

# The Domestic and International Enforcement of the OECD Anti-Bribery Convention

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## Abstract

*International corruption law is a growing, if understudied, area of international economic law. This Article examines two aspects of governments' enforcement of the OECD's Anti-Bribery Convention. The first aspect is the member state's efforts to enforce its own national legislation prohibiting foreign corruption within its territory and with regards to its nationals doing business abroad. The OECD Treaty's obligation concerning member states' enforcement of their own national legislation is somewhat ambiguous. While the obligation to pass particular national legislation is quite clear and specific, the treaty does not specify what resources that a state must dedicate to internally enforcing these laws. As a result, states may have robust anti-corruption laws on the books but fail to enforce them in a meaningful way. This is more than an abstract concern. As of 2013, less than half of the states party to the OECD Treaty had successfully prosecuted a private actor for foreign corruption. This Article also discusses a second aspect of enforcement: how these internal enforcement ambiguities hamper state-to-state efforts to enforce the agreement. States cannot easily identify whether other states are breaching the treaty's obligations when the internal enforcement obligations are opaque. This complicates international efforts to pressure other states to increase their compliance through retaliation or reciprocity. This Article concludes by discussing enforcement alternatives, namely the continued rigorous American enforcement of anti-corruption policies against private actors, even for activities having minimal territorial ties.*

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## I. INTRODUCTION

In *Economic Foundations of International Law*, Eric Posner and Alan Sykes provide an extensive overview of the application of economic reasoning to the development of international law. The book surveys a host of areas from security and the rules of war, to environmental and human rights concerns. One of the areas that the economic approach to legal development has been the most successful is in international economic law. At the outset, the background justification for international cooperation is overwhelmingly economic. Economic theory predicts that freer trade or greater access to capital investment leads to economic growth and greater net national welfare. These welfare effects are the driving motivation for trade or investment treaties.<sup>1</sup> Empirical questions about causal relationships between a treaty's terms and the agreement's welfare effects can thus undermine support for the agreement. For example, the growing empirical literature on the relationship between foreign direct investment and economic growth in the host state raises concerns in some quarters about the utility of bilateral investment agreements.<sup>2</sup>

In addition, economic analysis provides expectations about the negotiating process and the effects of specific treaty terms on institutional design elements. With respect to negotiations, economic frameworks tend to focus on the structure of the cooperation problem<sup>3</sup>: are the benefits of international cooperation excludable? Are the actions of states easily observable? Are states uncertain of the potential distributional effects of the agreement?<sup>4</sup> The elements of problem structure can influence who is invited to the negotiating table as well as institutional design choices. For instance, the benefits of trade agreements are

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<sup>1</sup> Of course, there can be subsidiary political motivations for these agreements, such as credibly committing the state to a policy path. See FREDERICK MAYER, *INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS* (1998). Most commonly, the public justifications are welfare oriented.

<sup>2</sup> See Anne van Aaken, *Smart Flexibility Clauses in International Investment Treaties and Sustainable Development: A Functional View* (Univ. of St. Gallen Law & Economics, Working Paper No. 2013-18, 2013); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2010).

<sup>3</sup> See KAL RAUSTIALA & ANNE-MARIE SLAUGHTER, *International Law, International Relations and Compliance*, in *THE HANDBOOK OF INTERNATIONAL RELATIONS* 538–58 (Walter Carlsnaes et al. eds., 2002) (focusing on problem structure). For examples of the effect of problem structure on institutional design from the law and economics tradition, see ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006) (discussing the form of dispute resolution); Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005) (discussing access to dispute resolution in different economic regimes).

<sup>4</sup> See Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289 (2001).

more excludable than the benefits of climate change mitigation and thus trade agreements can often take place at the bilateral or regional level while climate negotiations are almost always global. Similarly, economic analysis may also lead us to expect that some substantive obligations are more desirable than others. For instance, the use of a Most Favored Nation (MFN) provision, while not a necessary element of economic liberalization, provides several attractive qualities—such as the extension of liberalizing policies to all regime members and a limit on trade diversion—and is therefore commonly observed in both international trade and international investment agreements.<sup>5</sup>

This short Article seeks to expand upon Posner and Sykes's work by providing a first cut at an economic analysis of a relatively recent but rapidly expanding area of international economic law: anti-corruption treaties. In particular, this article examines the Organisation for Economic Co-operation and Development's Anti-Bribery Convention, thus far the most important anti-corruption agreement.<sup>6</sup> The OECD Treaty requires member states to adopt specific legislation that prohibits private actors from bribing or offering bribes to foreign government officials.<sup>7</sup> While the treaty's standard for conforming national legislation is quite clear, the standard for *internally enforcing* such national legislation is far less explicit.<sup>8</sup> That is, what measures governments must actively take to investigate and prosecute private activity within their jurisdiction (or by their nationals acting abroad) is ambiguous. Governments may formally comply with the treaty by nationally enacting all of the necessary domestic laws and, yet, fail to meaningfully comply with the treaty by engaging in either no or very low levels of enforcement. This is not simply a theoretical concern. As of December 2012, fifteen years after the Convention's signing, well over half of the states that have joined the OECD Anti-Bribery Convention have *never* prosecuted a domestic individual or firm for foreign corruption.<sup>9</sup> Such government reluctance

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<sup>5</sup> See ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 269–70 (2012).

<sup>6</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (1998), 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention].

<sup>7</sup> OECD Anti-Bribery Convention, *supra* note 6, arts. 1–3.

<sup>8</sup> OECD Anti-Bribery Convention, *supra* note 6, art. 5.

<sup>9</sup> See The Organisation for Economic Co-Operation and Development *Working Group on Bribery: 2012 Data on Enforcement of the Anti-Bribery Convention* (June 2013). As of December 2012, only thirteen member states have convicted an individual or firm for foreign corruption. In addition, three member states (the Netherlands, the Czech Republic and Turkey) have each brought only one prosecution that ended in an acquittal. *Id.* at 4. The OECD Working Group on Bribery reports that twenty four member states had on-going investigations in foreign corruption by the end of 2012 but what percentage of these will result in prosecutions is uncertain. *Id.* at 2.

to dedicate resources to enforcing domestic anti-corruption laws undermines the effectiveness of the agreement.<sup>10</sup>

This Article seeks to analyze the effects of the treaty's "internal enforcement ambiguities" on interstate efforts to encourage greater compliance with anti-corruption norms. First, this Article examines what the treaty actually requires of states in terms of government enforcement against private actors (that is, how a national government implements foreign anti-corruption measures within its own jurisdiction). The Article then considers the effects of these internal enforcement ambiguities on the interstate enforcement of the treaty agreement: namely, how states responded to its treaty partners' compliance or noncompliance with the international agreement. As a matter of terminology, this Article refers to "internal enforcement" as a national government's decision (or sub-national government decisions) to make enforcement of anti-corruption law a priority or not. "External enforcement" refers to the state-to-state efforts to enforce the treaty among other member states.

The OECD Anti-Bribery treaty is a form of international economic law but it is different than most international economic obligations in that it regulates activity that is out of the direct control of the state. The relevant transaction—a private party bribing or offering to bribe a foreign government official—is a private, not a government, action. Thus a government regulating foreign bribery cannot comply with the goals of the treaty by simply altering its own immediate actions. Instead, the regulating government must dedicate resources to monitoring private activities, investigating claims, and prosecuting alleged violators.

