—OPEN LETTER OF RESIGNATION TO THE MANAGING DIRECTOR OF THE INTERNATIONAL MONETARY FUND 102 (1990); see also KLEIN, *supra* note 8, at 226–27 (noting that Dani Rodrik, “a renowned Columbia University economist who worked extensively with the World Bank,” explained that these free trade policies “had no direct link with creating stability”).

85. See KLEIN, *supra* note 8 and accompanying text.

86. See, e.g., MICHAEL MOFFITT, THE WORLD’S MONEY: INTERNATIONAL BANKING FROM BRETTON WOODS TO THE BRINK OF INSOLVENCY 13–40 (1983) (describing the rise and fall of the Bretton Woods system); see also Peter M. Garber, *The Collapse of the Bretton Woods Fixed Exchange Rate System*, in A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM 461–63 (Michael D. Bordo & Barry Eichengreen eds., 1993); David Hammes & Douglas Wills, *Black Gold: The End of Bretton Woods and the Oil-Price Shocks of the 1970s*, 9 INDEP. REV. 501 (2005).

87. This is a term of art often used in political science and international relations literature. It understands a nation’s strength in material terms by measuring both economic and military strength. Nations who have more power relative to other nations are considered superpowers. See Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1, 20 (2007) (“Few States have the material power Those states that do—the great powers—are rational, self-interested actors that also enforce international law according to their self-interests.”).

88. See, e.g., William A. Lovett, *Beyond Doha: Multipolar Challenges for a Globalized World*, 17 TUL. J. INT’L & COMP. L. 3 (2008) (arguing that from the perspective of U.S. trade policy, the United States is moving from an era defined by its being the world’s preeminent economic power to an era marked by a multipolar distribution of economic power).

C. The Chinese Challenge

After spending nearly two centuries as a minor actor on the world stage, China is now emerging as one of the world's Great Powers. Former U.S. Ambassador to China, Charles W. Freeman, notes that China

believes, with some justification, that for most of its history it was the largest, wealthiest, best governed, and technologically most advanced society on the planet. China brims with confidence that it can regain this status, which it considers the natural order of affairs, and that it will do so in this century.⁸⁹

Over the next few decades, China's reemergence as the Pacific Rim's regional hegemon represents the primary geopolitical challenge to U.S. interests in the region.⁹⁰ Should China's geopolitical influence continue to grow during this period, the world will witness

the largest shift in the global distribution of power since the rise of the United States in the late 19th and early 20th centuries. If China in the next 10 to 15 years surpasses the United States as the world's largest economy, it will mark the first time in centuries that the world's economic leader will be non-English speaking, non-Western, and non-democratic.⁹¹

Many Chinese elites believe that by 2021, China will surpass the U.S. as the world's largest economy.⁹² If efficiently managed, this new-found economic power will shape the region's geopolitics in China's favor. China's paramount leader, President Xi Jinping, openly advocates for the realization of a "Chinese dream" that culminates in "the great rejuvenation of the Chinese nation."⁹³ The Chinese dream is that by 2049, China will restore itself as the regional hegemon.⁹⁴

In his March 2014 press briefing, China's Foreign Minister, Wang Yi, described "mutual respect" between the U.S. and China as the founding principle of the new era in Great Power politics. Yi, however, defines the phrase, "mutual respect," as deference to "each other's sovereignty

89. Ambassador Charles W. Freeman, Jr., *China's Challenge to American Hegemony: Remarks to the Global Strategy Forum* (Jan. 20, 2010) (discussing the relative rise and fall of Chinese and U.S. hegemony).

90. See JOHNSON ET AL., *supra* note 26 and accompanying text.

91. *Id.* at 1.

92. *Id.* at 2.

93. See Gracie, *supra* note 23 (detailing President Xi Jinping's remarks at an October 2014 top level Communist Party meeting in Beijing at which he set out his vision for Chinese governance); see also Zhao Yanan, 'Chinese Dream' is Xi's Vision, CHINA DAILY (Mar. 18, 2013), http://www.chinadaily.com.cn/china/2013npc/2013-03/18/content_16315025.htm.

94. See JOHNSON ET AL., *supra* note 26, at 18.

and territorial integrity, social system and development path, and core interests and concerns,” making no reference to the U.S.’s strategic interests in the region concerning adherence to the international rule of law, customs, and norms.⁹⁵ President Xi and the Communist Party are inching ever closer to the great rejuvenation of the Chinese dream.⁹⁶ This vision was stated boldly in May 2014 when President Xi delivered a speech on Asian security.⁹⁷ In this speech, Xi states, “It is for the people of Asia to run the affairs of Asia . . . and uphold the security of Asia.”⁹⁸ Former U.S. Secretary of State and Secretary of Defense Henry Kissinger notes that China is not accustomed to an egalitarian system of equal states, arguing, “[Historically], China considered itself, in a sense, the sole sovereign government of the world. . . . Diplomacy was not a bargaining process between multiple sovereign interests but a series of carefully contrived ceremonies in which foreign societies were given the opportunity to affirm their assigned place in the global hierarchy.”⁹⁹

Today, China’s rising economic and geopolitical power also comes in the form of newly created multilateral institutions, which mirror the Bretton Woods institutions, but where China sits as the chief member. In July 2014, China signed an agreement with Brazil, Russia, India, and South Africa to create the New Development Bank (NDB) which, like

95. For instance, in 2010, China’s exponentially increasing military budget and naval modernization aroused fears among its ASEAN neighbors, especially in view of the territorial disputes in the South China Sea. Concern about China’s military ambitions led neighboring ASEAN countries, particularly Vietnam, to try to “internationalize” the dispute. Comments by then-U.S. Secretary of State Hillary Clinton in 2010 indicating that “the United States would be willing to facilitate multilateral talks on the issue,” elicited a furious response from Beijing, charging that the United States was interfering in the issue. MELISSA MURPHY & WEN JIN YUAN, CTR. FOR STRATEGIC & INT’L STUDIES, REGIONAL MONETARY COOPERATION IN EAST ASIA: SHOULD THE UNITED STATES BE CONCERNED? (May 14, 2012), available at http://csis.org/files/publication/101129_Yuan_Regional_Coop_WEB.pdf; see also *Foreign Minister Wang Yi Meets the Press*, MINISTRY OF FOREIGN AFF. OF PEOPLE’S REPUBLIC OF CHINA (Mar. 8, 2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1243662.shtml.

96. See JOHNSON ET AL., *supra* note 26, at 31 (“Today China accounts for roughly half of overall economic activity in East Asia and has become the world’s largest merchandise trader. The country is expected to contribute the single largest share of any country to global and regional growth in 2014, and it is forecast that more than US\$1 trillion of Chinese FDI will flow abroad by 2020, much of it to China’s periphery.”); Yinan, *supra* note 93; see also Denny Roy, *More Security for Rising China, Less for Others*, ASIA PACIFIC ISSUES, Jan. 2013, available at <http://www.eastwestcenter.org/system/tdf/private/api106.pdf?file=1&type=node&id=33843>.

97. The speech was delivered at the Conference on Interaction and Confidence Building Measures. See *Xi Jinping Presides Over the Summit and Delivers Important Speech*, CICA-CHINA.ORG, http://www.cica-china.org/eng/yxxw_1/t1170126.htm (last visited Aug. 28, 2015).

98. See President Xi Jinping, Remarks at the CICA Shanghai Summit (May 21, 2014), available at http://www.china.org.cn/chinese/2014-06/03/content_32561159_2.htm.

