

THE MARKET FOR GLOBAL ANTICORRUPTION ENFORCEMENT

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I

INTRODUCTION

In a brief couple of decades, America’s enforcement of its Foreign Corrupt Practices Act (FCPA)—civilly by the Securities and Exchange Commission (SEC) and criminally by the Department of Justice (DOJ)—has gone from practically nonexistent to one of the largest and busiest fields of corporate crime practice in the world. Corporate enforcement has been a growth area in American law throughout that period. No other area has expanded so rapidly nor so expensively for corporate defendants as enforcement under the umbrella of the FCPA. The broad statute prohibits covered corporations and their employees from offering bribes to foreign officials and political leaders for the purpose of advancing business interests.¹

The FCPA rested mostly dormant for over two decades before American prosecutors and securities enforcers eagerly embraced the statute at the beginning of the twenty-first century. In the nearly quarter century from the statute’s enactment in 1977 through the year 2000, the federal government pursued only fifty-two FCPA enforcement actions.² No more than five such actions were brought in a single year,³ and in four of those years, zero actions were commenced.⁴ Then, from 2001 through 2015, the government initiated 379 FCPA cases, reaching an annual high of 56 cases in 2010.⁵

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1. 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff (2012).

2. Stanford Law School, Foreign Corrupt Practices Clearinghouse, fcpa.stanford.edu (last visited June 1, 2016).

3. *Id.*

4. *Id.*

5. *Id.*; see also U.S. Secs. & Exch. Comm’n, *SEC Enforcement Actions: FCPA Cases (1978–2016)*, sec.gov/spotlight/fcpa/fcpa-cases.shtml [<https://perma.cc/6JWE-4FT9>]. Not surprisingly, as the volume of cases has ballooned, settlement has become the norm. A recent study using an original data set found sharp upward trends, within a total of nearly 500 criminal resolutions of all types between the U.S. Department of Justice and public corporations between 1997 and 2011. See Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-*

This explosion in FCPA practice, as some have called it, is not limited to numbers of cases and settlements. FCPA prosecutions and enforcement actions include some of the biggest-ticket matters the government brings in the corporate sector. From 1977 through 2000, the government collected approximately \$129 million in FCPA sanctions.⁶ Since 2000, over \$8 billion has flowed into government coffers from FCPA enforcement actions, most of which has been dictated by terms of settlements between SEC or DOJ and corporate defendants.⁷

What has created this surge in FCPA cases? This article explores both supply channels for cases—the international cooperation between law enforcement officials that made more rigorous enforcement of the FCPA politically possible—as well as the demand pressures that generate cases—the incentives and behaviors of U.S. prosecutors and enforcement attorneys.

Of particular note on the supply side has been the government's willingness to bring enforcement actions and prosecutions against foreign firms as well as domestic U.S. enterprises. The FCPA's jurisdictional scope extends, roughly, to firms registering securities, headquartering, or principally doing business in the United States, as well as to any offense by any firm that is committed even in part within U.S. territory.⁸ Prosecuting foreign organizations and their employees for violating American laws against business crime—especially if non-FCPA matters such as evasion of economic sanctions or tax laws, and even organized fraud and corruption in international sporting institutions are included—has become normal where once it would have been seen as extraordinary.

Part I discusses the changes in politics, economic thinking, and international law that have made this geographically broad enforcement strategy possible. For almost twenty-five years, the United States was the only country to regulate foreign corruption. Other major exporters, including Germany, Japan, and the United Kingdom viewed foreign corruption as harmless at worst and market

Prosecution, Deferred Prosecution, and Plea Agreements, 52 AM. CRIM. L. REV. 537, 540 (2015) (The study's authors included all plea agreements as well as all settlements with sanctions not including pleas: so-called non-prosecution and deferred prosecution agreements.). Overall annual corporate resolutions rose from ten in 1997 to a high of nearly eighty in 2010. Among the eighty-six FCPA settlements the authors examined, only three (all pleas) fell in the period from 1997 to 2002, while seventy-three resolutions were reached in the period from 2007 to 2011. *Id.*

6. Foreign Corrupt Practices Clearinghouse, *supra* note 2.

7. *Id.* Looking at this data set of enforcement actions, total bribery also appears to have risen sharply. However, anti-bribery enforcement is at best a weak proxy for the incidence of bribery.

