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Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values

Duane Windsor*
Kathleen A. Getz**

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Introduction

In 1977, Congress passed the U.S. Foreign Corrupt Practices Act (1977 FCPA or the Act), which criminalized business bribery of foreign public officials by both securities issuers and domestic concerns. For purposes of implementing the prohibitions against business corruption contained in the Act, the 1977 FCPA also imposed substantial accounting and internal-control requirements on securities issuers. Congress substantially amended the 1977 FCPA in 1988 to include a provision requiring the President to seek international cooperation in suppressing such business bribery. Multilateral anti-corruption conventions followed after a marked lag.¹

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1. In addition to the United States, Transparency International (TI) and the International Chamber of Commerce (ICC) played a major role in motivating the multilateral initiatives. For more information on TI, consult their website at <<http://www.transparency.org>> [hereinafter TI website]. The ICC's website is <<http://www.iccwbo.org>>.

The Organization of American States (OAS), in 1996,² and the Organization for Economic Cooperation and Development (OECD), in 1997,³ adopted differing multilateral anti-corruption conventions reflecting varying membership-specific concerns and circumstances. These respective Conventions have been signed by all the members to these two organizations, and member nations currently are engaged in the various stages of formal ratification and implementation by domestic legislation. Upon adoption of the OECD Convention by the United States, Congress further amended the FCPA in 1998, in order to bring U.S. law into conformity.⁴ The OAS and OECD Conventions are open to other nations.

The OAS is a strictly regional association of Western Hemisphere countries. Most OAS member nations are developing countries, which rank poorly on Transparency International's (TI) Corruption Perception Index (CPI).⁵ The United States is greatly concerned with illegal drug trafficking operations originating within the Western Hemisphere, particularly from Latin America, and with the related problem of money laundering activities by financial institutions.

In contrast to the OAS, the OECD is a worldwide association comprised mostly of advanced-economy nations. The OECD arose as a consultative body, the so-called "Triad," among North America, Western Europe, and Asia-Pacific industrial democracies and trading partners. Membership has expanded in recent years to include Mexico, a member of the North American Free Trade Agreement (NAFTA), as well as certain formerly-communist countries in Central and Eastern Europe. Other nations are invited to join the Convention through the OECD Working Group on Bribery in International Business Transactions, and five countries, Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic, have done so. As part of its effort to reduce international business corruption, the OECD issued a recommendation, affecting some fourteen European countries, to eliminate tax deductibility of foreign bribe payments.⁶

2. See OAS Inter-American Convention Against Corruption (IACAC), Mar. 29, 1996, 35 I.L.M. 724 (1996) (effective Mar. 6, 1997). The OAS website is <<http://www.oas.org>>.

3. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998) (effective Feb. 15, 1999). The monitoring procedure began in April 1999 and was scheduled to be completed during Spring 2000. The OECD website is <<http://www.oecd.org>>.

4. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (effective Dec. 19, 1977) (codified as amended at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff) (amending scattered sections of 15 U.S.C. §§ 77a-78kk (1976)), as amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994) as amended by International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

5. See *infra* tbl.1. The CPI is reported annually by TI, a non-governmental organization (NGO) based in Germany. See TI website, *supra* note 1.

6. See Anti-Corruption Unit, OECD, *Update on the Implementation of the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials* (Apr. 28, 1998) <<http://www.oecd.org/daf/nocorruption/tax.htm#annex>>.

The European Union is comprised of fifteen countries, all of which are members of the OECD. The EU Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union (EU Convention) addresses bribery of EU officials.⁷

The OAS, OECD, and EU Conventions all adopt, albeit in variously modified forms, the FCPA's principle of extraterritorial and supply-side criminalization of home-country business bribery of host-country foreign officials and international public organization officials. Nearly all nations historically prohibited bribery of their own officials, although such demand-side regulation was evidently ineffective in preventing bribery and extortion in many countries; and it is commonplace, if not universal, to forbid commercial corruption as well.⁸

An impressive array of other multilateral entities, including the United Nations (U.N.),⁹ the International Chamber of Commerce (ICC),¹⁰ the Council of Europe,¹¹ the World Bank,¹² and the International Monetary Fund (IMF),¹³ have adopted resolutions or efforts directed toward the reduction and ultimate elimination of international business corruption.¹⁴ In particular, the U.N. Declaration Against Corruption and Bribery in International Commercial Transactions (U.N. Declaration) and the U.N. Draft Code of Conduct on Transnational Corporations (U.N. Draft Code)¹⁵

7. See 1997 O.J. (C 195). The EU website is <europa.eu.int>.

8. See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 258-59 (1999) [hereinafter Nichols, *Regulating Bribery*] (citing additionally FRITZ F. HEIMANN, SHOULD FOREIGN BRIBERY BE A CRIME? 2 (1994), and LIBRARY OF CONGRESS, A COMPILATION OF BRIBERY AND EXTORTION LAWS IN OPIC COUNTRIES (1976); Julie B. Nesbit, Note, *Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy*, 31 VAND. J. TRANSNAT'L L. 1273, 1274 n.1 (1998) (citing Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 318-21 (1997) [hereinafter Nichols, *Outlawing Bribery*]).

9. See U.N. Declaration Against Corruption and Bribery in International Commercial Transactions, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Supp. No. 49, Annex, Agenda Item 12, at 178, U.N. Doc. A/51/49 (1996). For more information on the United Nations (U.N.), visit the U.N.'s website at <<http://www.un.org>>.

10. See International Chamber of Commerce, 1996 Revisions to the ICC Rules of Conduct on Extortion and Bribery in International Business Transactions, Mar. 26, 1996, reprinted in 35 I.L.M. 1306 (1996).

11. The Council of Europe Committee of Ministers adopted a Programme of Action Against Corruption (Multidisciplinary Group on Corruption) in 1996. The Council of Europe website is <<http://www.coe.fr>>.

12. The World Bank website is <<http://www.worldbank.org>>.

13. The IMF website is <<http://www.imf.org>>.

14. See Nichols, *Regulating Bribery*, supra note 8, at 267 n.50. Philip Nichols argues that the World Trade Organization (WTO) has the authority to act in this matter. See Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL'Y 711 (1996). To date, however, the WTO, established in 1994 as the broader, institutionalized successor to the 1947 General Agreement on Tariffs and Trade (GATT) negotiating process, has not formally acted.

15. The U.N. Draft Code of Conduct on Transnational Corporations has not yet been implemented. Notably, however, it includes FCPA-like anti-bribery and financial disclosure language. See U.N. Draft Code, ¶ 20, reprinted in LEE E. PRESTON & DUANE WIND-

together indicate worldwide recognition that business bribery of foreign officials is wrong. Indeed, the endorsement of anti-corruption initiatives by such a broad range of multinational entities attributes strong moral authority¹⁶ to the actions of regional and global associative bodies, such as the OAS and the OECD, to combat corruption globally through extraterritorial actions and to influence other countries not formally adhering to their conventions. As Bill Shaw argues, the principles first articulated by the 1977 FCPA and subsequently strengthened by its progeny have become “morally unassailable.”¹⁷

The authors characterize the FCPA, as amended in 1988 and again in 1998, and these recent multilateral conventions as important but early steps in the development of an effective global anti-corruption regime, one that is gradually becoming institutionalized despite mixed motives and diverse values concerning corruption on the part of adhering member nations. The U.N. Draft Code¹⁸ reflects the complexity that results from world-scale bargaining and that has retarded its final adoption.¹⁹

The diversity of participant motives and values includes matters affecting economic self-interest, political ideology, national sovereignty, diplomatic leadership, and moral philosophy. “Economic self-interest” is not a simple notion, as it necessarily incorporates arguments pertaining to market efficiency, distribution of wealth and business opportunity, comparative and competitive advantage, and resource allocation.²⁰ “Economic motives” include the creation and distribution of revenues, profits, and jobs and their attendant repercussions. “Political or diplomatic motives”

SOR, *THE RULES OF THE GAME IN THE GLOBAL ECONOMY: POLICY REGIMES FOR INTERNATIONAL BUSINESS* 249-67 (1st ed. 1992) (reprinting the proposed text of the Draft Code, as of the early 1990s).

16. See William C. Frederick, *The Moral Authority of Transnational Corporate Codes*, 10 J. BUS. ETHICS 165 (1991).

17. See Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689 (2000).

18. See the proposed text of the U.N. Draft Code, as of the early 1990's, reprinted in PRESTON & WINDSOR, *supra* note 15, at 246-47.

19. See PRESTON & WINDSOR, *supra* note 15, at 249-67. The drafting process began in 1974, following revelations concerning alleged activities of ITT, a U.S. firm, in Chile. The Code attempts to address in global and comprehensive form enterprise respect for national sovereignty including domestic laws, conformity with national economic development policy, good-faith negotiation, respect for domestic socio-cultural objectives and values—a matter that could embrace value diversity with respect to corruption and gifts—respect for human rights and fundamental freedoms, non-collaboration with apartheid in South Africa, and non-interference in host country affairs and intergovernmental relations. The draft also addresses governmental treatment of transnational enterprises and a number of other issues. See generally *id.*

20. See Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 442 (1997) (arguing that “present multilateral initiatives to fight corruption are motivated by the economic self-interest of countries and businesses who believe that honesty and efficiency are closely linked”). The argument is cited in Nora M. Rubin, Note, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 AM. U. INT'L L. REV. 257, 315 n.364 (1998).

involve a complex of considerations centered on the roles of particular countries and regions in international relations. "Norm diversity" in this context covers a complex of issues as well, which might arguably be viewed as interlinked, including national sovereignty and political devolution, economic independence, and equality of cultural values. The controversy surrounding norm diversity centers on whether one country, or set of countries, however powerful, can and should attempt to impose its own views of morality or normalcy upon other nations with different views or traditions.

The present anti-corruption conventions thus may blossom into much broader initiatives, aimed at much more than merely suppressing business bribery of foreign public officials. Indeed, the anti-corruption campaign is gradually becoming, as was always implicit in the FCPA, a campaign for democracy and market-oriented development. Concern includes the effects of domestic corruption in OECD countries; the costs of endemic foreign corruption to OECD multinational enterprises; and the reportedly now epidemic nature of corruption in developing, emergent, and transition economies.²¹

The conventions discussed above should not be regarded simply as expressions of value convergence,²² and hence, as self-centering moral regimes. Adherence to a diplomatic convention should not necessarily be construed as a reflection of or a change in motives and values. Rather, the circumstances suggest that the emerging anti-corruption regime should properly be understood as calculated behavior modification, albeit in a normative direction, rather than as voluntary moral or ethical commitment. In simple terms, while a regime necessarily involves reasonably stable mutual expectations concerning functional behavior, it need not involve a moral principle. To use a familiar example, automobiles are driven on one side of the road simply in order to enhance general safety.

A global anti-corruption regime does involve, in part, what can plausibly be deemed a moral principle, namely that bribery and extortion are ethically unacceptable, even if economically and politically tolerable. Thus, norms clearly may arise as a result of moral principles. However, a norm is simply a standard for behavior, and a normative regime can also rest on cynical collaboration or calculated self-interest, entirely devoid of any underlying moral principle. Regardless of its origin, whether inspired

21. The following rough classification scheme is used: advanced economies are mostly the industrial democracies of the OECD; emergent economies, often termed newly industrialized countries (NICs) are certain relatively industrialized, but not necessarily democratic, countries important to the OECD (see *infra* tbl.1, for a rough list); transition economies are the formerly communist countries of Central and Eastern Europe (the former Czechoslovakia, USSR, and Yugoslavia having disintegrated); developing economies are effectively all other countries (although one can debate whether some of these countries might be classified as NICs: for instance, Argentina, Brazil, Chile, China, India, Mexico). The term emergent economies is used here to restrict attention to certain countries, less advanced although certainly developed, of special relevance to the OECD as a whole, whether members of the OECD or EU or not.

22. See Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429 (1997).

by values, economic self-interest, or cynicism, the regime can nevertheless produce a desirable modification of behavior. This realization is an important one to understand, for it is fundamental to crafting a successful anti-corruption campaign worldwide.

The alignment of differing motives and values, as also occurs in the U.N. and WTO processes, requires gradualism of regime development. A normative regime may evolve through the preference intensity of some actors—such as the United States, TI, and the ICC, for example—and despite the lack of interest of, and even in the face of resistance by, other important actors. Alex Seita argues that because “the exact form of globalization is not a fixed certainty,” nations committed to the promotion of liberal democratic values “should aggressively configure globalization to be consistent with” their interests.²³ If so, such countries push extraterritoriality relative to comity in international relations. In Seita’s view, “enlightened globalization” can and should alter attitudes.²⁴ Our view is that, at least initially, only calculated behavior modification is necessary.

The authors are management scholars educated in the social sciences. Their interest lies in understanding the fundamental nature, key driving forces, and likely consequences of multilateral cooperation in the emerging global economy. Cooperation, or collaboration, and the closely related notion of trust have become central to the stakeholder theory of the collective.²⁵ Participants in multilateral cooperation arrangements are stakeholders in the benefits or costs of these arrangements. Each adherent to the OAS, OECD, and EU Conventions must necessarily undertake some form of cost benefit calculation weighing the disadvantages and advantages of formal consent to these conventions, including implementation and subsequent enforcement of new domestic laws and the adherent’s international diplomatic conduct.

Timothy Fort and James Noone emphasize the importance of linking actor restraint from corruption with actor self-interest and community welfare perception. Trade, in principle, increases everyone’s wealth, at least in aggregation, and promotes peace.²⁶ In our view, it is simultaneously possible to address actor self-interest directly by increasing the penalties for mis-

23. *Id.* at 431-32.

24. *Id.* at 432.