99. HENRY A. KISSINGER, WORLD ORDER 213–14 (2014).

the Bretton Woods institutions, will provide loans and liquidity to its member nations.¹⁰⁰ Three months later, China inaugurated the Asian Infrastructure Investment Bank (AIIB), which now includes over forty nations.¹⁰¹ The U.S. views the AIIB as a deliberate attempt to undermine both the Asian Development Bank (ADB),¹⁰² whose decisions are steered by the U.S.,¹⁰³ and the World Bank.¹⁰⁴ There is little doubt that the creation of these new institutions reflects China's growing power, disdain for the Bretton Woods international order,¹⁰⁵ and its will to use its increasing influence for both economic and geopolitical purposes.¹⁰⁶ The U.S. views these institutions as political levers that allow China to pull its neighbors within its geopolitical and economic sphere of influence while defying Western world order ideas, institutions, and rules of the game.¹⁰⁷

100. The NDB headquarters is located in Shanghai and operates much like the World Bank. The NDB has \$50 billion in initial capital, mostly financed by China, through which it will finance infrastructure and development. The NDB also created an emergency reserve fund named the Contingent Reserve Arrangement (CRA) which operates much like the IMF. The CRA has \$100 billion in initial capital, also mostly financed by China, and will be a source of financial assistance for those signatory countries that are in financial need. See Jonathan Watson, *Sign of the Times: Financial Governance Must Reflect Reality*, IBA GLOBAL INSIGHT, Dec. 2014–Jan. 2015, at 40, 46, available at 38 IBA GLOBAL INSIGHT 40 (Westlaw).

101. Jackie Northam, *Dozens of Countries Join China-Backed Bank Opposed by Washington*, NPR (Mar. 31, 2015), <http://www.npr.org/blogs/thetwo-way/2015/03/31/396604082/dozens-of-countries-join-china-backed-bank-opposed-by-washington>.

102. Like the World Bank and IMF, the ADB was created after World War II to establish the global financial order. Notably, China has pledged one hundred billion dollars in initial capital. See Perlez, *supra* note 6.

103. See generally Mona M. Lyne et al., *Controlling Coalitions: Social Lending at the Multilateral Development Banks*, 4 REV. INT'L ORG 407 (2009); Christopher Kilby, *Donor Influence in Multilateral Development Banks: The Case of the Asian Development Bank*, 1 REV. INT'L ORG. 173 (2006); see also *supra* Part I.B.

104. See sources cited *supra* note 104; see also *supra* Part I.B.

105. See Perlez, *supra* note 6 (discussing the major motivation for China's initiatives in creating parallel institutions to the Bretton Woods international order).

106. China is willing to put up substantial amounts of money to fuel its efforts to increase its geopolitical influence in all organizations that help shape international discourse on the economic rules of the game. "China is doing it to increase its say; it's playing the part of investor in many international organizations in the hope of being able to formulate things, even rewrite the rules of the game" See Didi Kirsten Tatlow, *BRIC, BRICS or BRICSI? The Growing Challenge*, INT'L HERALD TRIB. RENDEZVOUS BLOG (Mar. 31, 2013 1:43 AM), <http://rendezvous.blogs.nytimes.com/2013/03/28/first-bric-then-brics-now-bricsi-the-world-financial-orders-challenge/>; see also JOHNSON ET AL., *supra* note 26.

107. See Perlez, *supra* note 6. For example, Perlez notes that the U.S. concluded the AIIB will "fail to meet environmental standards, procurement requirements and other safeguards adopted by the World Bank and the Asian Development Bank, including protections intended to prevent the forced removal of vulnerable populations from their lands." *Id.*

II. REALPOLITIK AND THE RISE OF FREE TRADE AGREEMENTS

A. The Zero-Sum Game of FTAs

Given the discrediting of the Bretton Woods international order and the trade liberalization policies that it enforces,¹⁰⁸ countries are now pulling away from this flawed system and towards a system of FTAs.¹⁰⁹ Notably, these new FTAs contain the very type of protectionist trade policies that galvanized the rise of U.S. hegemony.¹¹⁰ FTAs are evolving into an increasingly critical platform for writing the rules of the game, and they are increasingly viewed as key instruments in establishing diplomatic relationships.¹¹¹ FTAs have so permeated the conduct of international

108. See discussion *supra* Part I.B.

109. See William P. Kratzke & Dmitri Titoff, *Russia and the WTO: Realpolitik by the Rules of Free Trade*, 44 U. MEM. L. REV. 633, 641 (2014) (noting the growing force of FTAs, which began to proliferate in the late twentieth century); see also LIZ BROWSELL, *ADVOCATES FOR INT'L DEV., BILATERAL AND REGIONAL TRADE AGREEMENTS* 6 (2012), available at <http://a4id.org/sites/default/files/user/Bilateral%20and%20Regional%20Trade%20Agreements.pdf>. Brownsell argues:

The increase in the number of bilateral and regional trade agreements in recent years has occurred despite the existence of the WTO and the [Bretton Woods international order]. One explanation for this is that the WTO has become increasingly slow and comparatively ineffective as a means of establishing a system of free trade between countries.

Id.; Edward T. Hayes, *Department Recent Development ADR to Taxation*, LA. B.J., Dec. 2014-Jan. 2015, at 323, 323, available at 62 LA. B.J. 323 (Westlaw). Hayes discusses the fragile current status of the WTO, a cousin to the Bretton Woods international order, and its effects on the development of FTAs:

The [WTO] entered full crisis mode after its Members failed to adopt the Protocol of Amendment to add the Trade Facilitation Agreement (TFA) to the WTO Agreements.

. . . The failure to adopt the TFA is widely seen as fatal to the long-suffering Doha Development Agenda, which was launched in 2001. Since that time, the Members have completely failed to achieve any progress on the Doha issues. . . . The damage is now done and the WTO's role as a negotiating forum could be over as WTO members will continue to move away from multilateral trade negotiation to . . . bilateral and regional [FTAs].

Id.; *Regional Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Apr. 5, 2015) (noting the rise of FTAs to set the rules of global trade); see discussion *supra* Part I.A.

110. See generally Anne O. Krueger, *Free Trade Agreements as Protectionist Devices: Rules of Origin* (Nat'l Bureau of Econ. Res., Working Paper No. 4352, 1993), available at <http://www.nber.org/papers/w4352.pdf> (arguing that there is a protectionist bias inherent in FTAs). FTAs lowers tariffs between signatory countries, though allows for tariffs on non-signatory countries. *Id.*

111. See, e.g., Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 6 (2005) (evolution of trade agreements from essentially political to more regulatory); see also Stephen Joseph Powell & Ludmila Mendonça Lopes Ribeiro, *Managing the Rule of Law in the Americas: An Empirical Portrait of the Effects of 15 Years of WTO, Mercosul, and NAFTA Dispute Reso-*

business that Jagdish Bhagwati of Columbia University refers to their amalgamation as a “spaghetti bowl”¹¹² of FTAs. Today, there are over six hundred regional and bilateral trade agreements worldwide that constitute a “maze of free-trade areas.”¹¹³ For the U.S., FTAs represent both an opportunity to geopolitically hedge against the disintegration of the Bretton Woods regulatory order and to repair the frayed diplomatic relationships that often lie in the wake of the trade liberalization policies that it promulgated. For those poorer nations whose economic crises were related to the requirements of the Consensus, FTAs prove to be a far more sound economic policy than blind reliance on a trade liberalization ideology. The North American Free Trade Agreement (NAFTA),¹¹⁴ for example, represents this trend. It erodes the trade liberalization ideology that lies at the heart of the Bretton Woods regulatory order.¹¹⁵

lution on Civil Society in Latin America, 42 U. MIAMI INTER-AM. L. REV. 197, 198 (2011) (trade dispute settlement contributes to the management and perfection of the rule of law in support of democratic governance for civil societies in Latin America). See generally Patrick Specht, *The Dispute Settlement Systems of WTO and NAFTA—Analysis and Comparison*, 27 GA. J. INT’L & COMP. L. 57 (1998).

112. Jagdish N. Bhagwati, *U.S. Trade Policy: The Infatuation Free Trade Areas*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1–2 (1995).

113. Paul Sarlo, *The Spagetti Bowl Revisited in the Context of Corruption: Understanding How Corrupt Countries Could Subvert the WTO’s Rule-Oriented System Through Preferential Trade Agreements*, 43 DENV. J. INT’L L. & POL’Y 1, 1 (2014). See generally MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW (1st ed. 2013).