Such questions concerning how governments choose to spend their limited resources—what issues to prioritize, what systems to develop—are rarely addressed in anti-corruption treaties (or other agreements that require such "market-engaging" legislation). This leaves significant ambiguity in the treaty regime about what measures are required by international law. Is the adoption of national legislation alone sufficient? Is there a background rule that demands a certain level of enforcement? If so, what is the source of such a background rule and how do we ascertain the content of this obligation? The lack of clarity of an enforcement obligation (or more specifically, the lack of standard for evaluating whether a state is enforcing its own laws) creates an uncertain environment for

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<sup>10</sup> See Mark Pieth & Huguette Labelle, *Making Sure that Bribes Don't Pay*, TRUSTLAW (Dec. 12, 2012), <http://www.trust.org/item/?map=viewpoint-making-sure-that-bribes-dont-pay> (noting that "[the] lack of consistent enforcement endangers the success of the [OECD] Convention . . . . Unless the prohibition against foreign bribery is applied consistently, there will be a race to the bottom from which it will be practically impossible to recover.").

the implementation of anti-corruption laws. In addition, the external interstate enforcement of these agreements is made more difficult because states do not have clear expectations about what actions treaty partners are required to adopt.

This Article addresses these enforcement issues in three sections. Section II situates “market-engaging” agreements in the broader field of international economic law. Traditionally, international economic rules have governed activity that the state directly controlled—such as tariff rates, government regulations of goods, or state actions to expropriate property. These measures were designed to limit the state’s intervention into markets. A newer generation of international economic law has moved beyond these market-disengaging obligations to a new set of obligations that require governments to intervene in private market behavior. This section traces the evolution of the move to the new obligations.

Section III provides a more in-depth discussion of current anti-corruption law. The United States was the first nation to enact rigorous legislation aimed at prohibiting private actors from making illegal payments to foreign government officials.<sup>11</sup> Once the United States adopted anti-corruption legislation, it had an economic interest in having other states adopt similar measures and vigorously advocated for a multilateral anti-corruption treaty. Other scholars have described the politics of this treaty negotiation as a prisoner’s dilemma game, where the parties can achieve gains through collective action but each has an incentive to resist the legal obligation.<sup>12</sup> This section extends the analysis to the post-negotiation process and discusses the internal enforcement dilemma that governments face regarding implementation of anti-corruption policies.

Section IV concludes by discussing the impact of this internal enforcement ambiguity on interstate efforts to promote the goals of the treaty. Various non-governmental organizations, most notably Transparency International, have designed their own indexes of state enforcement to encourage and shame governments into dedicating greater resources towards implementation efforts. Yet these indexes do not necessarily align with the treaty’s legal obligations. As such, governments cannot use these indexes to externally sanction governments who devote few resources towards enforcement. This section ends with a discussion of the enforcement alternatives, namely the continued rigorous American enforcement of anti-corruption policies even for activities having minimal territorial ties.

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<sup>11</sup> See Paul B. Stephan, *Regulatory Competition and Anticorruption Law*, 53 VA. J. INT’L L. 53, 53 (2012).

<sup>12</sup> See Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT’L L. 665 (2004).

## II. A NEW WAVE OF INTERNATIONAL ECONOMIC LAW OBLIGATIONS

The contours of international economic law have changed considerably in the last two decades. The early push in international economic law was for the restriction of government action in markets. These agreements represented cooperation on the “easiest” issues. States agreed to lower government-imposed barriers to trade. These treaty obligations were relatively transparent and only covered behavior that the state directly controlled.<sup>13</sup> For instance, governments established tariff levels that were negotiated progressively lower during successive General Agreement on Tariffs and Trade (GATT) rounds.<sup>14</sup> The GATT agreement similarly eliminated quantitative restrictions on trade (quotas) and discriminatory internal taxes.<sup>15</sup> As these early and easy gains were realized, newer international agreements have begun to engage more complicated economic relationships.<sup>16</sup>

A new generation of international agreements seeks to re-engage governments in regulating private market activity. These treaties, including bilateral agreements on antitrust rules, multilateral agreements on anti-corruption law, and aspects of multilateral intellectual property agreements, require governments to monitor private activity and intervene to prevent or punish certain transactions. As compared to trade or investment law, the obligations contained in these agreements are much less clear—making monitoring of government compliance more difficult—and cover issues that the state can control only by indirect means.<sup>17</sup> This section compares these two types of agreements and discusses the challenges posed by this new wave of economic agreements.

### A. Trade and Investment Treaties

As a generalization, foundational economic agreements in international law focused on the withdrawal of governments from national markets. The first

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<sup>13</sup> See POSNER & SYKES, *supra* note 5, at 268 (discussing the transparency of government-mandated tariff levels).

<sup>14</sup> See *id.* at 266; MICHEAL TREBILCOCK, ROBERT HOWSE, & ANTONIA ELLASON, *THE REGULATION OF INTERNATIONAL TRADE* 24 (4th ed. 2013).

<sup>15</sup> General Agreement on Tariffs and Trade, arts. III & XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>16</sup> See POSNER & SYKES, *supra* note 5, at 266 (discussing concerns with non-tariff barriers to trade that were not adequately disciplined by the GATT).

<sup>17</sup> See, for example, Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L. L. 1, 17–26 (2011) (discussing the internal enforcement ambiguities in the TRIPS Agreement).

decades of the GATT negotiating rounds were dedicated to removing government barriers to trade between national markets.<sup>18</sup> Governments agreed to channel market protection into tariffs and then negotiate down tariff rates. Other forms of government protection, such as differential taxation of imports or discriminatory regulation, were also limited by the GATT's national treatment obligation.<sup>19</sup> Similarly, international investment agreements restricted government intervention in markets.<sup>20</sup> Investment agreements commonly limit the conditions governments can place on incoming investment as well as the types of measures that governments can impose on existing investments.

Traditional trade and investment rules generally only cover direct state actions, not private behavior. If market participants wish to discriminate based on national origin, the state has no obligation to police or prevent this behavior. The general thinking is that private actors (but not necessarily governments) will be primarily motivated to seek higher profits.<sup>21</sup> Thus if there are greater economic gains to be made through international transactions, private actors will be ready to engage international markets and not prefer domestic transactions that offer lower profit margins.<sup>22</sup> As a result, GATT rules do not require governments to enforce certain behaviors on private actors. For instance, the U.S. government is not required to discourage an American labor association from funding a campaign to "buy American" or to prevent a local NGO from leading a boycott against foreign manufacturers.<sup>23</sup>

Monitoring government compliance with these traditional obligations is also *relatively* simple. Governments publish national tariff rates and private actors can readily discover discriminatory internal taxes or regulations. Of course, not all trade and investment rules are crisp. Determining whether an internal tax is discriminatory often turns on a multi-factor analysis of whether two differently

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<sup>18</sup> See TREBILCOCK ET AL., *supra* note 14, at 24.

<sup>19</sup> Later trade agreements, such as agreements on subsidies (the SCM agreement) and non-facially discriminatory domestic regulations (such as the SPS and TBT agreements) were similarly aimed at restraining government intervention in markets. See POSNER & SYKES, *supra* note 5, at 273–77.