25. See Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 *ACAD. MGMT. REV.* 65, 65-91 (1995) (depicting stakeholder theory as akin to an onion with embedded dimensions). Donaldson and Preston argue that the core of stakeholder theory is normative—for example, a moral theory of justly distributed property rights—and the surface is descriptive-empirical—for example, a realistic understanding of both the world and reform possibilities. The intervening dimension is instrumental—a purely cause-and-effect understanding of management actions. See Thomas M. Jones, *Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics*, 20 *ACAD. MGMT. REV.* 404, 404-37 (1995) (arguing that cooperation founded in mutual trust should outperform competition founded in pure self-interest).

26. See Timothy L. Fort & James J. Noone, *Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercica*, 33 *CORNELL INT’L L.J.* 515 (2000).

conduct without respect to community welfare arguments. As the world becomes increasingly integrated economically, international investment, trade, and communication are growing even more rapidly than gross domestic production.²⁷ Consequently, multilateral cooperation in many spheres of international interaction is becoming both more important and more prevalent.²⁸

The complexity of multilateral cooperation arises in part from the fact that there are multiple arrangements and institutions—partly overlapping, partly reinforcing, and partly competing or conflicting. The number, types, and forms of arrangements are likely to increase. Complexity also arises partly from the fact that international politics proceeds at two levels: international and domestic (or intranational).²⁹ The world is becoming a “club of clubs,”³⁰ and the WTO may evolve to become a kind of “economic constitution” for the world.³¹ Nichols points out, however, that the transnational institutions for sustaining global economic interaction “must be cobbled together from the institutions of various countries.”³²

A long debate over the FCPA and its amendments within the legal, management, and social science disciplines has involved complex issues concerning motives, cultures, consequences, ethics, and strategies. To impose some rough sense of logical structure on this complexity, we use a simple two-by-two matrix, depicted below in Figure 1, intended to reveal the relationships among these issues. As constructed, each of the four cells of the matrix represents the viewpoint of one of four distinct, extreme

27. Lee Presten and Duane Windsor calculated in nominal dollars—from UN Conference on Trade and Development (UNCTAD), World Bank, and IMF data series—that between 1970 and 1994, annual world GDP, a measure excluding imports but including exports, grew about 746.8% (a compound annual growth rate of 16.48%), while annual world exports grew 1266.9% (a compound annual growth rate of 20.54%) and annual foreign direct investment (FDI) outflows grew 1615.5% (a compound annual growth rate of 22.51%). See LEE E. PRESTON & DUANE WINDSOR, *THE RULES OF THE GAME IN THE GLOBAL ECONOMY: POLICY REGIMES FOR INTERNATIONAL BUSINESS* 29, 30 (2d ed. 1997). The nominal 1994 amounts were roughly \$25.7 trillion GDP, \$4.3 trillion exports, and \$222 billion FDI. Nominal data have to be corrected for inflation, but the same inflation adjustment would occur across the three measures, and all three compound annual growth rates are well above any reasonable estimate of inflation. The World Bank estimated the gross national product (GNP) deflator at about 7.6% annually over this period. WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES* (1996).

28. Various examples in business operations (consumer protection, restrictive business practices, international sale of goods, multinational enterprises); regional and associative arrangements; international transport; telecommunications; financial services; environmental protection; and trade, monetary, and investment cooperation are reported in PRESTON & WINDSOR, *supra* note 27.

29. See DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993).

30. ROBERT Z. LAWRENCE ET AL., *INTEGRATING NATIONAL ECONOMIES: PROMISE AND PITFALLS* 14 (1996).

31. See *WTO Denies Claims by Special Interests Linking Ruggiero to MAI [Multilateral Agreement on Investment]*, WTO Doc. PRESS/91 (Feb. 17, 1998) (summarizing Jan. 16, 1998 speech by then-WTO Director-General, Renato Ruggiero, at Chatham House, London, quoting Professor John Jackson of the University of Michigan).

32. Nichols, *Regulating Bribery*, *supra* note 8, at 260.

schools of thought that contribute to the debate. Each cell links an attitude, or expectation, with logically implied conduct. The horizontal axis defines a continuum spanning from "universalism," at one extreme, to "particularism," at the other.³³

The vertical axis defines a continuum spanning from "moralism" to "realism."³⁴ The distinction between universalism, or globalism, and particularism, or localism, is well established in current corruption and business ethics literature. We introduce the distinction between moralism and realism deliberately, drawing from international relations literature. In interpreting Figure 1, one should bear in mind the difference between ethics, which is the term applicable to behaving morally by choice, and moralism, which describes the act of presuming, typically from local custom, the right thing to do in particular, and likely gray, circumstances. Realism is self-interest maximization in all circumstances, whether or not such maximization dictates regard for the well-being of others. Because the endpoints of these two continua are polar-opposite extremes, the labels within the cells should be regarded as defining the outside corners of each cell. Also the reader should note that combinations of views and conducts might arguably be found along the intervening continua.

The horizontal axis reflects the debate concerning whether regional and global diversity of values or a universal anti-corruption attitude should prevail. This debate thus concerns the dispute over whether extraterritoriality or comity should govern conduct with respect to corruption. Extraterritoriality arguably disregards the legitimate, or at least explainable, values of other cultures and conflates gifts or gratuities with extortion.³⁵ One consequence of global anti-corruption efforts may be the elimination of

33. The case for universalism, and hence extraterritoriality, is well argued by Seita, *supra* note 22, and Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451 (1999). The case for what we shall term particularism (or localism), that is for cultural diversity and hence comity, is well argued by Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419 (1999), and Stephen Muffler, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act Is Not the Answer*, 1 ILSA J. INT'L & COMP. L. 3 (1995). The concept of particularism is explicated in ALFONS (FONS) TROMPENAARS, *RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS* (2d ed., 1998). Particularism is at work in the anti-corruption conventions to the degree that the agreements are adapted to participants' concerns and circumstances rather than simply cloning the FCPA. See CHARLES HAMPDEN-TURNER & ALFONS (FONS) TROMPENAARS, *THE SEVEN CULTURES OF CAPITALISM: VALUE SYSTEMS FOR CREATING WEALTH IN THE UNITED STATES, JAPAN, GERMANY, FRANCE, BRITAIN, SWEDEN, AND THE NETHERLANDS* (1993).

34. See Hans Rommen, *Realism and Utopianism in World Affairs*, 6 REV. POL. 193, 193-215 (1944). "International politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim. . . . When we speak of power, we mean man's control over the minds and actions of other men." HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 13 (1950).

35. See Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327 (1994).

customary gift-giving and gratuities practices not truly constituting corruption. Another consequence may be what some could regard as gray corruption in the form of gifts to local communities with benefits accruing to host-country officials in the form of recognition for obtaining such corporate donations.

The vertical axis distinguishing moralism from realism reflects the regional and global diversity of motives with respect to action against corruption. This axis concerns the dispute over whether the United States acted rationally in passing, first, the 1977 FCPA and, subsequently, the 1988 amendments, which directly pressured other nations to join the OAS and OECD Conventions. The authors' view is that U.S. conduct reflects a mix of moralism and economic self-interest.

The four cells of the resulting matrix are defined as follows. Localized networks of corrupt relationships, found in many developing or transition countries and at least some advanced and emergent countries,³⁶ would implicate, in combination, the extremes of particularism and realism. The presence of localized corruption pockets implies for foreigners a natural bribery strategy abroad, assuming they function domestically within analogous, corrupt networks. The extreme form of moralism and universalism, in combination, is the expectation of or insistence on global value convergence.³⁷ A global value convergence form implies for foreigners a natural moralism that actively suppresses both foreign bribery and domestic corruption as incompatible with moral values and economic efficiency. This form, however, will likely resemble a moral crusade asserting universal values such as democracy and markets. These two opposed forms are what Amartya Sen characterizes as "behavioral codes," as distinguished from moral calculation.³⁸

The design of the Figure 1 matrix is such that the diagonal from global value convergence to local corruption networking—that is, from the upper left to the lower right corner of the matrix—defines natural or likely conduct for moralists and realists, and the international policy problem is that no global regime operates across the intervening boundary. Universal moralists cannot approve of local corruption. Given the strong evidence of corruption in many of the OAS countries, and in some of the OECD countries, there must be a scientifically valid cause-and-effect explanation for their sudden formal adherence to the anti-corruption conventions because they

36. See generally EDWARD C. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* (1958); RICHARD P. NIELSEN, *The Politics of Long Term Corruption Reform: A Combined Social Movement and Action-Learning Approach*, 10 *BUS. ETHICS Q.* 305 (2000).

37. Seita, *supra* note 22, characterizes globalization in terms of an economic market integration process, a political spread of democracy and human rights among nations, an ideology of rule of law and substantive principles for peaceful international dispute settlement and agreement negotiation, increased perceived importance of distant international, relative to local, problems, and common economic and political values for humanity. However, Seita characterizes convergence of fundamental values in terms of deeply held moral beliefs. It is perhaps rather the case that such beliefs, where divergent, would retard cooperation. See *id.*; see also NESBIT, *supra* note 8.

38. See AMARTYA SEN, *DEVELOPMENT AND FREEDOM* 267, 275-79 (1999) (examining corruption in some detail).

are in theory moving from local corruption tolerance, if not practice, to global value endorsement. That they have suddenly acquired a civic "religion" seems a dubious explanation; that they may gradually acquire "faith" with future experience is a different matter.

The other diagonal continuum—that is, from upper right corner to lower left corner—that can be defined in Figure 1 contrasts two opposing approaches to strategic or calculated action. The extreme form of moralism and particularism in combination defines a calculated strategy of passive, self-interested practice that is, nevertheless, within voluntary moral constraint. In other words, this form of self-interested practice within voluntary moral constraint contemplates an actor who may disapprove of corruption, but will neither actively practice nor actively oppose it as a matter of realism. The Ford Administration's proposed disclosure approach and the Swedish anti-corruption statute, both discussed in Section II, come closest to this form. Adherence to a convention could arguably be barely one step away from this corner of the matrix; realism may dictate public consent followed by studied inaction.

The extreme form of universalism and realism defines a calculated strategy of directive gradualism, operating, in the authors' view, from mixed motives. The U.S. drive for international cooperation, stemming from the 1988 amendments to the FCPA, comes closest to this form, in that the drive has been grounded in both moralistic assertions and economic and political self-interest. The circumstance that concerted, yet not necessarily collaborative, action can occur despite mixed motives and diverse values suggests that a global anti-corruption campaign is that much easier to initiate where one party, such as the United States, is willing to bear the costs of leadership.³⁹

Figure 1.
Four Schools of Thought Concerning Corruption Abroad

	Universalism	Particularism
Moralism	Global Value Convergence	Passive Self-Interest
Realism	Directive Gradualism	Local Corruption Networks

Voluntary multilateral cooperation may suggest win-win conditions where all parties benefit in some form and some degree.⁴⁰ The North

39. Concerted action can occur by parallel incentives that simply move all actors in a roughly similar direction and toward an ultimate outcome. Collaborative action requires deliberate coordination. The multilateral anti-corruption conventions involve no regional or associative enforcement mechanism and rely upon national implementation and enforcement. For an instance of parallel incentives—argued as a legal defense against antitrust enforcement—see Thomas K. McGraw & Richard S. Tedlow, *Ready to Regulate Ready to Eat (A1)*, Harv. Bus. Sch. Case No. 381065 (revised Oct. 1981).

40. In neoclassical economic theory, a Pareto efficiency improvement—for example, an overall or aggregative gain in wealth—occurs when at least one party gains and no other party loses. The latter can have no rational objection to the former's gain. Pareto efficiency improvement is not a basis for voluntary cooperation; rather it is simply a

Atlantic Treaty Organization (NATO), established in 1949 pursuant to the North Atlantic Treaty, reflected multilateral recognition of mutual security necessity. The European Economic Community (EEC), established in 1957 pursuant to the treaties and Convention of Rome,⁴¹ and the Organization of Petroleum Exporting Countries (OPEC), established in 1960,⁴² reflected multilateral recognition of very different types of mutual economic opportunity. The EEC aimed at promotion of trade, whereas OPEC aimed at exploitation of increased monopoly power of a vital economic resource. But mutual gain is not necessarily the only basis for multilateral cooperation, which can involve involuntary elements. The authors' analysis of multilateral cooperation with respect to corruption is that specific win-lose or competitive distribution conditions, such that someone is losing something, are embedded even within general win-win or aggregate-gain conditions.⁴³ In this context, the participants in multilateral arrangements, including the United States, act from mixed motives and under conditions of considerable norm diversity with respect to both the acceptability of bribery and extortion as forms of corruption and the likelihood and cost of suppression of bribery and extortion in the global economy.

Without attempting to develop here a general theory of involuntary cooperation, two less-than-ideal circumstances can be delineated. The most extreme circumstance is the pure application of what is effectively imperial power—that is, dominance and control by one country over other, theoretically sovereign nations. A classic, now-defunct example, created in emulation of and counterbalance to the EEC and NATO, was the USSR-imposed dual structure of the euphemistically named Council for Mutual Economic Assistance (CMEA), established in 1949, and the Warsaw Pact, established in 1955, by which the USSR controlled the economic and mili-

non-interference, or consent, principle. The basis of the principle is aggregative wealth without respect to distributive justice considerations. Sen argues that aggregative and distributive wealth principles are equally important and legitimate. See SEN, *supra* note 38, at 286.

41. The EEC comprised Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany. The three Benelux countries were already participating in a customs union (1948), as were France and Italy (1949). The EEC involved overlapping membership as well in the European Coal and Steel Community (ECSC), established in 1951 pursuant to the Treaty of Paris, and the European Atomic Energy Community (Euratom), established in 1957 pursuant to the second Treaty of Rome. A 1957 Rome Convention joined the newly created European Assembly—the European Parliament after 1962, the Court of Justice of the European Communities, and the Economic and Social Committee (ECOSOC) into a common political structure, which can be regarded as a form of confederation. See PRESTON & WINDSOR, *supra* note 15, at 141.