114. NAFTA is one of the most well-known free trade zones, with parties to the agreement being Canada, the U.S., and Mexico. *North American Free Trade Agreement (NAFTA)*, OFFICE OF U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Mar. 31, 2015). By way of example, if Canada desired to import goods from the United States, those goods would be imported tariff free as long as they meet NAFTA origin requirements. To be eligible for tariff-free treatment under NAFTA, goods must originate in a NAFTA country. This scheme prevents NAFTA signatories from importing goods from non-NAFTA countries, then trading those goods within the free trade zone without the signatories being able to assess tariffs on those goods. *Id.*

115. *Id.*; see also BROWNSSELL, *supra* note 109, at 10. Brownsell notes:

It seems clear that NAFTA has played an important role in increasing trade between its member countries. However, an important question in relation to world trade is whether this increase is a global one or whether the increase actually represents trade diversion (i.e. diversion of trade away from non-member countries, rather than a genuine increase in trade). NAFTA contains restrictive rules of origin, which are very protectionist in nature

Id.; JEFFREY J. SCHOTT & GARY CLYDE HUFBAUER, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 23 (2005) (arguing that “in a few industries, most notably textiles and apparel where ‘yarn forward’ rules of origin were imposed specifically to make US textile firms the preferred suppliers for Mexican apparel manufacturers, NAFTA has indeed fostered trade diversion”); John C. Thomure, Jr., *The Uneasy Case for The North American Free Trade Agreement*, 21 SYRACUSE J. INT’L L. & COM. 181 (1995) (noting that NAFTA is likely to hinder the global free trade agenda); see also discussion *infra* Part I.B.

For the United States, NAFTA represents an economic opportunity to capitalize on a growing export market to the south and a geopolitical opportunity to repair a Mexican relationship frayed by the Consensus.¹¹⁶ The agreement opens doors for U.S. exporters who faced Mexican industrial tariffs five times higher on average than U.S. tariffs.¹¹⁷ In 2010, the United States reported \$918 billion in trade with Canada and Mexico.¹¹⁸ As for job growth, the director at the Center for North American Studies at American University, Robert Pastor, argues that despite grim predictions, the largest job growth in the U.S. occurred after NAFTA was signed. He argues, “The period of greatest growth in trade among the N[AFTA] countries coincided with the period of the largest growth in employment, of jobs in the United States, 23 or 24 million jobs.”¹¹⁹ For Mexico, NAFTA represents an exit from the calamitous debt crisis of the 1980s.¹²⁰ NAFTA provides Mexican exporters with additional market access and helps to attract foreign direct investment (FDI). At the end of 1999, Mexico was the eighth largest export economy in the world and, by the end of 2000, became the fifth largest export economy in the world. During the nineties, Mexico’s exports to the United States rose 160 percent.¹²¹ Despite the results, however, there are many who still oppose the signing of NAFTA.¹²²

Criticism of FTAs notwithstanding,¹²³ the recalibration of global trade rules that they represent is a manifestation of geopolitical realities that dwarf such critiques.¹²⁴ Currently, the *realpolitik* concern for the U.S. is the great rejuvenation of the Chinese dream in the Pacific Rim.¹²⁵

116. See SCHOTT & HUFBAUER, *supra* note 115 and accompanying text.

117. *Id.*

118. See Julián Aguilar, *Twenty Years Later, NAFTA Remains a Source of Tension*, N.Y. TIMES (Dec. 13, 2011), <http://www.nytimes.com/2012/12/07/us/twenty-years-later-nafta-remains-a-source-of-tension.html>.

119. *Id.*

120. See BROWNSSELL, *supra* note 109.

121. See *Treaties - Post-World War II Collective Trade Agreements*, ENCYCLOPEDIA OF NEW AM. NATION, <http://www.americanforeignrelations.com/O-W/Treaties-Post-world-war-ii-collective-trade-agreements.html> (last visited Mar. 31, 2015).

122. See Aguilar, *supra* note 118. Aguilar notes that “critics of NAFTA say it has resulted in a loss of United States manufacturing and shipping jobs and in less production oversight. They say N[AFTA] has also displaced Mexican agricultural workers into other sectors or forced them to immigrate illegally to the United States.” *Id.*

123. *Id.*

124. See Kratzke & Titoff, *supra* note 109, at 643 (arguing that “trade policy is a function of political pressures, not calculations of consumer welfare, as some might believe”).

125. See JOHNSON ET AL., *supra* note 26, at 18–19 (discussing the geopolitical ambitions of China); see also Gracie, *supra* note 23.

In this geopolitical reality, China also pursues its great rejuvenation through a web of FTAs in the Pacific Rim.¹²⁶ These agreements recalibrate the framework of regional trade in a way that improves China's position relative to other nations.¹²⁷ Speaking at the Third ASEAN+3¹²⁸ Informal Summit in November 1999, then-Chinese Vice Premier, Zhu Rongji, proclaimed, "China cannot develop without East Asia, neither can East Asia prosper without China. As a member of East Asia, China attaches great importance to increased cooperation with other countries in East Asia."¹²⁹ Consistent with this vision, Zhu proposed a China-ASEAN FTA, the first such agreement between ASEAN and an outside partner.¹³⁰ Critical to the successful operationalization of the FTA was an "early harvest" provision, whereby China agreed to unilaterally reduce tariffs in a number of key areas five years before the agreement was to fully take effect, and a decade before the members had to end their tariffs for Chinese imports.¹³¹ It is the hope of ASEAN members that an ASEAN-centric regional architecture will socialize China into norms of regional dispute resolution, rulemaking, and legal compliance.¹³² ASEAN members, however, now recognize that China, like the United States at a similar stage of economic development,¹³³ uses its size to dominate its regional relationships through regional structures that China dominates.¹³⁴

126. See FUJITSU RESEARCH INST., *supra* note 7.

127. Such agreements also provide for FDI opportunities. See Larry Catá Backer, *Michael Komesaroff on Chinese Investments in Afghanistan and the Changing Face of Global Mining*, LAW AT END OF DAY (Mar. 17, 2013), <http://lcbackerblog.blogspot.com/2013/03/michael-komesaroff-on-chinese.html>.

128. ASEAN+3 constitutes the addition of three member states to ASEAN10: China, Japan, and South Korea. See *ASEAN Plus Three Cooperation*, ASS'N OF SE. ASIAN NATIONS, <http://www.asean.org/news/item/asean-plus-three-cooperation-2> (last visited June 13, 2015).

129. Premier Zhu Rongji of the People's Republic of China, Address at the Third ASEAN+3 Informal Summit (Nov. 28, 1999), *available at* <http://www.asean.org/news/item/address-by-premier-zhu-rongji-of-the-people-s-republic-of-china-at-the-third-asean3-informal-summit-28-november-1999>.

130. The initial framework agreement of this agreement was signed in November 2002. ASEAN SECRETARIAT, ASEAN'S FREE TRADE AGREEMENTS (2013), *available at* http://www.jtrc.or.jp/koku/koku_semina/pdf/130306_presentation01.pdf.

131. The "early harvest" proposal included tariff reductions on 600 key agricultural products that went into effect in 2005. See ASEAN, FRAMEWORK AGREEMENT ON COMPREHENSIVE ECONOMIC COOPERATION BETWEEN THE ASSOCIATION OF SOUTH EAST ASIAN NATIONS AND THE PEOPLE'S REPUBLIC OF CHINA (2002), *available at* <http://www.worldtradelaw.net/fta/agreements/aseanchinafta.pdf>.

132. See JOHNSON ET AL., *supra* note 26, at 42.

133. See discussion *supra* Part I.A.; discussion *supra* Part I.B.

134. See discussion *supra* Part I.C. (detailing China's creation of institutions parallel to those of the Bretton Woods institutions, which are primarily used to extend China's reach in the region).