<sup>20</sup> See ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 554–64 (2nd ed. 2008) (discussing the restrictions on government action regarding foreign investment included in bilateral investment treaties); POSNER & SYKES, *supra* note 5, at 288–89.

<sup>21</sup> See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 420 (2000).

<sup>22</sup> Even if this is not true with every private actor, some entrepreneurs will be willing to engage international markets. These entrepreneurs will then make above average returns and outperform firms that have discriminatory preferences.

<sup>23</sup> See, for example, Panel Report, *Japan—Trade in Semi-Conductors*, ¶¶ L/6309 - 35S/116 (May 4, 1988) (interpreting GATT obligations only to apply to government action and not private action).



taxed goods are sufficiently similar to be treated as “like.”<sup>24</sup> However, on the spectrum from transparent to opaque legal obligations, traditional trade and investment rules tend towards the more transparent pole, largely because government intervention in markets is observable to interested private market participants most of the time. Moreover, the baseline for determining the level of required government compliance is well defined: governments are not permitted to maintain any illegal measures even if complying with international rules requires substantial resources.

## B. Market-Engaging Agreements

Early international trade agreements were quite successful in lowering formal barriers to trade. Over the course of many negotiating rounds, developed states successively lowered tariff rates on manufactured goods to less than five percent.<sup>25</sup> Further cooperative gains from trade required measures that were more invasive to domestic politics.<sup>26</sup> These included reviews of non-discriminatory state regulations—for instance, reviews of the scientific basis of health and safety regulations—as well as limits on anti-dumping and countervailing duty laws. In addition, governments began negotiating treaties that required state intervention in markets, sometimes as part of multilateral or regional trade agreements and sometimes as stand-alone treaties. Three such market-engaging issues are antitrust, intellectual property, and anti-corruption. Each of these issues place obligations on governments to address private activity, including private anticompetitive behavior, the unauthorized use of intellectual property, and private corruption of government officials, respectively.

These agreements create complex legal obligations. In one sense, the treaties’ requirements are incredibly sharp and transparent: the government has an obligation to enact domestic legislation prohibiting certain types of transactions. The existence (or not) of conforming legislation is readily apparent.<sup>27</sup> Other states or an adjudicator need only compare the text of the enacting legislation to the treaty’s requirements. Yet formal legislative

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<sup>24</sup> See, for example, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS11/AB/R (Oct. 4, 1996).

<sup>25</sup> See Alan V. Deardorff & Robert M. Stern, *What You Should Know About Globalization and the World Trade Organization*, 10 REV. INT’L ECON. 404 (2002), 407–8.

<sup>26</sup> The push towards more market-engaging agreements was a mix of factors, including the success of tariff reductions, the political push of protectionist demand into non-tariff barriers to trade, and a greater public policy focus on “good” government institutions in addition to liberalizing market reforms.

<sup>27</sup> See, for example, Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000).

compliance is not the most significant part of market-engaging economic agreements. The more complex and ambiguous part of the legal rule relates to government efforts to monitor and change private behavior.<sup>28</sup>

International economic obligations tend to be ambiguous regarding *what actions the government needs to undertake to enforce its own law*. This is, in part, a definitional problem of how to evaluate government efforts to control third-party behavior. Assessing enforcement efforts is difficult without a clear baseline established in a treaty because it is unclear which criteria should be used to evaluate government's actions. Such an analysis could incorporate several criteria, including the extent of a government's own efforts, the effects on private activity, or the institutional design of the domestic measure.

To be clear, a treaty agreement could specify how domestic rules are to be enforced. For instance, the TRIPS agreement takes a step in this direction by outlining what remedies must be available to domestic judges adjudicating intellectual property disputes.<sup>29</sup> But these market-engaging agreements necessarily involve issues related to the governments' approach to "rule of law" issues, such as the role of prosecutorial discretion, the resources available to police and prosecutors, and national law enforcement priorities.<sup>30</sup> Thus far, treaty negotiators have been reluctant to enter this domain of national governance. International economic agreements may demand that the state adopt specific national laws but are less stringent in setting out how these rules should be enforced against private actors within the state's jurisdiction.

This internal enforcement ambiguity makes a difference in the economic analysis of these rules because it changes the dynamics of international cooperation. Without sharper standards for evaluating the content of legal obligations, there is greater room for self-serving interpretations of a state's consistency with the treaty's policies. Even if states can establish third-party dispute resolution systems to decide these issues (either on an ad hoc or permanent basis), ambiguous agreements will necessarily require greater delegation of law-making power to non-state actors. Ambiguous obligations are also more difficult to enforce with reciprocity strategies. Reciprocity requires

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<sup>28</sup> See Brewster, *supra* note 17, at 17–26 (analyzing these complexities with regards to the WTO's TRIPS Agreement).

<sup>29</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 41–50, Apr. 5, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197.

<sup>30</sup> The commentary on the OECD Anti-Bribery Convention explicitly notes that the idea of prosecutorial discretion is fundamental to national enforcement regimes and does not seek to disturb it. See Organisation for Economic Co-operation and Development, *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, ¶ 27 (Nov. 21, 1997) [hereinafter *OECD Treaty and Commentary*].

being able to observe whether another party is abiding by its agreement and tailoring the response to be proportionate to the defection. The less clear the obligation, the harder it is for states to determine if there is a violation and what a proportionate response involves (and to convince third-party states that reciprocal action is justified and not itself a breach of treaty obligations). On the whole, these agreements are less self-enforcing and require more costly monitoring.

### III. CURRENT ANTI-CORRUPTION MEASURES

This Section begins with an overview of the economic justification for anti-bribery legislation. It highlights the collective action problems that states face in their attempts to regulate foreign corruption. This Section then provides a brief overview of the Foreign Corrupt Practices Act (FCPA) including its definition of corruption and its jurisdictional scope. It then turns to the OECD Anti-Bribery treaty and discusses the competitive dynamics that informed its negotiation in the 1990s and its current enforcement.

#### A. Economic Justifications for Anti-Corruption Law

Government corruption, most often defined as “the abuse of public office for private gain,”<sup>31</sup> is now widely accepted as economically inefficient. Instead of allocating government resources based on economic calculations that maximize benefits for the state, government officials maximize their own personal gain at the expense of the public. The idea that public corruption is economically inefficient was not always widely accepted. Samuel Huntington notably argued that corruption permitted private actors to avoid inefficient local bureaucracies.<sup>32</sup> The World Bank similarly viewed bribery as a welfare-increasing means of accelerating major infrastructure projects.<sup>33</sup> Presently, however, the standard economic wisdom is that corruption harms economic growth and development.<sup>34</sup> This is true of large-scale bribery over procurement contracts as

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<sup>31</sup> THE WORLD BANK, *HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK* 8 (1997).

<sup>32</sup> SAMUEL HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968) cited in Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. S141 (2002); see also J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417 (1967) (noting that corruption could be beneficial as a means of promoting entrepreneurship).

<sup>33</sup> See discussion in Abbott & Snidal, *supra* note 32, at S158-59.