42. OPEC comprises (date of admission shown parenthetically) Iran, Iraq, Kuwait, Saudi Arabia, Venezuela (1960), Qatar (1961), Libya, Indonesia (1962), Algeria (1969), Nigeria (1971), Ecuador (1973-93), United Arab Emirates (1974, Abu Dhabi, 1964-74 only), and Gabon (1975). Canada and Mexico are, significantly for the United States, not members of OPEC, nor are the European countries participating in North Sea oil and gas exploitation. See OPEC, *History* (visited Jan. 23, 2001) <http://www.opec.org/about_opec/history.htm>.

43. See Sen's distinction between aggregation and distribution. See SEN, *supra* note 38.

tary affairs of Central and Eastern Europe purely for its own, imperial self-interest.⁴⁴ The Warsaw Pact disintegrated in 1991 with the dissolution of the USSR, and, subsequently, Czechoslovakia and Yugoslavia.

The other circumstance is better characterized as influence rather than dominance or control, although obviously the distribution of influence resources is not equal and threats of retaliation in some form, explicit or veiled, may be employed. One party may seek to influence other parties to undergo a change in behavior either for its own benefit, at the others' loss, or to achieve mutual gains, incapable of arising absent a change of behavior that the other parties are not likely to undertake voluntarily. It is this circumstance, or rather perhaps a set of like circumstances, that characterizes the development of multilateral cooperation concerning bribery of public officials by foreign enterprises. The cooperation necessarily involves a redistribution of the gains and losses that occur as a result of the behavior modification, and this redistribution may more accurately be thought of as "co-opetition," defined as a mix of cooperation and competition elements.⁴⁵

The two types of non-ideal circumstances discussed above can be confused, and it can and has been argued that efforts to legislate control of bribery and extortion in the global economy constitute economic, moral, and cultural imperialism. If this argument has merit, then it applies not only to the instance of the United States attempting to orchestrate multilateral cooperation but also to OECD-concerted action aimed at developing countries and even the most extreme hypothetical instance of all countries save one agreeing on the merits of multilateral cooperation. (The U.N. Declaration effectively co-opts all countries.) The view of the one disagreeing country cannot be evaluated against the extraordinary majoritarian consensus and discounted; rather, the deviating view is intrinsically admissible on the logic of the argument.

I. Evolution of the Foreign Corrupt Practices Act

In the aftermath of the Watergate crisis, the United States moved first and unilaterally on the matter of extraterritorial prohibition of business bribery of foreign officials to criminalize such bribery under the 1977 Foreign Corrupt Practices Act.⁴⁶ The only other nation to adopt extraterritorial prohi-

44. The CMEA members were Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Romania, and USSR in Europe, together with Cuba, Mongolia, and North Vietnam (later Vietnam). Albania was a member only during 1949-1951. Yugoslavia maintained special status rather than full membership. China and North Korea were never members. The relationships with Albania, China, North Korea, and Yugoslavia marked the effective limits of Soviet economic and military influence. In 1991, CMEA became the Organization for International Economic Cooperation. See PRESTON & WINDSOR, *supra* note 15, at 150-51.

45. See generally ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION (1996).

46. Pub. L. No. 95-213, 91 Stat. 1494; see also *supra* note 4.

bition was Sweden, which followed suit, in limited fashion, in 1978.⁴⁷ In direct contrast, some fourteen European countries continued to permit deduction of foreign bribe payments on business tax obligations in some form.⁴⁸ The following section is not a comprehensive history or analysis of the 1977 FCPA and its 1988 and 1998 amendments.⁴⁹ It is important, however, to have a general sense of the statute and its two decades of evolution.⁵⁰

The 1977 FCPA resulted from a political bandwagon effect.⁵¹ As David Slade notes, statutory action seemed mandatory to Congress in the grip of a post-Watergate morality.⁵² No public official or private individual or entity could effectively oppose the movement to the FCPA because opposition was regarded as tantamount to active endorsement of corruption.

Revelations⁵³ that U.S. business firms had been making corrupt payments to foreign officials confronted the U.S. government with a continuing "serious foreign policy dilemma"⁵⁴ that persists today. The U.S. government faced six logically definable options arranged here from least

47. See David R. Slade, Comment, *Foreign Corrupt Payments: Enforcing a Multilateral Agreement*, 22 HARV. INT'L L.J. 117, 122 n.22 (1981) ("The general anticorruption statute recently enacted in Sweden applies expressly to corrupt payments to foreign public employees, if such payments are made domestically or in a foreign country that also punishes them."). Effective January 1, 1978, the statute amended the Swedish Penal Code, SFS § 103 (1977). See *id.*; see also Michael Bogdan, *International Trade and the New Swedish Provisions on Corruption*, 27 AM. J. COMP. L. 665 (1979). However, the statute requires perfect reciprocity—the foreign country must also punish such payments when made to Swedish as well as domestic officials, the United States being the only country with such a statute—and that an offender be in some way connected with Sweden—for example, an alien offender caught in Sweden at some time. See Slade, *supra*, at 122. Slade further states that "[t]he anticorruption laws of both Norway and the Netherlands apply to foreign corrupt payments to non-public officials (for example, private executives) regardless of their nationality if such a payment is illegal in the state where made and is made by a national or domiciliary." *Id.*

48. The United States amended federal income tax laws in 1958 to deny tax deductions for bribes paid to foreign officials. See I.R.C. § 162(C) (1994); Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 256 (1998). Prohibition of domestic bribery occurred in 1948. See 18 U.S.C. § 201 (1948) (amended 1962 and 1994); Low et al., *supra*, at 256. "Section 201 (b), as enacted in 1962, served as a model for the FCPA." Low et al., *supra*, at 255 n.40 (citing H.R. CONF. REP. No. 95-640, at 8 (1977); S. REP. No. 94-1031, at 7 (1977)).

49. For a comprehensive analysis, Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997).

50. See GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE* (1982), for a general history of the early legislative process, including initial Republican efforts at amendment of the 1977 FCPA.

51. See Duane Windsor, *Modeling the Swine Flu Decision*, in *MODELING UNDER UNCERTAINTY* 194-95 (S.B. Jones & D.G.S. Davies eds., 1986).

52. See Slade, *supra* note 47, at 117.

53. See *id.* The Watergate Special Prosecutor's office discovered information that bribes had been paid by U.S. firms to foreign as well as to U.S. officials. The U.S. Securities and Exchange Commission (SEC) launched a "voluntary disclosure program," under which U.S. firms could report questionable foreign payments. *Id.*

54. *Id.*

to most comprehensive action: (1) complete indifference—do nothing—as one may characterize the subsequent European and Japanese solution; (2) no action beyond an investigation, on the theory that while knowing about corruption is generally desirable, specific corrective action is not;⁵⁵ (3) formalistic resolution to the effect that foreign bribery is morally wrong;⁵⁶ (4) requirement of disclosure of bribery activities without criminalization, which was the Ford Administration's proposal, discussed below; (5) conclusion, as happened in the 1988 amendments, that the President should diplomatically seek international collaboration, with or without the disclosure provision but presumably incorporating the formalistic resolution; or (6) unilateral criminalization and other deterrents to conduct, such as reporting and internal accounting system requirements,⁵⁷ the initial approach adopted by the Congress in the 1977 FCPA.

The 1977 FCPA did not specifically include a provision for international diplomacy; rather, this provision was enacted in the 1988 amendments. Thus, the push to attain international cooperation took roughly two decades, from 1977 to the mid-1990s, to realize. One might argue that the initiation of a global anti-corruption movement would have been substantially delayed absent the FCPA. The opposite argument is conceivable too, that is that the FCPA perhaps created a stronger incentive for Europe and Japan *not* to cooperate both because U.S. firms became less competitive and the 1977 FCPA did not mandate international diplomatic action, thereby blunting its extraterritorial reach.⁵⁸ While the statute included an explicit extraterritorial reach provision that employees or agents could be citizens, nationals, or residents of the United States or "otherwise subject to the jurisdiction of the United States,"⁵⁹ there is limitation in that "the FCPA . . . applies to U.S. entities doing business overseas, but also requires a nexus to U.S. commerce."⁶⁰

In retrospect, the legislative process was effectively a moral crusade combined with a rough, and possibly self-serving, estimate that economic and diplomatic consequences would be, if not strictly trivial, then at least reasonably acceptable, or, even more strongly, that unilateral criminal prohibition would be a positive advantage for U.S. firms abroad.⁶¹ In the

55. Sen emphasizes the importance of the information base for democratic policy-making. See SEN, *supra* note 38, at 55.

56. This option attempts Frederick's moral authority approach, adopted by the U.N. See *supra* note 16 and accompanying text.

57. See 15 U.S.C. § 78m (1977); Kathleen A. Lacey & Barbara Crutchfield George, *Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (a Twentieth Anniversary Review)*, 7 TRANSNAT'L L. & POL'Y 119 (1998).

58. See Low et al., *supra* note 48, at 259 n.51 ("The legislative history of the Act makes clear that Congress considered and rejected the inclusion of foreign subsidiaries in the definition of 'domestic concern.'").

59. *Dooley v. United Tech. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992) (finding British and Saudi Arabian defendants covered by the FCPA).

60. Low et al., *supra* note 48, at 276.

61. Slade reports that testimony before Congress suggested that prohibition would not be detrimental to U.S. competitiveness. See Slade, *supra* note 47, at 117 n.3.

United States, the post-Watergate situation was not only one of moralism but of revelation of concealment of corrupt payments within a securities statutory framework invoking central principles of transparency and prohibition of insider trading.

A pragmatic exception was nevertheless made for "routine governmental action" in the form of "facilitating or expediting payment" to governmental officials or political parties or party officials; "essentially ministerial or clerical" employees were excluded on this basis.⁶² The essential distinction was that gratuities were permitted, in principle, to minor officials for the purpose of speeding up theoretically mandatory action.⁶³ This exception again blunted extraterritorial reach.

The Ford Administration argued prudence and realism, preferring disclosure to the Secretary of Commerce without criminalization and then patient international negotiations. Senators William Proxmire, Chairman of the Senate Committee on Banking, Housing and Urban Affairs, and Frank Church, Chairman of the Subcommittee on Multinational Corporations, Senate Foreign Relations Committee, disdained the disclosure approach.⁶⁴ Congress gave short shrift to the proposed alternative approach of the Ford Administration.⁶⁵

In principle, the disclosure approach would compel reporting of all payments made directly or indirectly "to any other individual or entity in connection with: An official action, or sale to or contract with a foreign government, for the commercial benefit" of the payer or payer's foreign affiliate.⁶⁶ The Secretary of Commerce would issue rules and regulations for reporting and would receive investigatory authority.⁶⁷ Fines would apply to failure to report, failure to maintain required records, and negligent omission or falsification of required information.⁶⁸ Knowing falsification would be subjected to fine and imprisonment for individuals and fine for legal entities.⁶⁹ While the proposal included provisions for dissemination of reports within the government and, one year after receipt, to the

62. See Bryan W. Husted, *Honor Among Thieves: A Transaction-Cost Interpretation of Corruption in Third-World Countries*, 4 *Bus. Ethics Q.* 17, 20-21 (1994) (explaining how bribes are made in Mexico to expedite issuance of driver's licenses).

63. *Id.*

64. Senator Proxmire, the chief driver of the 1977 FCPA, stated:

I just cannot understand under these circumstances, in view of the fact that we say bribes are not necessary or material to the success of a business, and in every industry we have had success without paying bribes, why not outlaw it. . . . It was just wrong for a corporation to pay bribes. We ought to outlaw it and be done with it. Certainly we should outlaw . . . payments that are illegal under the laws of the foreign country.

Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379, S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 5, 5-6, 16 (1976) (statement of William Proxmire, Chairman).

65. See Foreign Payments Disclosure Act, S. 3741, 94th Cong. (1976), *reprinted in* GREANIAS & WINDSOR, *supra* note 50, at 163-68.

66. *Id.*

67. See *id.*

68. See *id.*

69. See *id.*

public, this proposal was subjected to exceptions in which the Secretary of State found "foreign policy interests" and the Attorney General found "investigation or prosecution" interests.⁷⁰ In theory at least, the two cabinet officers could prevent publication of all reports. The two cabinet officers would be authorized to furnish information to foreign governments and foreign law enforcement authorities. The regulations to be issued by the Secretary of Commerce would "include the name of every recipient who receives anything of value over a specified amount and the amount received by each such recipient," and the possible loophole for multiple payments for a single transaction was addressed.⁷¹ Other statutes and the authority of the Securities and Exchange Commission (SEC) would not be affected by the proposal.⁷²

It can be argued that a fully implemented disclosure approach might have had a similar chilling effect on U.S. corporate bribery, but operating on the demand rather than on the supply side. In other words, who would engage in corrupt dealings with U.S. firms where such dealings would be public information within a year? Presumably something like the FCPA reporting and internal accounting control procedures would have been necessary. The main difference could have been to avoid supply-side criminalization of payments. The Ford Administration's motive was to temporize, likely for a number of reasons, while international diplomacy worked slowly on the matter.⁷³

While there was relatively little organized opposition to passage of the 1977 FCPA, it subsequently was subjected to considerable criticism on various grounds, and there was a continuing effort by Republican legislators to effect amendments to the statute, without attempting to reverse criminal prohibition of enterprise bribery. In general terms, there were efforts to reduce the alleged chilling effect of the FCPA on U.S. business endeavors abroad by softening legal standards for knowledge of illegal conduct by foreign agents. This and other changes were intended to reduce the burden of compliance, provide shareholder's right of action and private right of action, and instruct the President to work for international agreements.⁷⁴ These efforts eventually resulted in amendment of the FCPA by the 1988 Omnibus Trade and Competitiveness Act (OTCA).⁷⁵

70. *Id.*

71. *Id.*

72. *See id.*

73. *See id.*

74. The Ribicoff Resolution, S. Res. 265, 94th Cong. (1975), introduced by Senator Ribicoff's Senate Finance Subcommittee on International Trade, called for international negotiations within the GATT framework and other appropriate international forums. *See Slade, supra* note 47, at 127. In March 1976, the United States submitted a proposal for an international agreement to the Lima, Peru session of the U.N. Commission on Transnational Corporations. *See id.* at 128. The U.N. Economic and Social Council in August 1976 adopted Resolution 2041 (LXI) to establish a working group to begin elaborating an international agreement. The Draft International Agreement on Illicit Payments was submitted by the working group to ECOSOC in May 1979. *See id.* at 129.