Southeast Asian nations also see that China has no intention of supporting a strong and integrated ASEAN, as is envisioned in the group's charter.¹³⁵ China acts consistently to divide ASEAN members by pressing its territorial claims in the South China Sea, which borders several nations.¹³⁶ This dynamic was in play at the 2012 ASEAN ministerial meeting in Phnom Penh. For the first time, ASEAN failed to issue a joint communiqué due to Chinese pressure preventing any mention of the South China Sea in the document, over the wishes of the other ASEAN members.¹³⁷

China's neighbors also have long-standing concerns that what China touts as mutually beneficial development projects actually result in the exporting of China's domestic problems, including a lack of rule of law, environmental degradation, food and water security, and a poor record on human rights.¹³⁸ The growing narrative in the region is that China also conceives mutually-beneficial development projects to be those that primarily benefit China. This narrative continues to grow, as the majority of investment projects employ mostly Chinese workers rather than local labor, and the structure of trade, whereby China primarily imports commodities from less-developed nations, has given rise to accusations of neocolonialist behavior—a behavior also attributed to the U.S.¹³⁹

The majority of nations in the Pacific Rim are committed to international law, global trade rules, and norms of the twenty-first century. Like the United States, they are determined not to have their national interests compromised by any Great Power, and are anxious that China's long-term strategy is to use its geopolitical power to persuade neighboring countries to yield to its interests.¹⁴⁰ The apprehension of China's neighbors presents a highly favorable environment for the United States to pursue its vital regional security interests. It is a matter of situational irony that China's neighbors are now turning to the United States to

135. The ASEAN charter declares one of the organization's main goals is "to enhance regional resilience by promoting greater political, security, economic, and socio-cultural cooperation." ASEAN Charter, art. 1, ¶ 2, available at <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>.

136. See JOHNSON ET AL., *supra* note 26, at 42.

137. Ernest Z. Bower, *China Reveals its Hand on ASEAN in Phnom Penh*, SOUTHEAST ASIA FROM CORNER OF 18TH & K STREETS, July 19, 2012, at 1, available at <http://csis.org/publication/china-reveals-its-hand-asean-phnom-penh>.

138. See Jeffrey Reeves, *China's Unraveling Engagement Strategy*, 36 WASH. Q. 139, 141–42 (2013), available at http://csis.org/files/publication/TWQ_13Winter_Reeves.pdf.

139. *Id.*

140. See generally JOHNSON ET AL., *supra* note 26.

counterbalance China's growing hegemony.¹⁴¹ It is within this context that U.S. engagement in the TPP is best understood.

B. American Realpolitik and the TPP

As China challenges both its neighbors' and the U.S.'s vital interests in the region,¹⁴² the U.S. and other Pacific Rim nations are attempting to forge a counterweight to China. The TPP represents a significant tool for the U.S. to both counteract China's growing hegemony and remain a credible ally to China's neighbors.¹⁴³ It is an unprecedented FTA that will have lasting geopolitical implications for the Pacific Rim. It reflects both a convergence of economies seeking to form a broader alliance independent of China, and a divergence from the multilateral trading system represented by the Bretton Woods international order.

For the United States, the TPP is also key in maintaining important military security measures that are critical to U.S. interests in the region. Post-World War II, the Pacific Rim served as a strategic anchor for vital U.S. security interests, first in containing the Soviet Union¹⁴⁴ and now counteracting the rise of China.¹⁴⁵ This informs the Obama Administra-

141. According to Joseph S. Nye, a professor at the Harvard Kennedy School, China's growing economic and military might has frightened its neighbors into looking for allies to balance China's increase in hard power. Joseph S. Nye Jr., *China's Soft Power Deficit*, WALL ST. J. (May 8, 2012), <http://www.wsj.com/articles/SB10001424052702304451104577389923098678842>.

142. *Id.*; see also DICK K. NANTO, CONG. RESEARCH SERV., RL33653, EAST ASIAN REGIONAL ARCHITECTURE: NEW ECONOMIC AND SECURITY ARRANGEMENTS AND U.S. POLICY 4 (2008), available at <http://www.fas.org/sgp/crs/row/RL33653.pdf>.

143. See Roger C. Altman & Richard N. Haass, *Why the Trans-Pacific Partnership Matters*, N.Y. TIMES (Apr. 3, 2015), <http://www.nytimes.com/2015/04/04/opinion/why-the-trans-pacific-partnership-matters.html>. Discussing the motivation of the Asian nations for U.S. participation in the TPP, the authors argue:

In Asia and the Pacific, parties to the deal—not only our allies Japan and Australia, but also Vietnam, Singapore and Malaysia—see the trade accord as a way of counterbalancing China's economic might. This is why trade is central to our foreign policy; without this deal, the so-called pivot to Asia will be hollow.

Id.

144. See FERGUSON ET AL., *supra* note 17, at 5.

145. See Michael Vincent, *US Defence Secretary Ashton Carter Hails Trans-Pacific Partnership as Underscoring 'Our Lasting Commitment to Asia-Pacific'*, ABC NEWS (Apr. 5, 2015), <http://www.abc.net.au/news/2015-04-07/us-defence-secretary-backs-trans-pacific-partnership/6375274>. Carter noted that the Pacific Rim is a "defining region" for the U.S.'s vital interests, stating "[Y]ou might not expect to hear this from a secretary of defense, but in terms of the rebalance in its broader sense, TPP is as important to me as another aircraft carrier. . . . It would deepen our alliances and partnerships abroad and underscore our lasting commitment to the Asia-Pacific." *Id.* Noting that this region will be home to "an expected 3.2 billion middle-class consumers by 2030," Carter argued that the U.S. cannot afford the mistake of "taking security for granted." *Id.*

tion's "pivot to Asia,"¹⁴⁶ which clearly demonstrates that the United States considers China's growing hegemony as its foremost geopolitical challenge. In the *realpolitik* context, the TPP is a critical element in this pivot to the Chinese sphere of influence.¹⁴⁷

The United States has three major objectives with the TPP: (1) counterbalancing the rise of Chinese hegemony; (2) strengthening old alliances and building new ones;¹⁴⁸ and (3) reforming the economic architecture of the region in a way that ensures adherence to international law, customs, and norms.¹⁴⁹ Despite the emphasis the idea was given by the Obama Administration,¹⁵⁰ the United States' primary objective with the TPP is not to establish a free trade zone.¹⁵¹ Of the TPP's potential members, the United States already has FTAs with Mexico, Canada, Australia, Chile, South Korea, Singapore, and Peru.¹⁵² By this calculus, the United States could only form new connections with Vietnam, Malaysia, Japan, New Zealand, and Brunei. While the rationale for market

146. See FERGUSON ET AL., *supra* note 17 and accompanying text; MANYIN ET AL., *supra* note 11 and accompanying text; Altman & Haass, *supra* note 143 and accompanying text.

147. See sources cited *supra* note 146.

148. See Nye, *supra* note 141 and supporting text.

149. Nadia Gire, *The Trans-Pacific Partnership Agreement: A Revival in United States Trade Policy Reform*, CURRENTS: INT'L TRADE L.J., Summer 2012, at 60, 61–64, available at 20-SUM CURRENTS: INT'L TRADE L.J. 60 (Westlaw); see also Solis, *supra* note 10 and accompanying text. Solis also notes that the WTO "has been unable to update the multilateral rules on trade and investment for the past 20 years," and argues that the TPP is a critical vehicle to "make the rules in international trade" that matches the realities of the twenty-first century, and that the U.S. will lose the ability to do so if it is not a member of the TPP. Solis, *supra* note 10 and accompanying text.

150. See President Barack Obama, 2014 State of the Union Address (Jan. 20, 2015), available at <https://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> (emphasizing free trade as the primary focus of the TPP).

151. See Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing*, 34 B.C. INT'L & COMP. L. REV. 27, 28–29, 51–52 (2011). Noting the economic interests of the U.S. in the TPP, Kolsky Lewis argues:

Nevertheless, the reasons go beyond the longterm economic potential of a Free Trade Area of the Asia-Pacific; the reasons also include a significant geopolitical component. In particular, the United States has the potential to alter some of the economic power dynamics in the Asia-Pacific, which is consistent with President Obama's stated goals of increased U.S. engagement in the region.

Id. at 37.