<sup>34</sup> See Toke S. Aidt, *Corruption and Sustainable Development*, in 2 INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 3-12 (Susan Rose-Ackerman & Tina Soreide eds., 2011) (reviewing the literature on corruption and development); see also Pieth & Labelle, *supra* note 10, at 1 (stating

well as smaller-scale payments to bureaucratic officials to avoid or speed up documentation, although the former is viewed as more damaging than the latter.<sup>35</sup> Thus, in addition to any ethical, social, or moral justifications, one of the background justifications for adopting anti-corruption measures is an economic one: decreasing corruption will increase economic growth and national welfare, particularly in developing countries where the problems of corruption are the worst.<sup>36</sup>

The OECD Treaty only targets private actors' bribery or attempts to bribe foreign government officials.<sup>37</sup> Because the negative effects of national corruption are shouldered by the domestic economy, internal social forces pushed Western governments to adopt national anti-corruption laws (even if these laws are not always enforced).<sup>38</sup> However, foreign corruption has few direct negative effects on the national economy and may even confer competitive advantages (that is, the nation's corporations are able to sell more goods and services because they win foreign contracts by paying bribes). As a result, governments have not consistently prohibited foreign bribery, even as they criminalized domestic corruption.<sup>39</sup>

Nevertheless, decreasing foreign corruption may be in states' interests if it could be achieved collectively. Joint action could lead to beneficial effects, including (1) greater foreign economic growth can benefit national economies; (2) improved foreign government integrity can decrease political instability and

that "[i]t is now universally recognized that foreign bribery distorts competition, undermines good governance, and hurts the most vulnerable").

- <sup>35</sup> See Pierre-Guillaume Meon & Khalid Sakkat, *Does Corruption Grease or Sand the Wheels of Growth*, 122 PUB. CHOICE 69 (2005) (reviewing the literature and independently finding that "grease" payment harm growth even in non-democratic regimes).
- <sup>36</sup> Anti-corruption advocates also argue that anti-corruption measures increase the integrity of corporate accounting systems and thus benefits developed states as well. See, generally, Benjamin W. Heineman, Jr. & Fritz Heimann, *Arrested Development: The Fight Against International Corporate Bribery*, 92 NATIONAL INTEREST 80 (Nov./Dec. 2007). Recent studies show that bribery decreases employee morale within company and thereby decreases the profitability of the firms. See, generally Paul Healy & George Serafeim, *Causes and Consequences of Firm Disclosures of Anticorruption Efforts* (Harvard Business School Working Paper, 2011).
- <sup>37</sup> The OECD Convention only prohibits the "supply-side" of foreign bribery transaction. The treaty requires governments to criminalize the private actors offering the bribe but does not require the state criminalize the acceptance of the bribe (or request for a bribe) from the foreign government official. See OECD Anti-Bribery Convention, *supra* note 6, art. 1 (only requiring member states to regulate the "offer, promise, or give" a bribe); see also Pieth & Labelle, *supra* note 10, at 1 (stating that the "[the aim of the OECD Treaty is] to turn off the spigot on the supply-side of global corruption").
- <sup>38</sup> See Heineman & Heimann, *supra* note 36, at 82.
- <sup>39</sup> Some states implicitly endorsed foreign bribery by making it a tax-deductible business expense. *Id.* at 81.

thus decrease negative externalities to neighboring states; and (3) less corruption can improve access to foreign markets. In addition to these material incentives, states may also consider moral arguments that tolerate their nationals' corrupting influence abroad as not appropriate given international norms promoting good governance.

Yet states' collective and individual interests in anti-corruption may diverge: states may consider cooperation to decrease foreign corruption to be a net welfare improvement over no cooperation, but each state has an incentive to defect if other states are enforcing bans on foreign corruption. The defecting state can benefit because the state's businesses can increase their proportion of foreign contracts if they can continue to bribe while other states' businesses cannot. This is a classic prisoner's dilemma problem structure where the cooperative outcome is an improvement from a non-cooperative outcome, but each player is better off if it can cheat on the cooperative agreement. In this sense, anti-corruption cooperation is similar to the dynamics of international trade cooperation. Abiding by the agreement provides net gains to all states, but states are tempted to breach the agreement (particularly if the breach is hard to detect) to improve their individual gains further.<sup>40</sup>

Several significant differences exist, however, and these differences drive trade and anti-corruption cooperation towards varying cooperative dynamics. Most importantly, anti-corruption measures have public-good type qualities that make cooperation more challenging. Anti-corruption measures need significant export state participation. The goal of this "supply-side" model is to eliminate the supply for foreign bribes. For this to be effective, most states (or most capital exporting states) need to participate. The effectiveness of the agreement is undermined when there are actors outside of the cooperative agreement continuing to supply bribes. This is not the case in trade agreements where gains from liberalization can be achieved without the participation of a large number of states.<sup>41</sup>

Second, the gains from anti-corruption measures are non-exclusive. States cannot reap benefits by cooperating with a small group and excluding non-cooperators from the benefits of the agreement. The benefit from anti-corruption measures is greater efficiency in foreign markets, but access to the foreign market is not a good that states, which adopt anti-corruption measures,

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<sup>40</sup> International trade is a prisoner's dilemma game from a political point of view where the government prefers to export more and import less. From an economic point of view, states have little incentive to cheat on the agreement. See Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LITERATURE 113 (1997).

<sup>41</sup> The gains from liberalization may be lower and there may be trade diversion, but preferential trading arrangements can (but will not always) achieve economic gains with low levels of participation. See TREBILCOCK et al., *supra* note 14, at 90-91.

can control. Instead, anti-corruption measures generally require that cooperating states restrict access to foreign markets with the goal of pressuring the target state into implementing effective reforms. If the target state does decrease its level of corruption, then the gains from these measures are available to all states regardless of their level of contribution. Because benefits are non-exclusive, states cannot enforce the agreement through reciprocity. Members of an agreement cannot credibly threaten to cut defecting states out of the benefits of cooperation. Certainly states can use sanctions external to the agreement in crafting an enforcement strategy, but simple tit-for-tat strategies are ineffective.

An additional hurdle is that the relevant good—lower levels of foreign corruption—is a much less divisible good than the good in trade agreements. Trade agreements permit incremental gains. For instance, a trade agreement offers gains to cooperating states even if the agreement achieves only a marginal gain in liberalizing trade, such as a decrease in tariff rates of ten percent. Corruption, by contrast, is a societal collective action problem and does not respond in a linear manner to increases in outside pressure.<sup>42</sup> Instead, gains from anti-corruption measures are likely to proceed in step functions, where very few gains are observable until the system achieves a new equilibrium.

All of these issues pose hurdles for effective cooperation. Collective action is necessary to achieve gains—regional or unilateral efforts to dry up the supply of bribes still permit non-cooperating states to supply the corruption market. There are few unique gains to cooperation because the benefits are non-excludable. The costs of enforcing an agreement are higher because intra-agreement reciprocity is not an effective strategy. The benefits of small steps in achieving the agreement's policy goals are lower because the good is less divisible.

## B. The FCPA and OECD Treaty

The pattern of international cooperation on anti-corruption measures has developed differently than many international economic agreements in that it began with a single state's unilateral action rather than bilateral or multilateral action. The United States was the first mover in prohibiting private actors from engaging in corrupt activity overseas. Congress passed the FCPA,<sup>43</sup> in 1977 in the aftermath of the Watergate scandal, which revealed that American corporations had been paying bribes to secure overseas contracts. The FCPA prohibits those covered by the act from bribing or offering a bribe to any

<sup>42</sup> See Ajit Mishra, *Persistence of Corruption: Some Theoretical Perspectives*, 34 *WORLD DEVELOPMENT* 349 (2006).