75. *See* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-148, 102 Stat. 1415.

New affirmative defenses to the FCPA, as amended in 1988 (1988 FCPA), permitted payments to government officials when (a) "lawful under the written laws and regulations" of the host country, or (b) "a reasonable and bona fide expenditure, such as travel and lodging expenses" for promotion or contract performance.⁷⁶ The Attorney General was instructed statutorily to provide clarification through guidelines, voluntary precautionary procedures, and issuance of opinions responding to specific inquiries by issuers and domestic concerns.⁷⁷ Submissions to the Attorney General could be considered by a court and were specifically exempted from public disclosure. The term "routine governmental action" was illustrated by examples.⁷⁸

The President was instructed to seek international cooperation and to report on progress within one year of enactment.⁷⁹ The 1988 FCPA was further amended in 1998 during implementation of the OECD Convention.⁸⁰ The Secretary of Commerce was instructed to report to Congress by July 1, 1999, and each of the five succeeding years, on implementation of the OECD Convention.

The effectiveness of the FCPA is not the crucial consideration. The 1977 FCPA arguably involved both hasty policymaking and poor legislative drafting. Such problems might reasonably be handled by amendment, as discussed above, and relaxed enforcement.⁸¹

Steven Salbu concludes that U.S. enforcement of the FCPA has been historically lax.⁸² Rather, the essential matter is whether criminal prohibition, or even mandatory disclosure, should have been undertaken at all. Other advanced democracies were well aware of the post-Watergate revela-

76. *Id.*

77. *See id.*

78. *See id.*

79. *See* Exec. Order No. 12,661, 53 Fed. Reg. 779 (1988) (delegating these functions to the Secretary of State).

80. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302. Some refinements in definitions were substituted, and a subsection was added concerning "Alternative Jurisdiction." The term "foreign official" was defined in more detail to include public international organizations, with particular attention to the International Telecommunications Satellite Organization and the International Mobile Satellite Organization established pursuant to multilateral conventions. The statute was effectively broadened so as to prohibit improper action outside the United States and irrespective of whether mails or interstate commerce were employed. In effect, extraterritoriality was strengthened.

81. *See* Salbu, *supra* note 49, at 231.

82. *See id.* A number of prosecutions have been undertaken, and even recently allegations of bribery by U.S. firms have been made. *See id.* Low reports some 40 criminal prosecutions under the anti-bribery provisions and 33 Department of Justice public opinions. Lów et al., *supra* note 48, at 270. Lockheed admitted a bribe of \$1 million to facilitate aircraft sales in Egypt and settled for a combined civil and criminal fine of \$24.8 million—double the profits, the largest ever imposed under the law and the first case in which company officials received prison terms. *See id.* at 260; Salbu, *supra* note 49, at 237. The SEC proceeded against an Italian firm, Montedison, S.P.A., that traded American Depository Receipts (ADRs) on the New York Stock Exchange, for falsified reports over several years to hide an estimated \$400 million in bribes occurring entirely in Italy. *See* Low et al., *supra* note 48, at 263 n.73.

tions and it required no stretch of imagination to understand that similar bribery by other countries was being revealed. Those countries, with the exception of Sweden, opted to neglect the issue, leaving the United States acting unilaterally.

The lead author addressed the matter somewhat differently in 1982.⁸³ Haste and groupthink do not necessarily make bad legislation, but they are very likely to produce a situation in which legislation occurs without the foundation of what the lead author then termed a "coherent theory."⁸⁴ In testimony, John J. McCloy, chairman of the Gulf Oil special review committee and an old hand at international relations, stated:

I suggest before any legislation is adopted or . . . recommended by any committee of Congress, the whole subject of political contributions and payments, whether here or abroad, should be more thoroughly examined. I think it is much too early to rush to statutory remedies before the whole case is in and all the factors weighed.⁸⁵

II. Some Empirical Evidence

The two key complaints raised against the FCPA involve, first, the moral imperialism of its extraterritoriality and, second, the economic consequences for U.S. businesses. The FCPA was not, however, the result of an organized political drive mounted over time. It was a decade before the United States moved seriously on international collaboration, as distinct from U.N. endorsement in principle, and another decade before such collaboration, in preliminary and theoretical form, could be crafted. The costs of delay arguably affected other countries than the United States through the damages imposed by corruption.

A charge of moral imperialism suggests that the matter at hand is clearly one of local option.⁸⁶ However, facilitating payments, gifts, and gratuities in narrow form are recognized in the FCPA as different from bribes. The assertion of extraterritorial imperialism should thus be softened, at least prior to the 1988 amendments that moved the United States officially into pressuring OAS and OECD member nations for multilateral action. If a charge of imperialism is accurate, then the charge applies equally to the OECD with respect to the rest of the world. Whether the

83. See GREANIAS AND WINDSOR, *supra* note 50, at 133-51.

84. *Id.* at 142.

85. *Id.* at 134 (citing *Foreign and Corporate Bribes: Hearings on S. 3133 Before the U.S. Senate, Comm. on Banking, Housing and Urban Affairs, 94th Cong. 5 (1976)* (statement of John J. McCloy)).

86. See Elaine Sternberg, *The Universal Principles of Business Ethics*, in BUSINESS ETHICS IN THE GLOBAL MARKET I (Tibor R. Machan ed., 1999). Sternberg explicates the general case for ethical universalism in international trade relying upon shareholder value maximization within principles of distributive justice and ordinary decency. See *id.*, see also Robert W. McGee, *Minimal Ethical and Legal Absolutes in Foreign Trade*, in BUSINESS ETHICS IN THE GLOBAL MARKET, *supra*, at 63. McGee explicates the general case for minimal ethical and legal absolutes in international trade relying upon individual rights being superior to utilitarianism such that government should not interfere in voluntary contracts unless such rights are violated. See McGee, *supra*.

FCPA handles the gift distinction adequately can always be questioned, but the basic issue is recognized. Legislation could simply ban all gifts outside a proper business contract, although the next matter becomes soft extortion in the form of community benefits under the guise of corporate social responsibility.⁸⁷ Trivial amounts close to the line can in principle be ignored in favor of cultural diversity arguments.⁸⁸ However, a global anti-corruption campaign may simply sweep away such distinctions, and they may not even exist in the domestic legislation of some OAS or OECD member nations.

Thomas Donaldson and Thomas Dunfee may supply a reasonable general approach for addressing the matter.⁸⁹ They distinguish between (1) "global hypernorms" universally applicable as natural, or inherent, rights of human beings, and (2) other "integrative social contracts" in which norms within voluntary moral communities are determined by mutual consent.⁹⁰ One may visualize two nested circles, the inner circle labeled global hypernorms, or macrosocial contracts, and the outer circle labeled microsocal contracts, or local moral communities. The outer circle does not constitute a moral community unless it abides by the global hypernorms. Voluntary contracts cannot violate the natural rights of human beings who, by extension, cannot properly contract away their rights. Local custom may be wrong, and, whether right or wrong, it may nevertheless be wrong to impose local custom on foreigners. Donaldson and Dunfee provide a list of proposed global hypernorms.

The next issue is then whether the democratic countries, or at least one of them, can and ought to defend global hypernorms everywhere. At a minimum, the democratic countries should not actively support violation of global hypernorms. A multilateral campaign against bribery and extortion is not one of the listed global hypernorms. It is difficult to believe, however, that the hypernorms are fully effective in a society ruled by a highly corrupt officialdom. Sen emphasizes that individual freedom is the goal of development and also the effective agency, through market and democratic institutions, for development.⁹¹

It is unlikely that corrupt officials rule with the consent of the people, unless the people benefit more from the corruption than from honest government of honorable officials. The nature of corruption is that it is secret

87. See *Business Ethics: Hard Graft in Asia*, *ECONOMIST*, May 1995, at 61 (contrasting the term "soft extortion" with "hard graft").

88. See Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 *NOTRE DAME L. REV.* 1539 (1991).

89. See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 *ACAD. MGMT. REV.* 252, 252-67 (1994). Elsewhere Dunfee states that "hypernorms are defined as norms so fundamental to human existence that they will be reflected in a convergence of religious, political, and philosophical thought. Hypernorms thus represent core or fundamental values common to many cultures." Thomas W. Dunfee, *The Role of Ethics in International Business*, in *BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY* 63, 69 (Thomas W. Dunfee & Yukimasa Nagayasu eds., 1993).

90. See Donaldson & Dunfee, *supra* note 89, at 252-62.

91. See SEN, *supra* note 38, at xii.

and self-interested and hence unlikely to be shared with the people. Sen criticizes the argument for cultural diversity with respect to this consideration: "The so-called Asian values that are invoked to justify authoritarianism are not especially Asian in any significant sense. . . . The case for liberty and political rights turns ultimately on their basic importance and on their instrumental role. This case is as strong in Asia as it is elsewhere."⁹²

Corruption, whether by public officials or others, is socially impermissible deviance from some public duty or more generally some ideal standard of conduct.⁹³ Bribery is misuse of a public office for personal gain.⁹⁴ Extortion is demanding something of value under threat of damage in some form to the payer, if only the loss of a potential gain. The line between bribery and extortion may be a very thin one,⁹⁵ as also that between corruption and networking.⁹⁶ One might understandably conflate corruption with side-payments, or gifts, among individuals or multi-part tariffs, such as gratuities.

Leaving aside whether such practices are themselves proper, the chief distinction lies in the combinations of secrecy, violation of some defined duty, and official abuse of position or monopoly power that characterize supply-side bribery and demand-side extortion as forms of corruption. Gifts and gratuities are different in principle from full-blown corruption; however, their customary practice and expectation could become the basis for corruption.⁹⁷

Empirical data concerning the incidence and consequences of these various segments of bribery and corruption are notoriously difficult to collect and validate. Generally speaking, only poor and typically impressionistic information is available. Bribery and extortion are by nature secret

92. Amartya Sen, *Human Rights and Asian Values*, in *BUSINESS ETHICS IN THE GLOBAL MARKET*, *supra* note 86, at 61; See also Seita, *supra* note 22, at 448 ("All human rights are universal, indivisible and interdependent and interrelated.")

93. See Edward C. Banfield, *Corruption as a Feature of Governmental Organization*, 18 J.L. & ECON. 587, 587-609 (1975).

94. See Nichols, *Regulating Bribery*, *supra* note 8, at 257.

95. See James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988).

96. See Salbu, *supra* note 49, at 250.

97. The essential distinctions are that a gift is without "quid pro quo" unlike the key aspect of a bribe and is also immaterial, although such gifts may in reality be minor extractions. See Nichols, *Regulating Bribery*, *supra* note 8, at 278 n.117 (citing DON ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 6-19* (1995)). An important aspect of Nichols's critique of customary gifts is that systemic corruption involves a "creeping accumulation of seemingly minor infractions" that slowly erodes political legitimacy in a society. *Id.* at 274 n.92 (citing WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* 102 (1997)). Salim Rashid has argued that telephone service bribes in India began as price discrimination among customers in an officially egalitarian system—with inadequate capacity—and rapidly deteriorated into extortion practiced against all customers that impeded service to extract larger bribes. See *id.* at 278 n.117 (citing Salim Rashid, *Public Utilities in Egalitarian LDCs: The Role of Bribery in Achieving Pareto Efficiency*, 34 KYKLOS: INT'L REV. FOR SOC. SCI. 448, 448-55 (1981)); see also Jeffrey A. Fadiman, *A Traveler's Guide to Gifts and Bribes*, 64 HARV. BUS. REV. 122, 122-26, 130-36 (1986).

and deliberately concealed acts.⁹⁸ In this respect, the FCPA possibly retarded acquisition of information concerning corruption relative to the Ford Administration's disclosure strategy.⁹⁹

The authors suggest, for present purposes, that global corruption is roughly a pyramid of three levels—each level likely successively larger in nominal dollar volume. At the top of the pyramid is (1) business bribery of foreign officials, paid largely but not exclusively by enterprises of advanced countries to largely but not exclusively officials of developing, emergent, and transition countries; next is (2) money laundering, especially of illegal drug trafficking receipts, occurring largely in the advanced countries; and, at the base, is (3) domestic political and commercial corruption, which occurs in many countries, but is endemic and perhaps increasingly epidemic in developing, emergent, and transition areas. TI has published Corruption Perception Index information by country since 1995, gradually expanding its list of covered nations, and also has recently begun, in 1999, a Bribe Payers Index (BPI) for a restricted set of nineteen countries. The CPI information roughly captures all three levels of corruption identified here; the BPI information addresses solely the first level—business bribery of foreign officials.

A. The Incidence of Corruption

Nora Rubin states that “[t]here is no proof that corruption is more prevalent now than ever before in history.”¹⁰⁰ However, international consciousness and concern have clearly risen.¹⁰¹ The incidence of corruption in various forms in the developing and transition economies in particular has increased over the last decade and become more pervasive.¹⁰² The suggestion appears roughly true in former communist states of Central and Eastern Europe where, although a black market operated before 1991, economic chaos and widespread criminal corruption has followed.¹⁰³

98. See Nichols, *Regulating Bribery*, *supra* note 8, at 272 (“Quantitative treatment of bribery is virtually impossible: bribery is illegal in every country in the world and is thus chronically difficult to observe. Therefore, anecdotal, nonquantitative data must be used.”).