152. See *Free Trade Agreements*, INT'L TRADE ADMIN., <http://www.trade.gov/fta> (last visited Sept. 14, 2015). Indeed, among the twelve countries currently negotiating the TPP, there are so many existing free trade agreements that there are only eight bilateral combinations that are not already covered by existing preferential arrangements: Australia—Peru; Brunei—U.S.; Brunei—Peru; Chile—Vietnam; New Zealand—Peru; New Zealand—U.S.; Peru—Vietnam; and Vietnam—U.S. See also John Ravenhill, *Extending the TPP: The Political Economy of Multilateralization in Asia*, at 14 (United Nations Econ. & Soc. Comm'n for Asia & the Pacific, Conference Paper Presentation, Asia-Pacific Trade Economists' Conference, 2009), available at <http://www.unescap.org/tid/artnet/mtg/2-3John%20Ravenhill.pdf>.

access to Vietnam would appear to fit the mold of U.S. corporate interests, Vietnam joined the talks only after the United States signaled its interest. Given this, Vietnam is not driving the U.S.'s involvement.¹⁵³ Indeed, Vietnam's true motivation is to establish a geopolitical alliance with the U.S. as a counterbalance to China's growing hegemony in the region.¹⁵⁴

These geopolitical calculations are not limited to Vietnam. On March 15, 2013, Japanese Prime Minister Shinzō Abe announced that Japan would join the TPP. Noting the United States and Japanese alliance as critical in this effort,¹⁵⁵ he argued that the TPP is "Japan's last chance to remain an economic power in Asia and shape the region's future. . . . 'If Japan alone continues to look inward, we will have no hope for growth. This is our last chance. If we don't seize it, Japan will be left out.'"¹⁵⁶ Like the United States, Japanese interests in the TPP are both economic and geopolitical:

[Japan] sees a leadership role in the [TPP] as a way to return to center stage after being eclipsed in the region by the rise of China, which many in Tokyo view as jeopardizing Japan's economic interests and security. China . . . is pursuing its own bilateral and multi-lateral trade agreements in the region. . . . That has, in effect, made the [TPP] a vehicle of sorts for the United States, and now Japan, to counter China's influence.¹⁵⁷

153. See generally *Vietnam*, WORLD BANK, <http://data.worldbank.org/country/vietnam> (last visited Aug. 28, 2015); *Vietnam*, OFFICE OF U. S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/vietnam> (last visited Apr. 13, 2015) (reporting that Vietnam has a relatively large population of approximately 86 million, and yet it is only the U.S.'s 45th largest goods market as of 2009). Entering a free trade agreement that includes Vietnam as a partner would also cause some consternation within the United States-Vietnamese shrimp and catfish exports that have been the subject of antidumping investigations and associated litigation within the United States, resulting in the imposition of duties on these products. See generally Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. & BUS. 315 (2005); Stephanie Showalter, *The United States and Rising Shrimp Imports from Asia and Central America: An Economic or Environmental Issue?*, 29 VT. L. REV. 847 (2005); Joshua Startup, *From Catfish to Shrimp: How Vietnam Learned to Navigate the Waters of "Free Trade" as a Non-Market Economy*, 90 IOWA L. REV. 1963 (2005). The U.S. industries that filed these petitions are unlikely to be pleased by the prospect of Vietnam's products obtaining improved market access to the United States in the form of reduced—and perhaps ultimately removed—tariffs. See Cho, *supra*, at 315–17.

154. See, e.g., JAMES BELLACQUA, CNA CHINA STUDIES, *THE CHINA FACTOR IN U.S.-VIETNAM RELATIONS* (2012); John Roberts, *The U.S.-Vietnam Alliance Against China*, AXIS OF LOGIC (July 30, 2013), http://axisoflogic.com/artman/publish/Article_65866.shtml.

155. Hiroko Tabuchi, *Japan Moves to Enter Talks on Pacific Trade*, N.Y. TIMES (Mar. 15, 2013), <http://www.nytimes.com/2013/03/16/world/asia/japan-aims-to-join-trans-pacific-partnership-talks.html>.

156. *Id.*

157. *Id.*

Also in this vein, former Singapore Prime Minister, Lee Kuan Yew, cautioned that without U.S. engagement in Asia, China will be the sole regional hegemon, leaving the United States and much of Asia in the “dust.”¹⁵⁸

The TPP, as currently envisioned, excludes China. William Craft, deputy assistant secretary of state for trade policy and programs in the State Department’s Bureau of Economic and Business Affairs, notes that “we’re certainly not doing this as an anti-Chinese thing . . . we can foresee them joining it.”¹⁵⁹ However, Craft also notes that this is only possible in a subsequent version of the agreement.¹⁶⁰ The *realpolitik* translation of this position is that China is barred from joining the TPP until the agreement’s ground rules are firmly established, which is to say that constraining China’s economic hegemony is the primary objective of the TPP. This approach is not lost on China.¹⁶¹ Indeed, there is a sense among Chinese academic and policy circles that “the main reason behind the Obama Administration’s support for the TPP agenda is the US’s desire to use the TPP as a tool to economically contain China’s rise.”¹⁶² Similar reports published in the *People’s Daily*, the official news organ of the Chinese Communist Party, refer to TPP as “superficially an economic agreement but contain[ing] an obvious political purpose to constrain China’s rise.”¹⁶³ According to Chinese scholars, the TPP will result in a tariff scheme disadvantageous to China.¹⁶⁴ Official Chinese online media is clear as to what it perceives as the U.S.’s strategic interests in the region:

158. Interview by Steve Weisman with C. Fred Bergsten, coauthor of *China’s Rise: Challenges and Opportunities* (Nov. 16, 2009), available at <http://www.pii.com/publications/interviews/pp20091116bergsten.pdf> (discussing emergence of a China-led, Asian-only trading bloc).

159. See Everett Rosenfeld, *Major Asia-Pacific Trade Pact Enters Final Stages*, CNBC (Mar. 20, 2015), <http://www.cnbc.com/id/102517056>.

160. *Id.*

161. Larry Catá Backer, *Encircling China or Embedding It*, LAW AT END OF DAY (Nov. 8, 2010), <http://lbackerblog.blogspot.com/2010/11/encircling-china.html>. For a considerable period of time, Chinese officials have been focusing on the possibility that the United States intends to surround it to prevent it from more forcefully asserting its own interests in the region. Echoing similar concerns of the Russians, the Chinese suggest that American policy has been to engage China economically while creating an effective military encirclement that would enhance the American position in the event of conflict. *Id.*

162. WEN JIN YUAN, CTR. FOR STRATEGIC & INT’L STUDIES, THE TRANS-PACIFIC PARTNERSHIP AND CHINA’S CORRESPONDING STRATEGIES 1 (2012), available at http://csis.org/files/publication/120620_Freeman_Brief.pdf.

163. *Id.* at 2 (quoting Ding Gang & Ji Peijuan, *Mei Licu Fan Taipingyang Huoban Guanxi [The US Attaches Great Importance to the Pan-Pacific Partnership]*, RENMIN RIBAO [PEOPLE’S DAILY] (July 27, 2011), http://news.xinhuanet.com/world/2011-07/27/c_121725596.htm).

164. *Id.* at 5.

On a strategic level, Washington wants Southeast Asia to form the center of an “Asian strategic alliance” that includes Northeast Asia, Southeast Asia and India. On a political level, the US continues to export “democracy” and Western values to Southeast Asian countries. On the economic level, the US has close ties with Southeast Asia in terms of trade, finance and investment and considers the latter an important overseas market, resource supplier and investment destination. At a military and security level, the US wants to set up more military bases and positively interfere in security affairs in the Asia-Pacific region.¹⁶⁵

Given the zero-sum game of writing the rules of global trade, China is redoubling its efforts in pursuing its own trade agenda that counters the perceived economic and geopolitical effects of the TPP.¹⁶⁶ A March 21, 2013, report notes,

[f]ollowing Japan’s recent announcement that it will join in negotiations of the US-led [TPP] the US and China are picking up the pace in staking their claims on Asian economic territory. The US is encouraging South Korea to join in the TPP, which has pressured China into spurring discussions of a trilateral [FTA] between China, Japan, and South Korea.¹⁶⁷

In the *realpolitik* context, it is critical for the United States and its allies to have a unified strategy for responding to the rise of Chinese hegemony. A lack of cohesion among the stakeholders’ responses to Chi-

165. Li Bing, *Time to Counter US Ploys*, XINHUANET (July 29, 2010), http://news.xinhuanet.com/english2010/indepth/2010-07/29/c_13420374.htm.