<sup>43</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 USC § 78dd-1 et seq.).

foreign officials to secure business abroad.<sup>44</sup> A bribe is defined broadly: offering “anything of value” to foreign officials, which has subsequently been interpreted to include money, gifts, the employment of family members, or charitable contributions. However, such payments only qualify as bribes if the payment is illegal under the law of the foreign state. In determining the content of foreign law, the FCPA looks to the written laws of the foreign state, even if these laws are rarely, if ever, enforced.<sup>45</sup> The term “foreign officials” is also defined broadly, including government officials, officers of international organizations, candidates for elected office, and employees of state-owned enterprises.<sup>46</sup> Entities covered by the law now include (1) U.S. nationals and resident aliens; (2) any entity incorporated or with a principal place of business in the United States; or (3) any entity that lists shares on an American exchange. In addition, the United States exerts jurisdiction over a bribe or offer to bribe if any part of the conduct occurs within the territory of the United States.

While early American enforcement efforts were tepid, the Department of Justice became far more interested in prosecuting violations of the FCPA in the late 1990s. Before 1998, the DOJ prosecuted less than three cases a year, but has subsequently made FCPA issues a priority, prosecuting over twelve cases a year.<sup>47</sup> The cases have also become more significant with the government prosecuting major firms, such as Halliburton, Kellogg, Brown & Root, and Siemens.<sup>48</sup> The SEC has also started prosecuting more FCPA cases, including claims against J.P. Morgan’s hiring practices in China.<sup>49</sup>

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<sup>44</sup> In addition, the act requires companies to establish internal accounting systems intended to prevent firms from the creation of slush funds or otherwise willfully failing to prevent employees or agents from making corrupt payments without the firm’s knowledge. These accounting provisions were arguably more important than the criminal prohibitions in the early years of the FCPA because they required firms to take action to make themselves aware of foreign payments even if the federal government fails to prosecute any illicit behavior.

<sup>45</sup> Elizabeth Spahn, *Implementing Global Anti-Bribery Norms from the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 *IND. INT’L & COMP. L. REV.* 1, 8 (2013). *See also United States v. Kozeny*, 582 F. Supp.2d 535 (2008) (determining that a bribe paid to a government official in Azerbaijan is illegal under the FCPA even if the bribe-payer qualified for immunity under Azeri law because he reported the payment to local authorities).

<sup>46</sup> *See* Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012). This definition is currently being challenged in litigation. The Eleventh Circuit has recently heard arguments regarding the status of employees of state-owned enterprises as government officials. *See United States v. Esquenazi*, Case: 11-15331 (11th Cir.).

<sup>47</sup> Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* (NYU Law and Economics, Research Paper No. 12-15 2012).

<sup>48</sup> *See, for example*, Thomas O. Gorman & William P. McGrath Jr., *The New Era of FCPA Enforcement: Moving Toward a New Era of Compliance*, 40 *SECURITIES REG. L. J.* 341 (2012).

<sup>49</sup> *See, for example*, Neil Gough, *JPMorgan Is Said to Drop Out of Another Offering in China*, *N.Y. TIMES*, Jan. 21, 2014.

After the passage of the FCPA, the US government attempted to persuade foreign governments to undertake similar legislation.<sup>50</sup> From an economic point of view, the United States government did not want to harm American businesses engaging in transactions abroad. US businesses faced an uneven playing field for foreign business if they were bidding for government contracts against firms who were not constrained from offering bribes. Thus once the US government committed to a foreign anti-corruption policy, it was in American commercial interests to have other states adopt similar restrictions.<sup>51</sup>

In OECD and WTO negotiations, American officials pushed European colleagues to apply anti-corruption laws to firms within their jurisdiction.<sup>52</sup> European governments were generally uninterested in following suit, tending to view the FCPA as moralistic legislation that was naïve regarding how business operated in many developing countries.<sup>53</sup> In addition, European governments recognized that the United States' unilateral action provided their firms with a competitive advantage.<sup>54</sup> The ability to bribe foreign state officials, sometimes with the active assistance of home state embassy officials, permitted European firms to offer contract terms that were more appealing to host state government officials, particularly when bidding for large state procurement contracts.

Daniel Tarullo describes the bargaining over the OECD Treaty as resembling a prisoner's dilemma game.<sup>55</sup> He argues that all of the members of the OECD could gain by mutually agreeing to prohibit their firms from bribing foreign governments, but that each state was reluctant to give up any advantage for their exporters. Tarullo quotes one politician who argued his nation's firms needed the ability to bribe to compete against more efficient American firms.<sup>56</sup> Unsurprisingly, early negotiations were not successful. With the United States

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<sup>50</sup> This article focuses on the OECD Treaty as the major multilateral anti-corruption treaty. After the conclusion of the OECD Treaty, several other multilateral anti-corruption treaties were negotiated. The most important of these is the United Nations Convention Against Corruption, the first attempt at a global attempt to regulate corruption, which entered into force in 2005. Like prior agreements, the UN treaty requires governments to adopt national law that criminalizes foreign bribes but does not set out enforcement requirements. Unlike prior agreements, it also provides that states return any gains from bribery, such as the seizure of personal assets from former government officials, to the host state. Most major economies have ratified the UN treaty with the notable exceptions of Germany and Japan.

<sup>51</sup> Abbott & Snidal, *supra* note 32, at S158-59.

<sup>52</sup> Tarullo, *supra* note 12. American negotiators at one point even threatened to use trade sanctions if governments failed to regulate their own exporters. *Id.* at 678.

<sup>53</sup> Patrick Glynn et al., *The Globalization of Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY 6, 22 (Kimberly Ann Elliot ed., 1997).

<sup>54</sup> Tarullo, *supra* note 12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 674 n.26.



already committed to a policy of enforcing anti-corruption rules against its firms, other states were reluctant to bind themselves to a treaty that would limit their firms' range of action. It was not until the 1990s, when European governments experienced their set of domestic corruption scandals, that interest in a multilateral treaty gained traction.<sup>57</sup>

The OECD Anti-Bribery Convention is largely an extension of the FCPA to OECD member states.<sup>58</sup> The treaty requires states to adopt anti-corruption legislation that mimics the United States' legislation, including a ban on any private payment to foreign government officials made to attain or retain business.<sup>59</sup> Like the FCPA, the legislation does not include exceptions for local corruption norms (the idea of "this is how business is done here").<sup>60</sup> The treaty places an obligation on each state to enforce its own national legislation governing private corrupt payments to foreign officials, but does not demand any particular enforcement measures or discuss how enforcement should be evaluated.<sup>61</sup> As of this writing, forty states have ratified the OECD Convention; the thirty-four members of the OECD and six non-OECD members (Argentina, Brazil, Bulgaria, Columbia, Russia, and South Africa).<sup>62</sup>

While the signing and ratification of the OECD Treaty creates an international obligation for member governments to enact domestic legislation prohibiting foreign corrupt activity, the incentives for states to under-enforce this agreement remain. The same competitive concerns that made some states reluctant to sign onto the OECD Treaty may make some governments reluctant to enforce their rules stringently.<sup>63</sup> Transparency International finds that only four OECD Treaty members are "active" enforcers of the agreement.<sup>64</sup> Similarly, the OECD's own Working Group on Bribery regularly concludes that

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<sup>57</sup> Abbott & Snidal, *supra* note 32, at S158-59.