99. The authors' reasoning holds that at least under the disclosure approach, information theoretically would be filed with the U.S. government even if subsequently held from publication for some period of time. Corrupt payments would not be stopped, but rather be made subject to reporting that would subsequently undergo facilitated analysis. Prohibition arguably drove some corruption further underground, so that the extent of practice worldwide was more deeply concealed. The authors suggest that TI's CPI and BPI data for the United States, *see infra* tbl.1, and *infra* tbl.2, reveal that the 1997 FCPA has not necessarily improved the U.S. reputation for clean dealing.

100. Rubin, *supra* note 20, at 261-62.

101. *See id.* at 262.

102. *See* Nesbit, *supra* note 8, at 1275 n.7, 1278 n.18.

103. *See* JEFFREY P. BRALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITION ECONOMIES* (1996); Daniel Kaufman & Paul Siegelbaum, *Privatization and Corruption in Transition Economies*, 50 J. INT'L AFF. 419, 419-58 (1996); *see also* Beverley Earle, *Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What Is To Be Done?*, 33 CORNELL INT'L L.J. 483 (2000).

Bribes sometimes include an additional payment amount intended to establish or strengthen monopolies in host countries, thereby disadvantaging foreign business rivals.¹⁰⁴ A World Bank survey of 3600 firms in sixty-nine countries found that forty percent pay bribes.¹⁰⁵ There are suggestions that the going rate has risen from ten to thirty percent, with twenty percent being usual.¹⁰⁶

Transparency International's CPI is a "poll of polls" that combines various surveys conducted among businesspersons concerning their perceptions of corruption by country. The CPI is an eleven-point scale, with zero being "entirely penetrated by corruption involving immense sums of kickbacks, extortion, fraud, etc." and ten being entirely clean—free of corruption.¹⁰⁷ Variance among the surveys is combined and is reported in addition to the average point estimate.

The BPI is a newly established surveys, conducted in fourteen leading emerging market economies, intended to show the bribe-paying propensities of businesspersons from nineteen leading exporting countries.¹⁰⁸ The BPI was initiated in response to criticisms that the CPI inappropriately emphasized bribe-receiving countries. The BPI is also reported as an eleven-point scale, with a zero indicating great willingness to pay bribes and a ten signifying a corruption-free exporting country. Such CPI and BPI data are impressionistic and based on opinion surveys of presumably knowledgeable individuals.

The authors compared the 1998 and 1999 CPI point estimates by country and categorized the reported countries into deciles greater than 1.0, equal to or greater than 2.0, and so on through equal to or greater than the 9.0 level. The reported countries were also categorized into economic types or geographical locations: OECD advanced economies; emergent economies important to the OECD as a whole; transition economies of formerly communist Central and Eastern Europe, some of the new OECD countries; Latin America and Caribbean countries; Sub-Saharan Africa; Asia; and a few Arab countries. The CPI included eighty-five countries in 1998 and ninety-nine in 1999. Coverage was expanded in Central and Eastern Europe. Where the country was not included in 1998, the single point estimate was used from 1999. Where a country's two scores crossed categories, the simple average was used for assignment.

104. See Nesbit, *supra* note 8, at 1280.

105. See *id.* at 1277. The proportion was 15% in industrial countries and 60% in the former USSR. See *id.* at 1277 n.12 (citing Thomas Omestad et al., *Bye-Bye to Bribes*, U.S. NEWS & WORLD REP., Dec. 22, 1997, at 39, 42).

106. See Nesbit, *supra* note 8, at 1278-80.

107. TI website, *supra* note 1.

108. The reported standard error was 0.2% or less. The 14 leading emerging countries—accounting for more than 60% of total imports of all "emerging market" economies, as defined for purposes of the TI study—were: (a) Asia: India, Indonesia, Philippines, South Korea, Thailand; (b) Latin America: Argentina, Brazil, Colombia; (c) Transition Europe: Hungary, Poland, Russia; and (d) Africa: Morocco, Nigeria, South Africa. (The authors use a different, more restrictive, definition of "emerging." See *infra* tbl.1.

The resulting classification is reported in Table 1. The authors suggest that a ranking below 7.0 is reasonable evidence of propensity for domestic corruption. The resulting distribution shows OECD advanced economies positioned toward the relatively clean end with a scattering of countries perceived to be relatively more corrupt; and all other economies largely positioned toward the highly corrupt end with a scattering of countries perceived to be relatively more clean. Although we hesitate to conclude directly that economic advancement reduces corruption, the emergent economies tend to be less corrupt than the developing countries. However, it is not clear whether economic advancement reduces corruption or corruption impedes economic advancement. Our own view is that corruption hinders development. One may interpolate that the distribution suggests that democratic polities, which correlate generally with market economies, are relatively cleaner.

A few OECD advanced economies had corruption-prone reputations: France, above 6; Japan and Belgium, above 5; and Italy, above 4. The United States, together with Austria, Germany, and Ireland, fell between 7 and 8. Among emergent countries, Portugal and Spain, both EU and OECD members, and Israel, fell above 6; Taiwan and South Korea, above 5; Greece, an EU and OECD member, above 4; and Turkey, an EU associate member and an OECD member, above 3. Outside the OECD, a few countries may rank above 5, but the bulk fall below 4. Only Singapore scored above 9 and Hong Kong above 7. The most corrupt countries, those scoring below 2, were Nigeria, Cameroon, Indonesia, Paraguay, Honduras, Uzbekistan, and Azerbaijan. Developing countries with large populations are typically rated as very corrupt.

Table 1.
Categorization of Countries Using TI Average 1998-1999 CPI Scores¹⁰⁹

Category	Advanced Countries (All OECD Members)	Emergent Countries	Transition Countries	Latin America & Caribbean	Sub-Saharan Africa	Asia	Arab World
> 1.0			Uzbekistan* Azerbaijan*	Paraguay Honduras	Nigeria Cameroon	Indonesia	
> 2.0			Yugoslavia Russia Croatia* Albania* Georgia* Krygyz Rep.* Kazakhstan* Moldava* Ukraine Armenia*	Colombia Venezuela Bolivia Ecuador	Ivory Coast Uganda Kenya	India Vietnam Pakistan	
> 3.0		Turkey	Macedonia* Lithuania Slovak Rep. Belarus Latvia Bulgaria	El Salvador Jamaica Mexico Nicaragua Argentina	Mozambique* Zambia Senegal Ghana	Philippines China Thailand	Morocco Egypt
> 4.0	Italy	Greece	Czech Rep. Poland	Peru Uruguay Brazil	Malawi Zimbabwe	Mongolia* Mauritius	Jordan
> 5.0	Japan Belgium	Taiwan S. Korea	Estonia Hungary	Costa Rica	Namibia S. Africa	Malaysia	Tunisia
> 6.0	France	Portugal Spain Israel	Slovenia*	Chile	Botswana		
> 7.0	Austria U.S. Germany Ireland	Hong Kong					
> 8.0	Switzerland Luxembourg Australia U.K. Norway						
> 9.0	Denmark Finland Sweden Iceland New Zealand Canada Netherlands	Singapore					

CPI and BPI scores are not directly comparable by country, since the data are collected from very different sources for very different purposes. But the scores shown in Table 2 suggest that a BPI below 6.0 is reasonable

109. See Transparency Int'l, *The 1999 Transparency International Corruption Perceptions Index (CPI) (1999)* <<http://www.transparency.org/documents/cpi/1999/index.html#cpi>>. CPI scores range from 0, signifying that a nation is considered very corrupt, to 10, signifying the opposite. An asterisk (*) denotes datum comprising only a 1999 score.

evidence of propensity to bribe foreign officials for business purposes and also that the rough average difference between CPI and BPI indices is about the 1.0 level. This difference corresponds closely to the CPI–BPI difference for Sweden,¹¹⁰ Canada, and Switzerland, which do not change rank order in this comparison and remain at the top end of the table. In comparison, South Korea and China do not move much at all between CPI and BPI scores at the bottom end of the table. Table 2 rank orders the nineteen countries included in the 1999 BPI report, which groups Hong Kong with China, according to the 1999 CPI of each country.

Both a CPI–BPI difference and the change in rank order from CPI to BPI listing are computed and shown. Despite the difference in CPI and BPI scores, a higher reported CPI—ten being clean—roughly corresponds to a higher reported BPI—again, with ten being clean. Naturally, some countries had relatively higher or lower CPI relative to BPI scores within this general pattern. Generally, the expected countries fall at the extreme ends of both indices. Of course, very few non-OECD countries are rated in the BPI report. Two key shifts in perception occur between the CPI and BPI “respondents.” Belgium’s BPI score was considerably greater than its CPI score. Singapore’s BPI score was greatly lower than its CPI score and represented the largest shift. Italy’s BPI score was lower than its CPI score, as was the case also for Taiwan. However, Italy’s situation directly matches the postulated 1.0 downward shift from CPI to BPI score, while Taiwan’s shift is roughly double that size. The United States and Germany each fell a rank order position while Australia and Austria gained considerably in rank order position.

110. Bofors of Sweden was involved in an arms sale bribery scandal in India. See *Letters to the Editor: Bribery Apologia Sells Asians Morally Short*, WALL ST. J., June 17, 1996, at A15.

Table 2.
Comparison of the 1999 TI CPI and BPI for Nineteen Countries¹¹¹

	Domestic Corruption		Corruption Abroad		Difference CPI-BPI 1999	Change in Rank 1999
	Corruption Perception Index 1999		Bribe Payers Index 1999			
	Index	Rank	Index	Rank		
Relatively Clean: Above 7.0 CPI and Above 6.0 BPI						
Sweden	9.4	1	8.3	1	-1.1	0
Canada	9.2	2	8.2	2	-1.0	0
Netherlands	9.0	4	7.4	6	-1.6	-2
Switzerland	8.9	5	7.7	5	-1.2	0
Australia	8.7	6	8.1	3	-0.6	+3
United Kingdom	8.6	7	7.2	7	-1.4	0
Germany	8.0	8	6.2	9	-1.8	-1
Austria	7.6	9	8.1	4	+0.5	+5
United States	7.5	10	6.2	9	-0.7	-1
Countries With Reversed CPI and BPI Relationships						
Belgium	5.3	15	6.8	8	+1.5	+7
Singapore	9.1	3	5.7	11	-3.4	-8
Relatively Corrupt: Below 7.0 CPI and Below 6.0 BPI						
France	6.6	11	5.2	13	-1.4	-2
Spain	6.6	11	5.3	12	-1.3	-1
Japan	6.0	13	5.1	14	-0.9	-1
Taiwan	5.6	14	3.5	17	-2.1	-3
Malaysia	5.1	16	3.9	15	+1.2	+1
Italy	4.7	17	3.7	16	-1.0	+1
South Korea	3.8	18	3.4	18	-0.4	0
China	3.4	19	3.1	19	-0.3	0

B. The Effects of Corruption on Political Institutions and Civil Society

For political institutions and civil society, bribery and extortion create three related costs: such corruption (1) is anti-democratic; (2) spreads to infect whole societies with a sense of fatalism; and (3) has direct and immediate effects on people's safety, especially during natural disasters.

First, bribery is anti-democratic. Donaldson has argued that the right to political participation is a fundamental human right, regardless of nationality.¹¹² A public official who fails to act in the larger public interest

111. See Transparency Int'l, *The Transparency International Bribe-Payers' Survey* (1999) <<http://www.transparency.org/documents/cpi/bps.html>>; *supra* note 109. CPI and BPI indices run from zero, very corrupt, to ten, very clean.

112. See THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 81-94 (1989).

because of a bribe payment has disrupted democracy and political participation. As OAS Secretary General César Gaviria commented: "Corruption deprives us all: our governments of their legitimate functions; our citizens of their resources and rights; and the international commerce of its balance and transparency."¹¹³ Even in societies where corruption is widespread and apparently accepted, the population that suffers from its effects does not prefer it. Oscar Arias Sanchez, former President of Costa Rica and Nobel Peace Prize recipient, catalogued a list of abuses attributable to corruption: former Ivory Coast president-for-life Houphouët-Boigny built a monumental cathedral amidst a sea of poverty; in the former Burma, a repressive army deals heroin to finance its grip on power; in Latin America, many dictators have justified their governments by pointing fingers at corrupt regimes of the past, while depriving citizens of the legal resources necessary to expose the corruption.¹¹⁴ The immediate effects of corruption include the destruction of democratic institutions.

Second, corruption tends to spread, infecting large groups of people and whole societies with widespread moral decay and fatalism and resulting in hopelessness and inaction. Corruption in the poorest countries can become self-sustaining when citizens lack the energy to be outraged by the corrupt actions of government officials. In addition, corruption can "trickle down"¹¹⁵ so that "grand" corruption by high-level officials is mirrored in "petty" corruption by low-level officials, and corruption pervades both the public and private sectors.

Third, corruption leads to improper construction of infrastructure, which is easily destroyed in the event of natural disaster. For example, Hurricane Mitch, which hit Honduras, Nicaragua, and other Central American countries in 1998, resulted in widespread death and destruction out of proportion with the strength of the hurricane itself. Part of the reason is that the infrastructure of those countries had not been adequately constructed, due largely to corruption. Furthermore, reconstruction was stalled due to corruption. Disaster relief funds "poured into" the region, while no significant progress was made with reconstruction.¹¹⁶

C. The Economic Consequences of Corruption

Mahoney predicts that a "commercial and political renaissance" will result from the suppression of corruption.¹¹⁷ A short-term case can be made for¹¹⁸ and a long-term case can be made against¹¹⁹ bribery in developing

113. TI NEWSL. (Transparency Int'l), Sept. 1994, at 4.

114. See Oscar Arias Sanchez, *Open Session*, in OECD SYMPOSIUM ON CORRUPTION AND GOOD GOVERNANCE 13 (1996).

115. See Wangari Maathai, Speech at the 9th Annual International Anti-Corruption Conference in Durban, South Africa, in TI NEWSL. (Transparency Int'l), Dec. 1999, at 4.