166. See WEN JIN YUAN, *supra* note 162, at 6 (noting China’s response to the U.S.’s TPP strategy is developing its own web of FTAs in the Pacific Rim—and that this response is China’s “unswerving policy”); see also Larry Catá Backer, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of a New World Trade Regulatory Order*, 13 WASH. U. GLOBAL STUD. L. REV. 49, 77–78 (2014). Backer argues:

More importantly, China will accelerate the creation of its own enhanced free trade area, one in which it will play the dominant role. China is “also putting work into the Regional Comprehensive Economic Partnership for East Asia (CEPEA), which would include not only China, Japan, and South Korea but also the ten countries in the Association of Southeast Asian Nations (ASEAN), along with India, Australia, and New Zealand.”

Id. at 77.

167. Park Hyun et al., *US Hoping South Korea Will Join Trans-Pacific Partnership*, HANKYOREH (Mar. 21, 2013), http://english.hani.co.kr/arti/english_edition/e_international/579052.html. At a Korea Society lecture in New York on March 19, Assistant U.S. Trade Representative for Korea, Japan and APEC Affairs Wendy Cutler said, “We believe that Korea could be a natural member of the Trans-Pacific Partnership negotiations. We look forward to continuing our working relationship with Korea and keeping them updated. . . . In response, China is pulling out all the stops in pursuit of the China-Japan-South Korea FTA.” *Id.*

na's growing power will damage any effort to integrate China into a rules-based regulatory system.¹⁶⁸ However, as discussed in the next Part, the Obama Administration's uncompromising enforcement of the FCPA threatens to undermine the success of the TPP by disincentivizing U.S. companies from investing in the region.

III. RECONCILING FCPA ENFORCEMENT WITH THE TPP

A. FCPA Enforcement Undermines the TPP

The FCPA is widely regarded as among the most important and burdensome statutes in international business, with fines routinely reaching in the tens or hundreds of millions of dollars.¹⁶⁹ The policy objective of the FCPA is to deter bribery in a manner that aids the United States in building international economic and diplomatic alliances in developing countries¹⁷⁰—the same alliances that lie at the heart of a successfully operationalized TPP.¹⁷¹ The vague language and strict enforcement of the FCPA, however, conspire to disincentivize business from entering the markets of those countries perceived by the United States as more corrupt,¹⁷² thereby undercutting the geopolitical objectives of the TPP.

The FCPA prohibits U.S. citizens, companies, and their employees from (1) giving “anything of value” to foreign officials “in order to assist [the payor] in obtaining or retaining business for or with, or directing business to, any person” and (2) failing to keep records and books “which, in reasonable detail, accurately and fairly reflect the transactions

168. See FERGUSSON ET AL., *supra* note 17, at 1. The TPP serves several strategic goals. Namely, “[i]t is a manifestation of the Obama Administration’s ‘rebalance’ to the Asia-Pacific and if concluded, may serve to shape the economic architecture of the region . . . and has the potential to . . . establish regional rules on new policy issues facing the global economy.” *Id.*

169. TRANSPARENCY INT’L UK, DETERRING AND PUNISHING CORPORATE BRIBERY: AN EVALUATION OF UK CORPORATE PLEA AGREEMENTS AND CIVIL RECOVERY IN OVERSEAS BRIBERY CASES 32, 74 (2012).

170. See Spalding, *supra* note 28, at 357–58.

171. See discussion *supra* Part II.B.

172. One researcher found that higher initial corruption levels were significantly associated with a higher frequency of FCPA enforcement actions even after controlling for other relevant variables. Nicholas M. McLean, Note, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 1974–75 (2012). Similarly, there is evidence that greater FCPA sanctions are imposed in countries where citizens have worse perceptions of their government’s anti-bribery institutions. Stephen J. Choi & Kevin E. Davis, *Foreign Affairs And Enforcement Of The Foreign Corrupt Practices Act*, 3–4, 23, 63 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 12-35, 2012) (using the World Bank’s scores for government effectiveness and rule of law to measure the strength of local anti-bribery institutions). Choi and Davis’s results also show that firms operating in lower-income countries tend to incur greater FCPA penalties. *Id.* at 24, 52 tbl.5; see also *Trying to Pull Together*, ECONOMIST (Apr. 20, 2011), <http://www.economist.com/node/18586448>.

and dispositions of the assets of the [company].”¹⁷³ A “foreign official” is defined as

[a]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.¹⁷⁴

While “department” and “agency” are somewhat straightforward, the FCPA does not define “instrumentality.” U.S. officials have long advanced the position that an SOE might constitute an instrumentality under the statute, though courts refuse to adopt a bright-line rule to define instrumentality.¹⁷⁵ This is particularly troublesome for U.S. businesses because of the SOE’s dominance in many of the TPP-negotiating members’ economies.¹⁷⁶ Additionally, U.S. officials define “foreign official” broadly enough to include doctors employed by state-owned hospitals that may fall under the definition of an SOE instrumentality.¹⁷⁷ The statute also does not define “anything of value,” but has been interpreted to include not only cash payments, but also gifts, meals, drinks, and entertainment; there is no de minimis value associated with this element that

173. Foreign Corrupt Practices Act, 15 U.S.C. § 78m (2006).

174. *Id.* §§ 78 dd-1 to -3 (2006).

175. *See Courts Reject Bright-Line Approach to Defining “Foreign Official” in Favor of Fact-Based Approach, Creating Greater Uncertainty for Business*, WHITE & CASE LLP 2 n.5 (Mar. 21, 2012), <http://www.whitecase.com/sites/whitecase/files/files/download/publications/alerts-Courts-Reject-Bright-Line-Approach.pdf>.

176. *See* FERGUSSON ET AL., *supra* note 17, at 43–44; *see also* Robert Zoellick, Opinion, *Questions for the World’s Next Trade Chief*, FIN. TIMES (Apr. 1, 2013), <http://www.ft.com/intl/cms/s/0/5f9f5ece-923a-11e2-851f-00144feabdc0.html#axzz2PGbI4Atv>. Zoellick notes the centrality of SOEs to many of the world’s economies and discusses the problem they present to basic rules of global trade. He argues:

The increased importance of SOEs in the world economy—in financial services, telecommunications, steel, chemicals and energy, and other natural resources—requires new rules so that private businesses can compete fairly with state capitalism. The rules need not push privatisation or rollbacks of state enterprises, but they should require transparency, commercial behaviour, declarations of subsidies, nondiscrimination and open procurement.

Id.

177. U.S. authorities argue that “[b]ribes to public doctors can have a detrimental effect on the public health care systems that potentially pay more for products procured through greed and corruption.” *See SEC Charges Johnson & Johnson with Foreign Bribery*, U.S. SECURITIES & EXCHANGE COMM’N (Apr. 7, 2011), <http://www.sec.gov/news/press/2011/2011-87.htm>.

would avoid the statute's sweep if a gift was given "in order to assist" the payor to obtain or retain business.¹⁷⁸

Federal enforcement authorities practically demand that companies voluntarily conduct internal investigations, disclose potential violations, and cooperate with federal investigations.¹⁷⁹ While the government notes that it may provide some relief to companies who take such steps, uncertainty as to the reaction of the DOJ and SEC to these disclosures renders these assurances inherently unreliable.¹⁸⁰ That is, even for those companies that voluntarily conduct internal investigations and disclose their findings to the government in good faith, these good faith efforts may not save them from the FCPA's harsh enforcement regime.

Furthermore, under the particularly draconian guidelines issued by the Office of Management and Budget, not only may a person or firm found in violation of the FCPA be barred from doing business with the federal government, but also an indictment alone, without conviction, can lead to a suspension of the right to do business with the U.S. government.¹⁸¹ Interestingly, and perhaps heartening given the gift-giving culture of various TPP nations, the FCPA's legislative history shows that bribery was not considered a universal moral wrong.¹⁸² While bribery

178. See Michael B. Runnels & Adam M. Burton, *The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical Foreign Direct Investment in China and Other Emerging Economies*, 34 CARDOZO L. REV. 295, 296 (2012).

179. *Id.* at 322–23.