<sup>58</sup> Spahn, *supra* note 45.

<sup>59</sup> *OECD Treaty and Commentary*, *supra* note 30, arts. 1–3. Like the FCPA, the OECD Treaty also establishes private record keeping requirements, *see* art. 8.

<sup>60</sup> *See OECD Treaty and Commentary*, *supra* note 30, at 15 (stating that "It is also an offence irrespective of . . . the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business.").

<sup>61</sup> *OECD Treaty and Commentary*, *supra* note 30, arts. 5, 17.

<sup>62</sup> *See* Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 20 November 2012, available at <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf>.

<sup>63</sup> *See* Pieth & Labelle, *supra* note 10, at 1 (noting that "[t]he internal enforcement of anti-corruption is particularly important during the global recession] when some argue that winning orders should trump fighting corruption.>").

<sup>64</sup> Transparency International Report, *Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* (2013).

many, if not most, OECD members do not undertake adequate efforts to enforce the agreement.<sup>65</sup> In short, the prisoner's dilemma continues to exist but has been moved to the enforcement stage: some states may find a strategy of formal compliance with the OECD rules (enactment of the necessary domestic legislation) but lax internal enforcement of these rules to be optimal. Moreover, the ambiguity of the OECD Treaty's requirements for implementing anti-corruption law domestically makes such a strategy possible.

### C. Criteria for Evaluating Domestic Enforcement Efforts

Although the OECD Treaty does not define what a state's obligations are in terms of enforcing its own anti-corruption law, there are various metrics that can be used to evaluate enforcement efforts. This section discusses the most prominent two metrics: a resource-based approach (the level of government police and prosecutorial resources) and an incidence-based approach (the level of violations that occur within the state's jurisdiction). Both of these approaches have important limits to evaluating state implementation of its national rules.

The most common means of assessing government enforcement is a resource-based approach: an evaluation of the level of resources the government has dedicated to policing and prosecuting private behavior. For instance, Transparency International grades states' anti-bribery enforcement efforts based on the number of prosecutions each pursues.<sup>66</sup> This criterion is not inherently problematic but it suffers from several concerns. First, treaties rarely specify what level of resource engagement is necessary. As a result, governments are not obviously in breach of an international agreement or failing to "live up" to their obligations by failing to bring a certain number of prosecutions. While governments may have to make a "good faith effort" to effectuate this legislation, it is far from clear what level of resources constitutes a good faith effort. If there is a low level of underlying illegal behavior, then low levels of enforcement may be appropriate.<sup>67</sup> However, determining the level of underlying

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<sup>65</sup> The OECD Working Group on Bribery provides a three-phase analysis of specific countries' implementation of the OECD Anti-Bribery Treaty. These country reports regularly find that states need to do more to enforce the agreement. *See, for example*, OECD Working Group on Bribery's Phase 3 Report on Implementing the OECD Anti-Bribery Convention in South Africa, 5 (March 2014), available at <http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf> (expressing that the Working Group was "seriously concerned" that the South African government had not brought a single prosecution for foreign bribery in spite of its robust domestic legislation).

<sup>66</sup> *See supra* note 64.

<sup>67</sup> For instance, the OECD working group on bribery notes that the New Zealand government has the perception that it does not need to prosecute an anti-bribery case because New Zealand businesses never engage in bribery. *See* OECD Working Group on Bribery's Phase 3 Report on

illegal behavior is difficult given that private actors are unlikely to be forthcoming about their illicit behavior. In addition, government officials cannot count on injured private market actors to inform them of violations. Illicit behavior may not be observable to other private market participants, and thus injured parties may also not be able to reliably report these violations to their host or home government.<sup>68</sup>

Second, states are resource constrained and may prioritize law enforcement goals over others.<sup>69</sup> Resource constraints are an issue for all governments, but particularly so for states facing budget crises. When evaluating whether the state is making a good faith effort, this inquiry should account for the severity of the state's other illegal activity. If the prosecution of foreign corruption cases will siphon resources away from other law enforcement goals, such as prosecuting violent crime or monitoring security threats, then low levels of resources may again be appropriate.<sup>70</sup> In addition, the absolute number of prosecutions may not

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Implementing the OECD Anti-Bribery Convention in New Zealand, 9 (October 2013) (expressing concern with the “outdated perception” held by many in New Zealand’s public sector that domestic companies do not engage in bribery is holding back more rigorous enforcement efforts). While one may wonder if every New Zealand business is, in fact, so virtuous, the government’s perception illustrates a broader issue. If the rate of illegal activity is low, it may very well be appropriate for a government to dedicate few resources toward a specific policy goal (such as anti-bribery or antitrust efforts) as compared to general law enforcement funds. However, the probability of detecting illegal activity is also low if police and/or prosecutors are not educated or trained to look for this type of behavior or are not incentivized to prosecute it.

<sup>68</sup> Illegal transactions are often observationally equivalent to legal transactions. For instance, price fixing resembles efficient market pricing in antitrust law. Similarly, government procurement contracts that include bribes appear identical to corruption-free contracts. Only by observing the negotiations surrounding the activity (for example, discussions to harmonize price or pay-offs made by third-parties outside of the scope of contract negotiations) can a transaction be determined to be illicit. Often market participants only have access to transparent outcomes—the price of a good, the procurement contract—but these outcomes are typically insufficient to show illegal action. Thus, though an injured market participant may suspect illegal activity, they may not have access to the conclusive information.

<sup>69</sup> A state’s failure to prosecute cases does not necessarily mean that formal laws have no chilling effects. Non-prosecutorial effects may exist to deter private actors from engaging in illegal conduct even if the threat of prosecution is low. For instance, American banks have refused to accept deposits from or make loans to small marijuana farmers, even in states where the practice has been legalized and federal law enforcement officials have declared that small batch marijuana farming will not be prosecuted. The lack of bank support makes engaging in the activity difficult notwithstanding the lack of government enforcement. See Jonathan Martin, *Medical-Marijuana Dispensaries Run into Trouble at the Bank*, SEATTLE TIMES, April 29, 2012.

<sup>70</sup> One means of addressing resource scarcity may be to delegate enforcement to private parties. Private rights of action or qui tam legislation can effectively transfer to private parties the ability to enforce these laws. See Paul D. Carrington, *Private Enforcement of International Law*, in ANTI-CORRUPTION POLICY (Susan Rose-Ackerman & Paul D. Carrington eds., 2013), 285–97. Private litigation will still burden a state’s judicial system, but private parties bear the monitoring and prosecutorial costs. The efficacy of private litigation depends on a number of factors including

be particularly revealing if the choice of cases is strategic. Antitrust, anti-corruption, and intellectual property prosecutions all provide governments with the ability to use law enforcement as a form of industrial policy: a state may bring a large number of cases but disproportionately prosecute foreign firms as a means of advantaging domestic producers.<sup>71</sup>

Alternatively states' efforts could be judged based on the frequency of illicit private behavior in its jurisdiction. For instance, the United States frequently complains of the Chinese government's failure to abide by its intellectual property right's obligations under the WTO's TRIPS agreement based on the level of private intellectual property violations that take place in the country.<sup>72</sup> No state, however, can hope to eliminate all private violations (or even most violations) of these types of laws. For instance, the United States government arguably is a strong supporter of copyright laws, and yet private violations of copyright law by consumers are rampant. The question is when the underlying incident-level surpasses some critical threshold and whether the government is aware of the level of violation.