116. See *The Americas*, TI NEWSL. (Transparency Int'l), Dec. 1999, at 13.

117. J. Mahoney, *Ethical Attitudes to Bribery and Extortion*, in WHOSE BUSINESS VALUES?: SOME ASIAN AND CROSS-CULTURAL PERSPECTIVES 235 (S. Stewart & G. Donleavy eds., 1995).

118. See Rubin, *supra* note 201 citing SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 68, 69 (1969); Daniel Kaufmann, *Corruption: The Facts*, 107 FOR-

countries. The short-term case for bribery is that it copes with existing resource shortages, distorted markets, and administrative incompetence and is relatively limited in both scope and consequences.¹²⁰ Paulo Mauro, an IMF economist, found that corruption reduced private investment and thus the rate of economic growth.¹²¹ The negative association was statistically and economically significant. Quantitatively, a decrease in existing corruption might raise the ratio of investment to GDP by almost 4% and the annual growth of GDP per capita by almost 0.5%.¹²² For example, despite the Nigerian oil boom, which contributed about eighty percent of Nigeria's total revenues during the period from 1983 to 1992, per capita GNP declined from \$770 to \$320.¹²³ The most reasonable explanation for this situation is Nigeria's high level of corruption. A Russian study found corruption increased food vendor prices fifteen to twenty percent.¹²⁴ In Vietnam, graft was estimated at a ten to twenty percent surcharge on con-

EIGN POL'Y 114, 114-18 (1997); Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 417-27 (1967); Susan Rose-Ackerman, *Corruption and Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1997 35, 36-42 (Boris Pleskovic & Joseph E. Stiglitz eds., 1997).

119. See M. Shahid Alam, *Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment*, 48 AM. J. ECON. & SOC. 441 (1989); David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719 (1966); Scott F. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999 (1996); Ronald H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979); Omotunde E.G. Johnson, *An Economic Analysis of Corrupt Government, With Special Application to Less Developed Countries*, 28 KYKLOS: INT'L REV. FOR SOC. SCI. 47 (1975); Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121 (1996); Robert Klitgaard, *Cleaning Up and Invigorating the Civil Service*, 17 PUB. ADMIN. & DEV. 487 (1997); Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45 (1995); Nathaniel Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8 (1964); Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOREIGN POL'Y 55 (1996); Philip Oldenburg, *Middlemen in Third-World Corruption: Implications of an Indian Case*, 39 WORLD POL. 508 (1987); Robert Wade, *The System of Administrative and Political Corruption: Canal Irrigation in South India*, 18 J. DEV. STUD. 287 (1982); Robert Wade, *The Market for Public Office: Why the Indian State Is Not Better at Development*, 13 WORLD DEV. 467 (1985).

120. See Rashid, *supra* note 97, at 448-55 (describing bribe payments in India to obtain telephone lines and both overseas and domestic calls); see also Nichols, *Regulating Bribery*, *supra* note 8, at 271 n.77. One can analogize the interpretation as a three-part tariff in telecommunications: basic monthly rate, long-distance or other usage rate, and additional payment for more rapid connection. The additional payment, however, goes to private parties in violation of their formal duties on behalf of the government.

121. See Paulo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 700-04 (1995).

122. See Paulo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross Country Analysis*, in CORRUPTION AND THE GLOBAL ECONOMY 83, 91 (Kimberly Ann Elliott ed., 1996).

123. See Nesbit, *supra* note 8, at 1292 (citing *Threat to U.S. Trade and Finance from Drug Trafficking and International Organized Crime: Hearing Before the Senate Caucus on International Narcotics Control & the Senate Subcommittee on International Trade of the Committee on Finance*, 104th Cong. 45, 45-46 (1996) (testimony of Robert S. Leiken)). It is estimated that bribery amounted to \$100 billion in Venezuela over the preceding 20 years. See *id.* at 1277 n.12 (citing Omestad et al., *supra* note 105, at 44).

124. See *id.* at 1287 (citing Almond & Syfert, *supra* note 20, at 434).

sumer goods prices.¹²⁵

Wei examined the effect of corruption on foreign direct investment (FDI) using two different survey data sources, including TI's CPI, which provided a sample of fourteen source and forty-five host countries during 1990-91.¹²⁶ Wei treated corruption payments as equivalent to an increase in the tax on corporate profits. Wei concluded that: (1) a rise in either host-country tax rate or corruption level reduced inward FDI flows; (2) corruption had the same effect on FDI into East Asian host countries as elsewhere; and (3) U.S. investors, despite the FCPA, were no more averse to corruption in host countries than average OECD investors.¹²⁷ The findings are both statistically significant and economically large. Wei determined that the increase in corruption level from Singapore—very clean—to Mexico—very corrupt—was equivalent to raising the effective corporate tax rate by over twenty percent. Wei discovered “some weak support for the hypothesis that Japanese investors may be somewhat less sensitive to corruption,” but found no difference in U.S. versus Japanese investors concerning East Asia.¹²⁸

The World Bank estimates foreign bribery and related extortion at roughly five percent of all FDI inflows and imports into developing countries.¹²⁹ The Hong Kong Independent Commission Against Corruption estimated a three to five percent increase in bribes and grease payments relative to operating costs.¹³⁰ In 1990, world exports destined for the developing countries amounted to some \$916 billion.¹³¹ In 1994, FDI to the same regions amounted to some \$91 billion.¹³² In 1992, the Development Assistance Committee (DAC) of OECD member nations provided some \$115.8 billion in public and private aid to developing countries.¹³³ Adding these three figures together, inflows in roughly the early 1990s amounted to just over a trillion dollars.

A minimum estimate will suffice for our purposes. At five percent, the nominal value of corruption on foreign inflows could amount to some \$50 billion. That amount is perhaps two-tenths of one percent of the gross national product (GNP) of the industrial market economies, but 1.5% of world exports originate in those economies.¹³⁴ Rubin estimates the scale at almost \$80 billion annually.¹³⁵ The GNP outside the industrial market

125. See *id.* at 1287 n.84.

126. See SHANG-JIN WEI, *HOW TAXING IS CORRUPTION ON INTERNATIONAL INVESTORS?* (National Bureau of Econ. Research, Working Paper No. 6030, 1997).

127. See *id.*

128. *Id.* at 1.

129. See WORLD BANK, *HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK* 9-10 (Sept. 1997) (cited in Rubin, *supra* note 20, at 259 n.2).

130. See Nesbit, *supra* note 8, at 1287 (citing Almond and Syfert, *supra* note 20, at 434).

131. See PRESTON & WINDSOR, *supra* note 27, at 227.

132. See *id.* at 41-42.

133. See *id.* at 118 n.7 (based on U.S. Department of Commerce 1995 data).

134. See *supra* note 27.

135. See Rubin, *supra* note 20, at 259 n.2 (basing this analysis on World Bank data); see also WORLD BANK, *supra* note 129.

economies, which is roughly the aggregate of developing, emergent, and transitional economies together, amounted to an estimated \$5.3 trillion in 1993.¹³⁶ If the inflows are subtracted to yield crudely GDP of perhaps \$4 trillion or a little more, then domestic corruption would amount to another \$200 billion at a similar estimate of five percent. These crude estimates are hardly scientifically reliable, but they yield a rough sense of the likely minimum scale of the problem.

D. Economic Losses Suffered by the United States Due to the FCPA

A first mover may suffer losses rather than gain relative advantages. Given the reality of global bribery, "the risk that U.S. business activities abroad will be subject to criminal penalties in the United States, while their competitors in . . . other countries operate under no similar legal constraint, has greatly complicated the participation of U.S. citizens and companies in the global economy."¹³⁷ Since enforcement has arguably been lax, estimates of what overall effect the FCPA has had on preventing bribery by U.S. firms are difficult. However, the FCPA evidently receives serious corporate attention.¹³⁸

The evidence concerning U.S. business losses is mixed and difficult to interpret. Some firms cite losses; other firms cite gains and other advantages. The circumstances likely vary by industry, firm, and host country. Kate Gillespie concluded that FCPA harm to U.S. exports is unproved.¹³⁹ Paul Beck and others found a statistically significant but economically small effect of corruption on U.S. export competitiveness.¹⁴⁰ Richardson reported that the FCPA regulatory burden was generally unimportant.¹⁴¹ Almost immediately under the Carter Administration, however, doubts arose about the economic consequences of the FCPA. President Carter, in September 1978, directed the Attorney General to provide written guidance. The White House Export Disincentive Task Force concluded that, during a one-year period, the FCPA cost the United States \$1 billion annually in lost trade opportunities.¹⁴² A GAO Report found that many businesspersons believed they had lost business due to the FCPA and that costs

136. See Preston & Windsor, *supra* note 27, at 35.

137. David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, J. INT'L. L. & BUS. 457, 457-58 (1998).

138. Only 4.1% of surveyed respondents reported they had paid or authorized bribes; 44.6% rated the FCPA as a "very important" or "extremely important" factor affecting U.S. export trade. See Nichols, *Regulating Bribery*, *supra* note 8, at 286 nn.156-59 (citing JYOTI N. PRASAD, IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977 ON U.S. EXPORTS 121, 141 (1993)).

139. See Kate Gillespie, *Middle East Response to the U.S. Foreign Corrupt Practices Act*, 29 CAL. MGMT. REV. 9, 28 (1987).

140. See Paul J. Beck et al., *The Impact of the Foreign Corrupt Practices Act on U.S. Exports*, 12 MANAGERIAL & DECISION ECON. 295, 301 (1991).

141. See J. DAVID RICHARDSON, SIZING UP U.S. EXPORT INCENTIVES 131 (Institute for Int'l Econ., 1993), cited in WEI, *supra* note 126, at 5.

142. See Slade, *supra* note 47, at 118 (citing Philip Taubman, *Carter Unit Recommends Easing of Bribing Law*, N.Y. TIMES, June 12, 1979, at D1, D15). The task force recommended weakening and then abandoning FCPA. Senator Proxmire's protest prevented the recommendations from being finalized and submitted to President Carter. See *id.*

of compliance exceeded the Act's benefits.¹⁴³

Generally, the consensus of U.S. reports indicates some net loss of national economic wealth. James Hines found that, after controlling for growth of host-country GDP, corruption negatively affected the growth of U.S. FDI during 1977-92, with particular emphasis on aircraft exports.¹⁴⁴ (The aircraft industry is essentially a competition between the United States and the European consortium Airbus.) U.S. Trade Representative Kantor estimated a loss of \$64 billion in business in the 1996 calendar year.¹⁴⁵ The U.S. Department of Commerce valued alleged foreign bribery in 180 commercial contracts over three years at an estimated \$80 billion.¹⁴⁶ The 1995 testimony of Secretary of Commerce Brown identified, over time, 100 cases of bribery in deals worth \$45 billion and in which the bribers maintained an eighty percent success rate.¹⁴⁷

A prevailing U.S. presumption is that a level playing-field will eliminate any FCPA disadvantages to U.S. firms. The presumption ignores the economic and diplomatic costs of the transition to a corruption-free global economy driven initially by the United States. Economic losses are not automatically recoverable by future outcomes. As in the stock market, if the average price of a portfolio drops, a loss is suffered, and the fact that, six months later, the average price rises again does not mean that the loss is recovered. Rather, the diminished opportunity to sell the portfolio in the interim and invest the proceeds in some better opportunity is the relevant consideration. If business opportunities have gone to another country, a better playing-field in the future is no recompense—the gain must exceed the loss.

Assuming a level of even \$1 billion in losses annually, those losses over some twenty-two years amount to \$22 billion plus the economic multiplier effects; if multiplier effects are posited at five, the losses amount to at least \$100 billion. An annual loss of \$5 billion, including multiplier effects, is relatively trivial in relationship to GDP, though not necessarily so in relationship to negative trade balance to which employment effects may

(citing Philip Taubman, *Bribe Law is Defended in Congress: Idea of Easing it Angers Leaders*, N.Y. TIMES, June 13, 1979, at D7).

143. See GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: COMPTROLLER GENERAL'S REPORT TO THE CONGRESS 6 (1981), cited in Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 3 n.2 (1999).

144. See James Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977*, (National Bureau of Econ. Research Working Paper No. 5266, 1995), cited in WEI, *supra* note 126, at 5.

145. See Nesbit, *supra* note 8, at 1277 n.11. (citing Patricia Digh, *Shades of Gray in the Global Marketplace*, H.R. MAG., Apr. 1, 1997, at 91, 93).

146. See *id.* at 1278-79 (citing William Daley, *Comment & Analysis: Clamping Down on Commercial Bribery*, FIN. TIMES (London), Nov. 18, 1997, at 22).

147. See *Letter From the President of the Fairfax Group*, FAIRFAX BULL. (The Fairfax Group, Ltd., Falls Church, Va.), Fall 1995. For more information regarding the *Fairfax Bulletin*, including how to obtain a copy of this bulletin issue, contact them directly at 703-207-0600, or 800-967-9676.

be traced.¹⁴⁸ The countervailing condition is that global economic growth must increase sufficiently from corruption-free activities so that the United States and other OECD countries will be better off in the long run, thus offsetting the prior cost in addition to preventing future costs. Such improvement measured in the aggregate does not address the earlier distributive effects on industries, firms, and individuals.