180. Corporate compliance efforts are being further threatened by the new SEC whistleblower bounty program, part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. U.S. companies have expended significant time, resources, and funds to develop robust internal reporting mechanisms to identify and remedy misconduct. Under this program, a whistleblower may circumvent internal reporting channels and go directly to the SEC to report misconduct. Whistleblowers stand to receive a windfall with little incentive to report such conduct internally. This is compounded by advertisements by plaintiff's attorneys luring individuals to blow the whistle on their employer with the promise of "substantial compensation, potentially millions of dollars." *Foreign Corrupt Practices Act Reporting Center*, FOREIGN CORRUPT PRACTICES ACT REPORTING CTR., <http://www.foreign-corrupt-practices-act.org/> (last visited Mar. 6, 2012).

181. U.S. DEP'T OF JUSTICE & SEC. & EXCH. COMM'N, *supra* note 37, at 5; see also Trautman & Altenbaumer-Price, *supra* note 37, at 147.

182. When Congress adopted the FCPA in 1977, it quickly became an important component of the Carter Administration's efforts to use corporate behavior as a lever to promote Western values. Evidencing the significant concern that the FCPA's adoption would result in an economic disadvantage for the U.S. in international business, then-Deputy Secretary of State Robert S. Ingersoll argued that "[i]t is tempting to try to deal with the situation unilaterally, but there are serious risks for the United States in such an approach. There is widespread recognition in the Congress that such unilateral action would put U.S. companies at a serious disadvantage in the export trade." *Abuses of Corporate Power: Hearing Before the Subcomm. on Priorities & Economy in Gov't of the Joint Econ. Comm.*, 94th Cong. 153–154 (1976). Indeed, while it was initially a symbolic component of the Carter Administration's efforts—that was scarcely enforced—the past ten years have seen the DOJ and the SEC initiate an extraordinarily dramatic surge in FCPA enforcement. WINSTON &

does distort markets, there are a number of TPP countries where the culture permits, or even requires, the kind of practices that the FCPA, broadly interpreted, prohibits.¹⁸³

Although the purpose of the FCPA is to deter bribery in a manner that aids the United States in building international economic and political alliances, recent empirical studies reveal that the dogmatic application of the statute contributes to an erosion of the position of U.S. corporations in certain countries.¹⁸⁴ In countries where bribery is considered relatively common,¹⁸⁵ the FCPA's current enforcement regime is ineffective, if not counterproductive, in preventing corruption in the host country.¹⁸⁶ U.S. companies subject to the FCPA are hard-pressed to compete in those countries and in some cases may be deterred from even trying. Corporations based in countries not subject to strictly enforced anti-bribery legislation have taken advantage of this uneven playing field, and corruption continues there unabated.¹⁸⁷ This dynamic creates a myriad of economic¹⁸⁸ and foreign policy problems for the United States, particu-

STRAWN LLP, FCPA ENFORCEMENT AND COMPLIANCE STRATEGIES OVERVIEW (2009), available at <http://www.ace.com/chapters/socal/upload/11-17-09-fcpa.pdf>; see also Spalding, *supra* note 28, at 400 (arguing that, if one begins from the premise that bribery is wrong, in toto, the only appropriate response would be to work towards reducing it). Spalding goes on to argue that “[t]he problem with this justification, however . . . [is that] there is simply no evidence that Congress, or any other deliberative body for that matter, has ever adopted this policy. As the legislative history shows, whether bribery is an absolute and universal moral wrong, which government should seek to immediately eradicate regardless of the economic implications, was heavily disputed in Congress. Unless and until politically accountable bodies adopt this principle, it should not be used to justify the enforcement of a statute where fines have exceeded \$1 billion for a single company.” *Id.*

183. See *supra* note 32 and accompanying text.

184. See generally Spalding, *supra* note 28.

185. *Id.*

186. *Id.*

187. See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 115–18 (2010) (arguing that the rise of China as an exporter of FDI directly challenges efficient FCPA enforcement, due to the endemic bribery suffusing Chinese business culture); see also Patrick M. Norton, *The Foreign Corrupt Practices Act Dilemma*, 33 CHINA BUS. REV. 22, 22 (2006) (explaining “[w]idespread corruption in China puts many U.S. companies between the proverbial rock and a hard place. . . . China’s leaders have long acknowledged that widespread corruption is one of the country’s main problems and have repeatedly vowed to eliminate it,” though to little discernable effect); Pei, *supra* note 34; Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China’s New Laissez-Faire*, 59 UCLA L. REV. 354, 392–95 (2011) (describing the seemingly progressive Chinese anti-bribery legislation as a façade, Spalding argues that while China has an interest in enforcing domestic prohibitions to project a more favorable image and attract FDI, China’s lack of meaningful overseas bribery prohibitions gives it a great competitive advantage). Spalding concludes by noting that “despite China’s symbolic efforts, there is little reason to doubt that Chinese companies will continue to pay bribes in developing countries without fear of penalty.” *Id.*

188. See generally Runnels & Burton, *supra* note 178. In a 1999 report to Congress, the Congressional Research Service, a nonpartisan group that provides analysis on legislative issues, esti-

larly considering China's aggressive investment in developing economies of the Pacific Rim. By enforcing the FCPA without regard to its collateral effects, the U.S. unwittingly sacrifices the geopolitical objectives of the TPP in order to combat bribery abroad.¹⁸⁹

B. Policy Recommendations to Reform the FCPA

While deterring bribery is certainly a worthy goal, it is far wiser to deter bribery as part of an ongoing business relationship, rather than as a prerequisite to conducting business or, especially, U.S. foreign policy. Foreign cultures view acceptable gifts quite differently from illegal bribes.¹⁹⁰ By criminalizing the bribery of foreign officials, as defined under the FCPA, the U.S. is forcibly imposing its values regarding bribery on other nations. Indeed, the overemphasis on policing corruption abroad, and the extraterritorial application of criminal sanctions, places U.S. companies at a substantial competitive disadvantage in seeking business relationships in countries where the culture permits the kind of practices that the FCPA considers corrupt.¹⁹¹ The geopolitical challenge

mated that the FCPA's anti-bribery "provisions have cost up to [\$1 trillion] annually in lost [U.S.] export trade." MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL 30079, FOREIGN CORRUPT PRACTICES ACT (1999). In this vein, it may be useful to consider that the majority of countries with anti-bribery laws provide for an adequate procedures defense to liability. Corporations in those countries are able to defend against anti-bribery enforcement actions by showing that they had procedures and policies guarding against bribery in place. See Mike Koeler, *The Compliance Defense Around the World*, FCPA PROFESSOR (June 28, 2011), <http://fcprofessor.blogspot.com/2011/06/compliance-defense-around-world.html> (documenting a defense similar to an adequate procedures defense as part of anti-bribery statutes in the U.K., Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden, and Switzerland).

189. See James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977* 20 (Nat'l Bureau of Econ. Res., Working Paper No. 5266, 1995), available at <http://www.nber.org/papers/w5266.pdf> (explaining that while U.S. FDI in corrupt countries saw significant declines as a result of the FCPA, no evidence exists to suggest that total FDI in such countries dropped). Indeed, other firms that were not constrained by anti-bribery legislation apparently assumed the position once occupied by U.S. companies. As such, Hines argues that the principal effect of the FCPA is to divert U.S. FDI to less corrupt countries and, in those countries considered more corrupt, the FCPA operates to "encourage[] ownership substitution between [U.S.] and foreign investors." *Id.* Ultimately, Hines demonstrates a persuasive argument that corruption-prone countries will increasingly turn to companies from countries without effective anti-corruption regimes to replace the capital that the U.S. and its allies conclude are too much of a hazard to risk); see also Alvaro Cuervo-Cazurra, *Who Cares About Corruption*, 37 J. INT'L BUS. STUD. 807, 814 (2006) (arguing that as the FCPA and other anti-bribery legislation adopted by OECD countries become more widespread and strictly enforced, corrupt countries will ultimately receive less of their FDI from less corrupt countries and more of their FDI from more corrupt countries, which turns the policy priorities of the FCPA completely on its head).

190. Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 165 (2009).

191. See Salbu, *Foreign Corrupt Practices Act*, *supra* note 28 and accompanying text; Salbu, *Bribery in the Global Market*, *supra* note 28 and accompanying text; Duncan, *supra* note 28 and

presented by China should encourage U.S. policymakers to revisit the text and enforcement regime of the FCPA so that the law will be a more effective tool, without disincentivizing U.S. corporations from investing in the developing world. The following section provides three concrete recommendations that harmonize the objectives of the FCPA with the TPP.