Applied to anti-corruption measures, this method of evaluating whether governments are abiding by their obligations is to monitor the underlying incidence of foreign bribery by multinational corporations (or other private actors) within the state's jurisdiction. States that have higher levels of corrupt private activity would be less compliant with the agreement than states with lower levels. The limits to this approach are two-fold. First, learning the underlying level of private corruption is difficult information to gather. Because these actions are criminalized, private actors will attempt to hide any evidence of corrupt activity. As such, this is a highly speculative metric. Second, the treaty does not establish at what incident threshold the state would be responsible for taking additional actions. For instance, the United States is generally viewed as a

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private parties' information on the illicit activity, the level of damages allowed under civil law, and the availability of procedural devices (for example class actions). Governments may opt to not provide private access to enforcement for various reasons, including concerns about over-deterrence or the calibration of policy implementation. Most international economic agreements do not require governments to create private enforcement mechanisms, although the TRIPS Agreement requires that states provide private civil remedies for violations of intellectual property law.

<sup>71</sup> Choi and Davis find that the United States government fines foreign firms much more severely under the Foreign Corrupt Practices Act, even accounting for the size the bribe, the extent of the corruption, the level of company profits from corruption, and other variables. *See* Choi & Davis, *supra* note 47.

<sup>72</sup> *See, for example*, Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Mar. 19, 2009) (case in which the United States government alleged that the Chinese government was not prosecuting violations of domestic intellectual property law that were under a “commercial scale” threshold).

significant enforcer of anti-corruption law, but no one claims that most incidents of overseas corruption are detected or prosecuted.

In sum, the standards for evaluating whether a state is abiding by a good faith effort to enforce its own market-engaging legislation are not well defined. Unlike traditional international economic agreements, the obligations themselves lack clarity and unambiguous baselines for judging the state's compliance. On a spectrum of transparent to opaque, market-engaging agreements trend toward the opaque, making these agreements difficult to monitor. Other states and private actors cannot readily discern whether a government is complying with the agreement by observing its public acts.

#### IV. EFFECTS ON THE INTERSTATE ENFORCEMENT OF ANTI-CORRUPTION MEASURES

For all of the domestic legislation and international agreements, it is fair to ask whether the FCPA or the OECD Treaty have actually changed private actors' dealings with foreign governments. Anti-corruption obligations may simply be aspirational commitments rather than a policy priority. This Section discusses state-to-state enforcement of anti-corruption measures. The first part addresses how traditional interstate enforcement mechanisms, such a reciprocity or sanctioning, have limited effect in the corruption context. The second part then turns to current assessments of the OECD enforcement, which highlights subsidiary enforcement mechanisms. This part discusses the United States' approach of expansive overseas jurisdiction as a means to compensate for other treaty's members weak enforcement practices.

##### A. Traditional Means of Interstate Enforcement

International treaty agreements have historically been enforced through informal state-to-state mechanisms, such a reciprocity and retaliation.<sup>73</sup> For either of these mechanisms to be effective, states need to be able to (1) observe the behavior of other treaty members and (2) interpret whether their actions are consistent with the treaty's terms. Both these observation and interpretation elements pose problems for the informal enforcement of the OECD Treaty. In terms of observation, governments can witness whether their treaty partners have adopted the requisite national legislation but cannot detect other key variables. How high of a policy priority is policing and prosecuting foreign corruption? Are police or prosecutors aware of any foreign corruption by prominent national corporations but are failing to investigate for political reasons? This information is critical to understanding the state's approach to

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<sup>73</sup> POSNER & SYKES, *supra* note 5, at 26–33.

implementing national anti-corruption legislation, but is generally unobservable to those outside of the state.

Interpreting whether a partner state's behavior is consistent with the treaty is also challenging. As Section III detailed, the OECD Treaty does not provide clear guidance on what levels of domestic enforcement efforts states need to undertake. Instead, the degree of implementation is left underspecified. This creates an interpretative question for states. Some treaty partners may understand the treaty to require only formal compliance (that is, enactment of domestic legislation) while others may understand the treaty terms to require more rigorous domestic implementation.

Treaty members who interpret the agreement to have more demanding domestic enforcement requirements can attempt to retaliate against treaty partners that fail to bring prosecutions. For instance, the retaliating state can threaten to withhold benefits from other forms of cooperation (such as trade preferences, good diplomatic relations, intelligence reports) unless the target state increases its domestic enforcement efforts. However, such threats of retaliation can put the enforcing state in a precarious situation. Without a clear standard determining that another state has violated its treaty obligations, the retaliating state itself may be viewed as overstepping legal limits. Alexander Thompson has described this as the "sanctioners' dilemma," where states seeking to enforce international agreements through retaliation may themselves be accused of violating legal rules if other states do not agree there has been an initial breach.<sup>74</sup> The more ambiguous the treaty terms, the greater the probability that a sanctioning state will face pushback from its unilateral retaliation.

States are also limited in their ability to use reciprocity to enforce anti-corruption measures. As discussed in Section III.A, it is difficult for states to use reciprocity to enforce an anti-corruption treaty because tit-for-tat actions do not punish the non-cooperative state.<sup>75</sup> For instance, if one state is lax in its enforcement of its domestic rules, it is not materially injured if another state decreases its enforcement in response. As a result, reciprocity may not be effective in enforcing anti-corruption agreements.

However, reciprocity may have important impacts on the effectiveness of the agreements. If a state suspects that its treaty partners are not rigorously

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<sup>74</sup> Alexander Thompson, *The Rational Enforcement of International Law: Solving the Sanctioners' Dilemma*, 1 INT'L THEORY 307 (2009).

<sup>75</sup> Reciprocity is effective where the benefits of cooperation are excludable. For instance, in trade agreements, an enforcing state can punish a breach states by raising its tariff levels in response to the breaching state's decision to raise its tariff levels. The breaching state suffers a material injury here because it is denied the benefits of the treaty. Reciprocity is less effective in other situations—such as climate change or human rights—when another state's breach of the treaty terms does not exclude the breaching state from cooperative gains.

implementing the agreement, the state may choose to adopt a similar approach and lower its level of implementation. Such reciprocal actions may lead to lower overall levels of treaty enforcement as treaty partners adjust their expectation of compliance lower.<sup>76</sup> As the next section discusses, the generally weak level of enforcement of the OECD Convention may be the result of such lowered expectations.

## B. Current Assessments of OECD Enforcement

Since the signing of the OECD Treaty in 1997, it is not entirely clear how much the status quo has changed in terms of effective enforcement of anti-corruption norms. All of the parties have enacted the necessary domestic legislation, but prosecutions under domestic law have varied widely between jurisdictions. Transparency International, which bases its enforcement ratings on the number of prosecutions pursued, has rated only four states (ten percent of the membership) as active enforcers: Germany, Switzerland, the United Kingdom, and the United States.<sup>77</sup> Half of the OECD membership is ranked as having little to no enforcement of the agreement.<sup>78</sup> The United States remains the most active enforcer in terms of the number of cases pursued, accounting for over fifty percent of all OECD bribery prosecutions.<sup>79</sup> Prosecutions for foreign anti-corruption are rare outside of the OECD, although more developing states seem interested in prosecuting foreign firms for in-state corrupt activities.<sup>80</sup>

Transparency International's observation that most OECD Treaty members have little to no domestic enforcement of their national anti-corruption laws may be explained by a lack of trust between treaty members. If a government believes that other treaty members will not adopt rigorous implementation standards, then its optimal response may be to follow suit. Such actions may be reciprocal but here, reciprocity is acting in a manner that undermines the treaty's goals rather than supporting higher levels of interstate enforcement.