III. Evolution of a Multilateral Normative Regime

The authors examine, from the perspective of international regime theory, the evolution of regional and global collaborations for combating bribery and extortion.¹⁴⁹ An international policy regime is classically defined as follows: "A regime is composed of sets of explicit or implicit principles, norms, rules and decision-making procedures around which actor expectations converge in a given area of international relations."¹⁵⁰ Regimes are fundamentally behavioral in character.¹⁵¹ Formal institutional arrangements and underlying, legitimizing principles may or may not exist. While the term "regime" is also used as a synonym for "government," that meaning is not intended here. Rather behavioral expectations substitute for government in the conventional sense.¹⁵² As Friedrich Kratochwil comments, "norms" may be either explicit—that is, embodied in formal rules—or implicit—evidenced only in behavior, and regimes are effectively "soft law" lying between domestic "order" and international "anarchy."¹⁵³ Regimes, in this behavioral and expectational sense, are "sets of rules of the game" that guide interactions.¹⁵⁴

The authors distinguish between moral, or value-oriented, and normative, or behavior-oriented, regimes. A multilateral moral regime is a matter of intrinsic commitment concerning global hypernorms and presupposes either widespread value concurrence or value enforcement by a dominant actor. A normative regime by contrast merely requires voluntary consent

148. Between 1983 and 1993, as the proportion of worldwide sales of U.S. multinational enterprises (MNEs) due to foreign affiliates rose from 27% to 31%, worldwide employment of U.S. MNEs declined some 369,000, while foreign affiliate employment rose by 348,000—implying a loss in U.S. parent employment of some 717,000. Affiliate sales were most important in wholesale trade, petroleum, and service industries. See PRESTON & WINDSOR, *supra* note 27, at 55.

149. See H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407 (1999).

150. INTERNATIONAL REGIMES 2 (Stephen D. Krasner ed., 1983); see also Anne Drost & Richard Brooks, *Civil Society Regimes and Ecosystem Management: Selected Problems in Lake Champlain*, 15 ARIZ. J. INT'L & COMP. L. 289 (1998).

151. For a critical view, see Susan Strange, *Cave! Hic Dragones: A Critique of Regime Analysis*, in INTERNATIONAL REGIMES, *supra* note 150 at 337-54. Strange prefers a conception stressing "structures of power." *Id.*

152. See PRESTON & WINDSOR, *supra* note 27, at 16.

153. FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 12 (1989). "[M]arkets are probably the social institution most dependent on normative underpinnings." *Id.* at 47.

154. ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 3 (1994).

or involuntary compliance concerning specific forms of behavior, without respect to motives or attitudes. Participation need not be fully voluntary or due to value concurrence without conflict of motives and interests. Such a regime can operate reasonably effectively under a "rule of anticipated reactions."¹⁵⁵ Toleration is both a necessary and a sufficient condition. Normative regimes resemble the Donaldson and Dunfee notion of local moral communities, or micro-contracts, but moral values need not be at stake other than rhetorically.¹⁵⁶ A normative regime may address a value question—for example, whether bribery and corruption are morally acceptable, but it turns on a practical question, namely, whether bribery and extortion are economically and politically tolerable. If suppression of corruption falls under the rubric of global hypernorms it does so instrumentally; suppression is instrumental to the achievement of the hypernorms.

The corruption-suppression conventions and policies represent the beginnings of such a multilateral normative regime. The 1996 OAS and 1997 OECD Conventions and the 1997 EU Convention each constitute formal consent, albeit in differing forms, by adherents to the basic principle of suppressing business bribery of foreign officials. Although extant statutes already forbid domestic political and commercial corruption almost everywhere, the new arrangements also forbid foreign corruption. The new arrangements include specific provisions on extradition and prosecution so that, eventually, deviation in implementation and laxness in enforcement may also be addressed.

The OAS is a regional association embracing the Western Hemisphere. In 1994, the OAS adopted a Plan of Action aimed at strengthening democracy and combating corruption.¹⁵⁷ This step was followed in 1996 by the Inter-American Convention Against Corruption (IACAC). The IACAC requires national criminalization of the bribery of foreign officials, extradition of bribe-givers and bribe-takers, a pledge not to invoke bank secrecy laws to impede investigations, and criminalization of public officials' possession or acquisition of assets not reasonably explainable by lawful earnings.¹⁵⁸ The IACAC process provides a model statute from which OAS countries can work on illicit enrichment and transnational bribery that, in the latter instance, essentially adopts the U.S. criminalization approach. There is thus a source of comparison for specific Western Hemisphere statutes.

IACAC is open to ratification by any country. The obligation to enact implementing legislation, however, is subject to the constitution and legal system of each country as a form of escape clause. All countries are required, to the degree their legal principles permit, to cooperate with

155. CARL J. FRIEDRICH, *MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS* 203-05 (1963).

156. See generally DAVID GAUTHIER, *MORALS BY CONSENT* (1986).

157. See OAS, *First Summit of the Americas: Plan of Action* (visited Jan. 23, 2001) <<http://www.summit-americas.org/miamiplan.htm>>.

158. See Low et al., *supra* note 48, at 246-55; Rex J. Zedalis, *Internationalizing Prohibitions on Foreign Corrupt Practices: The OAS Convention and the OECD Revised Recommendation*, 31 *J. WORLD TRADE* 45-61 (1997).

other countries in enforcement of their laws.¹⁵⁹ The United States itself included a reservation concerning illicit enrichment of public officials due to its own constitutional problems.¹⁶⁰ The IACAC does not specify particular penalties, and only existing extradition treaties are extended to include the Convention offenses.¹⁶¹ There is no oversight or monitoring mechanism, so implementation is left to national discretion, but the Convention does require extradition or prosecution.¹⁶² The IACAC does not provide an exception for facilitating payments.¹⁶³

"The OECD brings together 29 countries sharing the principles of the market economy, pluralist democracy and respect for human rights."¹⁶⁴ The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions commits signatories to adopt FCPA-like national legislation. In addition to the Convention, the OECD issued a recommendation for the elimination of tax deductions for bribes, since many member nations, including Canada, France, Japan, Luxembourg, and West Germany, had laws permitting foreign bribe deductions provided the identity of recipient and an adequate business purpose were disclosed upon audit. Obviously, the stated policy could be ignored by benign neglect in not pressing inquiry.¹⁶⁵ In fact, only two countries, the United States and Belgium, explicitly denied tax deduction for the cost of foreign bribes.¹⁶⁶

The EU presently comprises fifteen countries in Western and Central Europe. Additional countries from Central and Eastern Europe are being considered for eventual integration, in some form, into the EU. The EU is a political confederation, common market, and monetary union moving gradually toward a more federalist integration. Voting within the EU reflects relative strength of the member nations. In 1996, the European Council adopted the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, criminalizing the payment of bribes to any official of the EU or of an EU member nation.

159. See Low et al., *supra* note 48, at 248-59, 248 n.10 ("This limitation is primarily directed to those countries that do not exercise jurisdiction over their nationals residing or acting outside their territory.").

160. See *id.* at 249 n.14.

161. See *id.* at 253.

162. See *id.* at 255, 276-77.

163. See *id.* at 270.

164. OECD website, *Membership* (visited Jan. 23, 2001) <<http://www.oecd.org/about/general/member-countries.htm>>.

165. See *Activities of Multinational Corporations Abroad: Hearings Before Subcommittee on International Economic Policy of the House Committee on Internal Relations*, 94th Cong. 75 (1975); Slade, *supra* note 47, at 125 n.32.

166. A 1975 report by the IRS Commissioner found that only Belgium, which ranks poorly on TI's CPI, adhered to a similar policy. The report noted West Germany, France, Japan, and Luxembourg as permitting foreign bribe deductions where identity of recipient and adequate business purpose are disclosed on audit. See Slade, *supra* note 47, at 125 n.32.

In addition to the actions of the OAS, the OECD, and the EU, several other international governmental organizations have begun to take steps toward suppressing corruption in international business transactions. The IMF¹⁶⁷ and the World Bank¹⁶⁸ have expressed strong interest in suppressing official corruption, arising from the desire for efficient and effective use of their funds. In 1974, the U.N. began a process, still underway, to regulate transnational corporations, that included anti-corruption provisions. This process has tended to languish, partly because of the inherently difficult dynamics of large-group bargaining and partly because of the complexity of the regulatory scheme, which is to take the form of a code of conduct for transnational corporations (TNCs). The 1996 U.N. nonbinding declaration on corruption recommends criminalization and elimination of the tax deductibility of bribes.¹⁶⁹ MNEs will come to play their role.¹⁷⁰ In the mid-1990s, some 35,000 MNEs operated through 170,000 foreign subsidiaries. The 300 largest MNEs then controlled twenty-five percent of the world's productive assets.¹⁷¹ Of the 1995 *Business Week* "Global 1000" and "Top 100" firms, about eighty-eight percent were based in the industrial market economies. Of the 1995 *Fortune* "Global 500" firms, about ninety-five percent were based in those economies.¹⁷²

The simultaneous development of corruption-suppression efforts in many international governmental and nongovernmental organizations (NGOs) provides plausible evidence of an emerging anti-corruption regime.¹⁷³ It is important to appreciate the co-occurrence of these efforts. The United States is the key linkage nation, holding membership in both the OAS and the OECD, which are the lead multilateral organizations in this regime development. Certain NGOs—especially the ICC and TI—have also been driving forces in adoption of the OAS and OECD agreements.

167. See Mauro, *supra* note 121; Mauro, *supra* note 122.

168. See WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* 103-04 (1997). The report is critical of anti-corruption regulatory systems and weak enforcement institutions. See *id.*; see also WORLD BANK, *supra* note 129; Ibrahim Shihata, *Corruption: A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451 (1997).

169. "At the United Nations, United States negotiators successfully persuaded the General Assembly to adopt a [non-binding] Recommendation from the Economic and Social Council against Corruption and Bribery in International Commercial Business Transactions in 1996." Rubin, *supra* note 20, at 282 (citing remarks of U.S. Representative Prezell Robinson).

170. See David Hess & Thomas Dunfee, *Fighting Corruption: A Principled Approach—The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L. J. 593 (2000).

171. See WILLIAM H. LASH, *THE EXAGGERATED DEMISE OF THE NATION STATE* 8 (Center for the Study of Amer. Bus., 1996) (citing U.N. estimates and *Multinationals Back in Fashion*, *ECONOMIST*, Mar. 27, 1993, at 5).

172. See PRESTON & WINDSOR, *supra* note 27, at 52.

173. See Barbara Crutchfield George & Kathleen Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L. J. 547 (2000).

The United States is also an important member of the IMF, the World Bank, and the U.N.

To overcome resistance, the United States must continue to exert leadership. Three factors likely to contribute to overcoming this resistance are: (1) a broad linkage agenda between Europe and the United States; (2) concern abroad over domestic consequences of foreign bribery; and (3) concern over the dramatic deterioration of conditions in Central and Eastern Europe. Linkage creates the basis for collaboration, but European and Japanese concerns create the motives for acting in that direction.

Although the United States is not a member of the EU, there is increasing economic linkage between the United States and the European Union. The New Transatlantic Agenda was launched by mutual agreement in December 1995, and layered onto this agenda was the Transatlantic Economic Partnership of May 1998.¹⁷⁴ This agenda covers a large number and broad range of policy concerns and constitutes a formal recognition of the interdependence of the United States and the EU. "The United States and the European Union (EU) enjoy an exceptionally broad and deep commonality of interests and values that form the basis of a close, mutually beneficial relationship."¹⁷⁵

The United States has profound interests in driving consensus formulations. For many years, the United States has argued the case for multilateral suppression of international business corruption, while engaging in unilateral suppression despite the costs of doing so. In this sense, the United States has tried to provide an international social good.¹⁷⁶ A social good is characterized by collective consumption under conditions in which exclusion from consumption by pricing is not feasible, once the good is supplied, it is consumed for free by everyone. Social goods are examples of market failure in the sense that the social good must be supplied either by collective action—either by government with compulsive taxation power or an associative club soliciting voluntary fees—or by action of someone with sufficient intensity of demand or interest. There is demand for the good, but no economic actor will rationally reveal such demand in order to enjoy free ridership.

Social goods are of three types: public goods, merit goods, and club goods. A public good is one supplied by a government under these conditions. A club good is one supplied by a voluntary association. A merit good is one that someone judges to be undersupplied by the market mechanism. The notion of a merit good can include desirable moral values. It has been argued that international public goods require an enforcement

174. See EU, State Dep't, *Joint U.S./EU Action Plan* (Dec. 3, 1995) <<http://europa.eu.int/en/agenda/eu-us/pub/tai/apindx.htm>>; EU, State Dep't, *Transatlantic Economic Partnership, Statement Released Following the U.S.-EU Summit* (May 18, 1998) <http://www.state.gov/www/regions/eur/eu/js_980518_useu_econ.html>.

175. State Dep't, *U.S.-EU Relations: Fact Sheet Released by the Bureau of European and Canadian Affairs* (May 26, 1998) <http://www.state.gov/www/regions/eur/eu/fs_980526_useu.html>.

176. See Charles P. Kindleberger, *International Public Goods Without International Government*, 76 AM. ECON. REV. 1, 1-13 (1986).

agency to ensure implementation.¹⁷⁷ None of the anti-corruption agreements provides for such an agency, so implementation must proceed, at least partially, in a voluntary way.

The United States discovered that it could not unilaterally supply a bribe-free global business environment, although it has come to view such an environment as a public good for a variety of reasons. The international negotiation process has been one of discovering bases by which to persuade the OAS, the OECD, and other multinational bodies to view a bribe-free environment as a merit good to be supplied by regional or associative club rather than global action. The leadership of the United States has led to the situation in which all affected countries—advanced and other—have effectively endorsed the principle of corruption suppression through at least one international organization to which they belong. The United States and certain NGOs promote voluntary compliance, ultimately acting in combination with a gradual shift in the interests and attitudes of the other OAS and OECD member nations.

In certain respects, however, many of the member nations of the OAS and OECD may be reluctant participants. Resistance to implementation has been noted in certain countries largely because of costs that must be borne both in the transition to a bribe-suppression environment and in an environment in which some actors continue to engage in bribery. For example, the bank secrecy laws of Switzerland may need to be changed, imposing costs on Swiss banks and their clientele.¹⁷⁸ Joachim Grunewald, former German State Secretary of Finance and the Federation of German Industry were opposed to banning of transnational bribes because German business would be constrained.¹⁷⁹ German bribes have been estimated at over \$5 billion per year.¹⁸⁰ There is reportedly an “official French system of bribery in less-developed countries,”¹⁸¹ and French implementation of the OECD Convention makes allowances for French companies to deduct some bribes if the payments are made under normal circumstances, are at a reasonable level, can be shown to be in the interests of the company, and the identity of the bribed person is revealed.¹⁸²

177. See Manuel Velasquez, *International Business, Morality, and the Common Good*, 2 *BUS. ETHICS Q.* 27, 27-40 (1992).

178. See Michelle Moser, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 *CASE W. RES. J. INT'L L.* 321 (1995); Rubin, *supra* note 20, at 309.