1. Recommendation One: Amend the FCPA to Provide a Safe Harbor Provision for Corporations that Voluntarily Conduct Internal Investigations, Disclose Potential Violations, and Cooperate with Government Investigations

Corporations that operate vigorous compliance programs and voluntarily report their misconduct should receive the benefit of a presumption against criminal prosecution. This recommendation does not offer amnesty to those corporations engaging in good faith self-reporting. The government may still impose civil fines robust enough to constitute more than the cost of doing business, and the safe harbor provision should not be available for corporations engaging in serial violations over a short period of time. However, removing the specter of criminal enforcement will produce more business certainty as to what reductions in penalties will occur for self-reporting. Such an amendment is likely to incentivize voluntary disclosure and the adoption of policies that are transparent, demonstrating to the DOJ and SEC that such a corporation poses no significant corruption threat.¹⁹² Such a corporation should be able to engage in international business operations without potentially facing criminal prosecution for voluntarily disclosing their own misconduct in good faith.

2. Recommendation Two: Prohibit the Barring of an Indicted Corporation from Doing Business with the United States Without a Conviction

Corporations that are indicted under the FPCA may be barred from doing business with the U.S. government, even if the indictment does not result in a conviction.¹⁹³ This is particularly dangerous for U.S. corporations involved in transportation, defense, energy, and other sectors of the economy that necessarily involve contracts with the government and which are viewed as especially prone to bribery in the developing

accompanying text; *see also* Spalding *supra* note 28 (arguing the current FCPA enforcement regime is “not just deterring bribery, but is deterring investment”).

192. *See* Spalding, *supra* note 28.

193. U.S. DEP’T OF JUSTICE & SEC. & EXCH. COMM’N, *supra* note 37, at 5; *see also* Trautman & Altenbaumer-Price, *supra* note 37, at 147.

world.¹⁹⁴ Indeed, these industries are precisely those that constitute the SOEs of TPP members. Legitimate issues of procedural justice notwithstanding,¹⁹⁵ the practice of barring corporations from doing business with the U.S. government without a conviction likely deters those corporations from investing in countries perceived to be more corrupt,¹⁹⁶ upending both the FCPA's and the TPP's goal of promoting U.S. corporate investment in emerging markets. As such, the application of such a severe penalty should be proscribed.

3. Recommendation Three: Clarify the FCPA's Definition of "Anything of Value," "Instrumentality," and "Foreign Official"

As noted earlier, the FCPA provides no de minimis value for its prohibition of providing "anything of value" to "foreign officials."¹⁹⁷ The DOJ notes that the FCPA covers "payments to low-ranking employees and high-level officials alike."¹⁹⁸ Given that U.S. companies are strictly prohibited from providing anything of value, even in trivial amounts, that could be construed as intended to gain a business advantage,¹⁹⁹ the statute should be amended to allow for the type of gift-giving that is typical of many of the TPP-negotiating nations.

Other ambiguities in the FCPA that require clarity are the definitions of "foreign official" and "instrumentality." As noted previously,²⁰⁰ the statute fails to define "instrumentality in its definition of "foreign official." Moreover, courts fail to define the term with any precision.²⁰¹

194. *Bribe Payers Index 2011*, TRANSPARENCY INT'L, <http://www.transparency.org/bpi2011> (last visited Apr. 13, 2015).

195. For a thorough discussion of this phenomenon, see the series of entries at FCPA BLOG: NEWS AND VIEWS ABOUT THE UNITED STATES FOREIGN CORRUPT PRACTICES ACT, <http://www.fcpablog.com/blog/tag/respndeat-superior>. Dick Cassin, the blog author, argues that in order to avoid the catastrophic effects of any potential conviction, "companies have to settle with the government. So they rush into agreements that may require them to waive the attorney-client privilege, hand over employees' private documents and data, cut off support for their legal defense, and fire those who don't cooperate with government investigations." Richard L. Cassin, *Naked Corporate Defendants*, FCPA BLOG (Jan. 22, 2009, 08:28 EST), <http://www.fcpablog.com/blog/2009/1/22/naked-corporate-defendants.html>.

196. Hines, Jr., *supra* note 189 and accompanying text; *see also* Cuervo-Cazurra, *supra* note 189, at 814 and accompanying text.

197. *See* Runnels & Burton, *supra* note 178.

198. *See* U.S. DEP'T OF JUSTICE & SEC. & EXCH. COMM'N, *supra* note 37, at 20–21.

199. 15 U.S.C. §§ 78dd-1 (2006).

200. *See supra* pp. 108–16.

201. *See, e.g.*, Recent Case, *Foreign Corrupt Practices Act—"Foreign Official"—Eleventh Circuit Defines "Government Instrumentality" Under the FCPA—United States v. Esquenazi*, 752 *f.3d* 912 (11th Cir. 2014), *Cert. Denied*, 135 *S. Ct.* 293 (2014), 128 HARV. L. REV. 1500, 1507 (2015). A recent Eleventh Circuit Decision purported to define "foreign official" and "instrumentality." The authors, however, found the Court's definition unavailing and argued that the Court

Therefore, it is unclear what types of entities, including SOEs, are instrumentalities of a foreign government such that their employees will be considered foreign officials under the FCPA. Given the dominant role of SOEs in TPP members' economies, and the DOJ's interpretations of the FCPA, some U.S. corporations worry that "everyone they deal with is a foreign official because they work for an SOE."²⁰² As such, the statute could be amended to indicate both what percentage of government ownership and what extent of control by a government will qualify a corporation as an instrumentality. For these reasons, the FCPA should be amended to provide a clear definition of "anything of value," "instrumentality," and "foreign official."

CONCLUSION

The United States has three major objectives with regard to the TPP: (1) counterbalancing the rise of Chinese hegemony; (2) strengthening old alliances and building new ones; and (3) reforming the economic architecture of the region in a way that ensures adherence to international law, customs, and norms. Relatedly, the policy objective of the FCPA is to deter bribery in a manner that aids the U.S. in building international economic and diplomatic alliances in developing countries. At the center

received a rare opportunity to clarify the scope of a term that lies at the heart of a contentious criminal statute. Although the court purported to define "instrumentality" with an eye toward helping companies and regulators determine which SOEs fall within the FCPA's reach, it ultimately provided unwieldy guidelines that lower courts are unlikely to refine. Operating against a backdrop void of judicial exegesis, risk-averse businesses will continue to settle enforcement actions exclusively out of court, leaving unabated the legal haze that currently envelops the FCPA.

Id.

202. See Declaration of Prof. Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One through Ten of the Indictment, at 447, *United States v. Carson* (No. SACR 09-00077-JVS), 2011 WL 7416975 (C.D. Cal. Feb. 21, 2011); see also Richard L. Cassin, *In the Master's Defense*, FCPA BLOG (Nov. 24, 2008, 8:22 AM), <http://www.fcpablog.com/blog/2008/11/24/in-the-masters-defense.html> (one commentator observes that "nothing magnifies the impact of the Foreign Corrupt Practices Act on corporations more than respondeat superior," the common law doctrine by which employers are held vicariously liable for the conduct of their employees); PAOLA DESIO, AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES 1 (2004), available at <http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGVIEW.pdf>.

Desio notes:

Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees' illegal actions.

Id.

of both policies lies the critical importance of forging international alliances to further the U.S.'s global strategic interests. The enforcement regime of the FCPA, however, operates as a poison pill to these interests. The geopolitical challenge of a rising China in the zero-sum game to rewrite the rules of global trade should encourage U.S. policymakers to revisit the text and enforcement regime of the FCPA. The statute should be amended to ensure its effectiveness in curbing corporate bribery without curbing corporate investment in the developing world.

In light of the U.S.'s core strategic interests in the Pacific Rim and the fair administration of justice, Congress should consider amending the FCPA in a manner consistent with this Article's recommendations. Without the recommended changes, the FCPA will unintentionally undermine the goals of the TPP by continuing to provide outsized penalties for conduct that is not only accepted, but also expected, in many Asian countries.²⁰³

203. *See supra* note 33 and accompanying text.