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<sup>76</sup> In game theory terms, this situation may approach a "stag hunt" game where states only cooperate if they trust that their treaty partners will cooperate as well.

<sup>77</sup> Heineman & Heimann, *supra* note 36, at 83.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> In particular, the Chinese government is increasing its prosecution of foreign firms who bribe local officials. *See, for example*, Peter Henning, *Lessons from the Glaxo Case in China*, N.Y. TIMES DEALBOOK, Oct. 22, 2013 (discussing increased Chinese enforcement of domestic anti-corruption laws against foreign firms).

The United States seems to be an outlier in anti-corruption enforcement, remaining an active enforcer among treaty partners who are weak enforcers. However, the US domestic actions—particularly the targets of US enforcement—may indirectly be a source of interstate enforcement. The United States has adopted a very broad jurisdiction approach to implementing its anti-corruption laws, casting a net wide enough to capture a lot of activity that has only limited connection to American territory. Of the ten largest FCPA cases, in terms of the size of the fine, nine of these cases have been against foreign corporations. Stephen Choi and Kevin Davis examine the entire body of FCPA prosecutions from 2004–2011 and find that the DOJ disproportionately sanctions foreign firms relative to domestic firms, controlling for the size of the bribe, the profits made from the corrupt activity, and the amount of economic activity involved.<sup>81</sup> The Choi and Davis study confirms that systematic discriminatory effects exist, although they cannot isolate the specific cause.<sup>82</sup> Nonetheless, the overwhelming majority of cases (with lower fines) continue to involve national firms.<sup>83</sup>

American prosecutors' decisions on how harshly to fine a corporation can be considered a form of interstate enforcement. Prosecutors may believe that they are balancing the disadvantage that American firms face through tighter general enforcement by imposing harsher punishments on foreign firms that fall within the FCPA's jurisdiction.<sup>84</sup> Such prosecutions are not retaliation—the United States government is not withdrawing any benefits of cooperation from foreign governments—but they may be an indirect attempt to promote greater domestic enforcement by OECD Treaty members. By expanding its *domestic enforcement* of anti-corruption measures, the United States can attempt to increase the *international enforcement* of the OECD Treaty by compensating for lax enforcement elsewhere.

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<sup>81</sup> Choi & Davis, *supra* note 47. Choi and Davis do not attempt to control for the quality of the evidence. See also Paul B. Stephan, *Regulatory Competition and Anticorruption Law* (University of Virginia Law and Economics Research Paper Series 2012-09, 20, 2012) (discussing the possibility of targeted prosecution).

<sup>82</sup> Interestingly, Choi and Davis also find that foreign firms receive high fines when there is cross-national prosecutorial cooperation. This indicates that the willingness of home state authorities to cooperate with the DOJ and provide evidence does not lessen the sanction that the foreign firm receives. Choi & Davis, *supra* note 47.

<sup>83</sup> This might be targeting but it might also be a function of the size of the operation or the quality of the evidence (foreign firms might be more open about their actions if they did not expect to be prosecuted and thus taken fewer actions to hide evidence of foreign bribery).

<sup>84</sup> Less strategic explanations also exist. Foreign firms may simply have less experience in negotiating deferred prosecution agreements with the DOJ and therefore receive less favorable treatment. If this is the case, there should be a learning curve for foreign firms and the gap between foreign and domestic fines for similar activity should decrease over time.



Such unilateral actions are not uncommon in international economic law. Under the GATT system of trade law, commentators and government officials viewed international enforcement of trade rules as weak. Dispute resolution systems were governed by a consensus rule, which led to a slow and sometimes ineffective enforcement system. Frustrated with the pace of enforcement actions, the United States government undertook a system of unilateral enforcement measures (“Section 301” actions) as a means of encouraging compliance with GATT rules.<sup>85</sup> The American unilateral measures were controversial internationally; foreign governments alleged that the United States was overly aggressive in its finding of violations and its threats of retaliation. Nevertheless, the United States practice of unilateral enforcement created the necessary political support among foreign nations for the creation of the World Trade Organization’s strong and more multilateral system of trade law enforcement.

An analogous situation may be taking place in the anti-corruption field. Generally, OECD governments are less than rigorous in their enforcement of domestic laws prohibiting foreign corruption. This lack of rigor is effectively permitted by the OECD Treaty regime because of the treaty’s internal ambiguities concerning what level of domestic enforcement is necessary. On the whole, this leads to a situation where governments have formally adopted strong national laws but dedicate few resources towards domestic implementation of these laws. However, a few states—most notably, the United States—are interested in enforcing these laws (against foreign actors, rather than foreign states) and adopt broad jurisdictional principles to extend their enforcement actions as widely as possible. While controversial, such “aggressive” enforcement of anti-corruption law may, in the future, create the political conditions necessary to strengthen the requirements of anti-corruption treaties and lead to a stronger and more multilateral enforcement system.

## V. CONCLUSIONS

Anti-corruption laws are gaining greater prominence in international economic law. The OECD Anti-Bribery Convention is the most significant example of an international agreement designed to decrease the supply of bribes from private parties to foreign government officials. From one viewpoint, the treaty represents an important change in governments’ views of the harms from foreign corruption. OECD members, and some non-members, have jointly

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<sup>85</sup> See Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM: AMERICAN’S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 1, 1–2 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). The terms “Section 301” comes from relevant provision in the U.S. 1974 Trade Act. Trade Act of 1974, § 301, 19 U.S.C. §§ 2411, 2414 (2000).

agreed to prohibit bribes and offers of bribes by private actors within their jurisdiction. Compliance with the agreement has been very high if judged by the adoption of national legislation. All of the OECD Convention members have in fact passed domestic legislation implementing the agreement. From a domestic enforcement viewpoint, however, it is unclear whether compliance with the goals of the OECD Treaty is particularly high. The treaty itself contains internal enforcement ambiguities regarding the extent to which governments must intervene in the market to investigate and prosecute corrupt payments by private actors. Thus governments can formally comply with the letter of the treaty that requires a minimum-standard for national legislation and yet dedicate little to no resources towards enforcement. Over half of OECD governments have failed to engage in any serious enforcement efforts.

These internal enforcement ambiguities further hamper the interstate enforcement of the agreement. The lack of a clear standard for enforcement efforts makes it difficult for governments to sanction weak enforcers. Worse, the expectation that other states will only weakly enforce the agreement may lead other states to act reciprocally and adopt a similarly weak enforcement strategy. Nonetheless, there are strong enforcement outliers among the OECD membership. The United States, in particular, appears to prefer a high level of enforcement regardless of other states' enforcement efforts. Germany, Switzerland, and the United Kingdom similarly appear to have independent preferences for higher enforcement levels. These states may be able to increase the enforcement of anti-corruption laws across the OECD indirectly by adopting broad jurisdictional theories to reach private activity in weak enforcement states.