179. See Rubin, *supra* note 20, at 290 n.187 (citing Beverly Earle, *The United States Foreign Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 *DICK. J. INT'L L.* 207, 234 (1996)).

180. See Nesbit, *supra* note 8, at 1277 n.12 (citing Omestad et al., *supra* note 105, at 43).

181. *Id.* at 1286 n.76 (citing Pascal Krop, *L'Argent Noir da La France*, *L'EVENEMENT*, Sept. 29, 1988, at 50, cited in John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 *INT'L L.* 1009, 1010 n.8 (1990)). Nesbit also cites Rosie Waterhouse, *The Sleazy State: Britain "Resisting Moves to Halt Bribes to Officials"*, *INDEP.* (London), Mar. 16, 1994, at 3.

182. See Sarah Marks, *France Takes Soft Line on Bribes for Business*, *EVENING STANDARD* (U.K.), Feb. 16, 1999, at 35.

It has been reported that some small European nations do not regard the global economy as a level playing-field. Bribe-paying has been seen as a means for leveling the playing-field, and prohibitions against bribe-paying amounts to exclusion of these companies from many opportunities.¹⁸³ This complaint is particularly problematic because the European economy is not as healthy as the U.S. economy.¹⁸⁴ The argument made within the United States upon the enactment of the FCPA, notably that U.S. companies would be harmed in competition against companies that were not prohibited from offering bribes, has re-emerged in the OECD context. Australian firms have expressed concern over potential business losses in their competition with companies from non-OECD countries, even though Australia has a relatively good BPI.¹⁸⁵

Anti-corruption campaigns have been mounted recently in several countries, albeit for largely domestic reasons. Japan has adopted "a ferocious anti-corruption campaign" due in part to its economic and political difficulties.¹⁸⁶ One report suggests that Germany has become concerned about companies engaging in domestic corruption because they have become accustomed to paying foreign bribes.¹⁸⁷ In Germany, former Chancellor Helmut Kohl and others have recently been implicated in campaign financing scandals. This concern mirrors speculation in the United States prior to the passage of the FCPA that foreign bribery can have detrimental domestic consequences.¹⁸⁸ Italy has recently begun an investigation called "Clean Hands," which is directed at civil servants and politicians who previously engaged in corruption without worry of the consequences.¹⁸⁹

Much of the European concern comes from the transition economies of Central and Eastern Europe. "The single greatest threat to the emerging democracies of Eastern Europe and the former Soviet Union is corrup-

183. See *Competitive Bidding*, WALL ST. J., Apr. 19, 1996, at A12.

184. The aggregate unemployment rate in the EU was 8.8% in January 2000, down from 9.5% in February 1999. See the EU, Eurostat (visited Feb. 8, 2001) <<http://www.europa.eu.int/comm/eurostat>> (reporting monthly-average International Labour Organisation data collected from parties actively seeking civilian employment). Continued high unemployment greatly influenced the 1998 Schroeder election in which German Chancellor Kohl was defeated. See Greg Steinmetz & Camille Rohwedder, *Germany's Schroeder Deals Kohl Firm Defeat*, WALL ST. J., Sept. 28, 1998, at A20, cited in Rubin, *supra* note 20, at 293 n.223.

185. See Stephen R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?: Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 225 n.15 (1999). The statement argued that non-OECD countries would gain a competitive advantage relative to Australia. See *supra* tbl.2.

186. Salbu, *supra* note 185, at 238 (citing Peter Tasker, *Crusade Makes a Meal of Corruption Cleanup*, MAIL ON SUNDAY, Apr. 12, 1998, at 11).

187. See *Competitive Bidding*, *supra* note 183.

188. See Press Release, BUS. WK., May 17, 1976, at 162, cited in Slade, *supra* note 47, at 125. Senator Proxmire stated, "If we permit bribery to become a regular policy of United States corporations doing business abroad, it will only be a matter of time before these same practices afflict our own domestic economic system." *Id.*

189. See Rubin, *supra* note 20, at 307-08.

tion.”¹⁹⁰ “The EU is also concerned about the prevalence of intra-community fraud in connection with general EU funds dispensed to member states for EU-approved expenditures. There is also concern about corruption’s links with organized crime, drug trafficking, and money laundering.”¹⁹¹ These and other scandals and investigations have given ammunition to TI and the ICC as they engage in public information campaigns intended to promote citizen outrage at official corruption. Presumably, revelations of corruption can also be used by U.S. diplomats in their negotiations.

These three factors—broad linkage in U.S.-EU relations, concern over domestic effects of bribery abroad, and concern over Central and Eastern Europe—suggest that the currently developing anti-corruption regime is more normative than moral in character. As noted above, a moral regime is based on intrinsic commitment to shared values, while a normative regime is based upon harmonized behavior regardless of motives. One quite revealing and theoretically interesting aspect of the FCPA process is that other advanced nations in the OECD have agreed, out of mixed motives and despite value diversity, to consent in principle to multilateral action, and such action is likely to increase gradually over time. Two decades, since 1977, must be presumed to be enough time for states to have thought about the matter, although of course policy-making may not proceed according to that logic. The multilateral efforts reflect a concatenation of circumstances, linkage of considerations, and mixed motives that do not amount to a value consensus. However, a value consensus may not be strictly necessary to a multilateral regime. The issue is not motive, but behavior. If the OECD countries effectively halt, or greatly reduce, foreign bribery by their enterprises, then behavior will have changed. One may posit that after two decades, the European and Japanese governments have roughly calculated the economic consequences and thus are prepared to tolerate those consequences.

Within the context of the anti-corruption effort, there has been an informative debate about the relationship between domestic morality and transnational policy. Salbu and Nichols have each articulated extremes of the controversy over global moral community building.¹⁹² Salbu urges the moral and practical defects of the FCPA process;¹⁹³ Nichols urges the human consequences of corruption and the likelihood of successful action.¹⁹⁴ Salbu’s position argues that the world is not, at least yet, a normative global village. He accepts that value convergence and unified agendas could emerge in the future, but argues that multilateral policies or

190. Mahoney, *supra* note 117, at 236 (citing Stephen Potts, Director of the U.S. Office of Government Ethics).

191. Rubin, *supra* note 20, at 275 n.94 (citing Simone White, *Proposed Measures Against Corruption of Officials in the European Union*, 21 E.L. REV. DEC. 465 (1996) (detailing corruption problems in the European Commission)).

192. See Nichols, *Regulating Bribery*, *supra* note 8; Nichols, *supra* note 33; Salbu, *supra* note 33; Salbu, *supra* note 35; 4 Salbu, *supra* note 49; Salbu, *supra* note 185.

193. See Nichols, *Regulating Bribery*, *supra* note 8; Nichols, *supra* note 33.

194. See Salbu, *supra* note 33; Salbu, *supra* note 49; Salbu, *supra* note 185.

extraterritorial application of unilateral policy should not precede such convergence. His general condition is that, "[w]hen laws are imposed across borders, there should be considerable transnational value consensus. Otherwise, the imposition threatens to deny respect for legitimate regional value variance."¹⁹⁵ A key consideration is what defines legitimate in this context. Salbu's proposed strategy is persuasion rather than pressure; in our view, the interest and value dispute will simply move back from consensus on an anti-bribery campaign to disagreement over implementation details and enforcement. For Nichols, corruption is universally proscribed by national laws and all major religious and moral schools of thought, and institutional pressures can thus properly be brought to bear against practitioners.¹⁹⁶

Each of these positions serves as a useful cautionary to the other, and thus our position is somewhere in between. The general cases against bribery are that it hampers global market functioning and local economic development, undermines local administrative capability, and is a common-law offense against the natural rights of the people of any society. These general cases do not constitute a rationale for a first mover to act unilaterally against bribery and extortion, yet the United States did just that in enacting the FCPA. The fundamental matter at the heart of the FCPA is whether it has been a reasonable action by the United States. As the policy has two distinct parts, the rationality of each part must be considered.

The decision to prohibit foreign bribery by U.S. citizens and their agents may well have been irrational. The United States proceeded on a legislative impulse, under domestic political stress, and without a carefully considered theory of sound policy. This decision turned out to have costs and burdens, but it was not a decision easily reversed. Thus the second part of the policy, the decision to influence everyone else in the world on this matter, is highly rational. The first decision made the second inevitable. Due to its first policy decision, the United States is compelled to promote the evolution of a moral community through changes first in behavior, a normative regime, and then in expectations and attitudes, a moral regime.¹⁹⁷

Over the past two decades, the United States has acted largely in a persuasive manner. Had true pressure been brought to bear, multilateral action may have occurred much sooner. Thus, the behavior of the United States was consistent with Salbu's position, though Salbu might not accept this argument. The United States recognized that its own interests would be served if corruption suppression were multilateral. However, the United

195. Salbu, *supra* note 185, at 227. The counter-argument is that no real progress can be made with corrupt officials. See Marjit Sugata & Heling Shi, *On Controlling Crime with Corrupt Officials*, 34 J. ECON. BEHAV. & ORG. 163, 171 (1998).

196. See Nesbit, *supra* note 8, at 1274 n.1 (citing Nichols, *Outlawing Bribery*, *supra* note 8, at 318-21).

197. See Seita, *supra* note 22.

States also apparently was committed to a corruption-free global economy as a moral good.

The United States likely viewed bribery and extortion as a commons problem, as argued by Slade.¹⁹⁸ In a commons tragedy, each individual acts rationally to over-consume an apparently free good—corruption as a small cost of business—without consideration of the long-term and global consequence, namely the destruction of the commons. There is a rational compulsion for every individual to participate in the behavior because one's welfare is reduced by unilateral exit.¹⁹⁹ Negotiation alone is insufficient for the solution of the problem due to the "freeloader effect"; thus, enforcement is also necessary.²⁰⁰ This is precisely the situation the United States faced for twenty years. Interestingly, the effort by the United States over these past two decades is becoming vindicated as other countries are beginning to see the commons problem inherent in bribery and extortion.²⁰¹ The effectiveness of U.S. efforts, however, appears to lie in appeals made on pragmatic grounds, rather than those made on moral grounds.

Conclusion

Elaine Sternberg argues that one must decide whether to attempt business in "disorderly jurisdictions" and "pariah regimes"²⁰² and comments that international boycotts and campaigning for international regulation are generally ineffective and counterproductive. "The way for a business to fulfill its moral responsibilities is not to legislate for others, but to make sure that its own conduct is ethical."²⁰³ The United States, for a variety of reasons, has moved from unilateral refusal to bribe abroad to insistence on multilateral anti-corruption action contrary to this admonition. The OAS and OECD member nations, following generally the path marked out by the 1977 FCPA, are now embarked on the next few stages of an emerging global anti-corruption campaign. However, gradually and perhaps cynically, this campaign is becoming an expanding torrent in scope, intensity, and participation. Moral authority for an international policy regime has been established since no one can actively endorse bribery and extortion, although customary gifts and gratuities are arguably quite different. Regional (OAS) and associative (OECD) action is moving faster than U.N. and WTO action, in part because global, large-membership organizations are more difficult to influence and drive. The whole matter has been backed into by happenstance.

In domestic law, one may seek to define optimal statutory policy, while recognizing the mixed motives inherent in the positive nature of legislation drafted in a political process. In international law, one may seek to define optimal dispute settlement and conflict resolution strategy while

198. See Slade, *supra* note 47, at 123-25.

199. See *id.* at 127 n.37.

200. See *id.* at 126.

201. See *id.* at 127.

202. Sternberg, *supra* note 86, at 31-36.

203. *Id.* at 35-36.

recognizing global value diversity. Multilateral cooperation to suppress foreign bribery and domestic corruption involves both domestic and international levels of action. The cooperation arrangements are diffuse rather than focused: at issue are (1) matters of foreign enterprise bribery; (2) money laundering arising in illegal drug trafficking; (3) the spread of organized crime; (4) the future of the transitional economies of Central and Eastern Europe arising out of the collapse of the Soviet empire; (5) domestic political and commercial corruption in OECD advanced economies; (6) domestic political and commercial corruption in the developing and emergent countries; and (7) the burden widespread, and arguably growing, corruption places on the various instruments available to OECD advanced economies for assisting the global development process.

Evidence is beginning to suggest that corruption originating in local circumstances becomes a form of a general tax by private parties, acting under cover of public office, levied on both foreign inflows and domestic transactions. Since the OECD advanced countries cannot simply disengage from the rest of the world, first complaint and then concrete action was likely going to occur eventually. The only issue historically was where and how that process would begin. The United States has paid some likely serious price, including economic and diplomatic costs, for leadership in this arena of international policy regime development. An interesting question that arises is whether such moral leadership can occur entirely by example and influence, without some element of coercion or threat.

These circumstances and forces have produced multilateral anti-corruption conventions, and these arrangements are becoming normative regimes as they are implemented, enforced, and accepted as a way of life. The regime development process may be gradual, prolonged, and bumpy, but an evolutionary or adaptive process is at work, and overall the process will be unidirectional. Further, there is a possibility that the normative regime could develop with time and experience into a moral regime. While one may turn a blind eye to corruption, one cannot positively endorse it. Perhaps more importantly, the emerging regime is also becoming a campaign for democracy and market-oriented development, replete with attendant, necessarily moralistic qualities. In the end, though, it is not important whether or not the anti-corruption regimes evolve from normative to moral and become universally valued. For the sake of all those negatively affected by corruption, what is important is that corrupt behaviors decline and then cease.