8. 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2012). One original data set of FCPA cases resolved by SEC or DOJ from 2004 to 2011, which excludes some cases given the authors' analytic objectives, shows fifty-three actions against firms whose home country was the United States and twenty-five actions against firms domiciled abroad. Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIR. LEGAL STUD. 409, 432–33 (2014). In examining all corporate prosecutions, not just FCPA cases, Brandon Garrett found that United States Sentencing Commission data revealed 120 *criminally convicted* foreign firms in cases brought by DOJ from 2000 through 2009. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1810 (2011). Garrett's separate hand-collected dataset of full corporate prosecutions showed 142 foreign firms convicted during the same period. *Id.*

enhancing at best. Without foreign agreement that international bribery should be prosecuted, anticorruption laws were politically difficult to enforce. This article examines how the 1999 Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention⁹ laid the foundation for an American prosecutorial strategy of robust extraterritorial enforcement.

Though it might be too early to say that international business prosecutions are the great wave of the future, it is not too soon to develop theories that might explain the demand side: why U.S. prosecutors have significantly increased their activities in the realm of anti-bribery enforcement and the implications of that increase for regulators and prosecutors in other nations. American interest in prosecuting business misconduct abroad, especially activities involving bribery, is not likely to slacken. At least some other nations will develop a more active enforcement presence in the affairs of multinational corporations—thus the importance of understanding the forces changing the global enforcement landscape.

Part II addresses the domestic political and professional forces that have influenced American prosecutors and shaped the American corporate defense bar. Internal incentives had to exist for federal prosecutors to spend time on FCPA cases. The domestic political and professional economies in which federal prosecutors work have shifted over the last several decades. Those changes have interacted with a changing global economic and regulatory landscape in ways that led prosecutors to the FCPA and rewarded them for their work there. Enforcement paths have been opening for other nations as well, in part due to the models and precedents that the United States has created. The future of the market for anti-corruption enforcement likely depends on how the domestic institutions and political economies of those nations determine the resources and zeal with which their enforcers pursue the activities of global corporations.

There is now a market for anticorruption enforcement that, though still emerging, is itself globalizing. Several political, economic, and legal forces have shaped this market and will continue to do so. This article begins to develop an understanding of these forces in the hope that further literature will engage with these questions.¹⁰

9. Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999) [hereinafter OECD Anti-Bribery Convention].

10. The literature on the FCPA is voluminous and growing. Most of it deals with subsidiary issues of doctrine and policy, or empirical measurement. Some work attempts to theorize the development of international norms against corruption. See, e.g., CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 65–67 (Oxford University Press 2015); Kenneth Abbott & Duncan Snidal, *Values and interests: International legalization in the fight against corruption*, 31 J. LEGAL STUD. S141 (2002); Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84 (2014); Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1 (2013); Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665 (2003). Other articles provide normative critiques of the law and its enforcement

II

THE U.S. INTEREST IN CORRUPTION ABROAD

For much of its early history, the FCPA existed mostly on paper. This part explains the origins of the FCPA and how it eventually became a forceful presence on the international legal scene. It examines how changes in international law, economics, and politics opened the door to greater enforcement of anti-bribery rules, which U.S. law enforcement officials later pursued. The international agreement to fight corruption did not lead to greater enforcement by most OECD states, at least not in the short term. Rather it provided an avenue for U.S. prosecutors to pursue FCPA cases against domestic and foreign firms with the investigatory and legal assistance of foreign partners that was, and to a large extent remains, the hallmark of the global anticorruption regime.

A. Domestic Political Economy Of The FCPA

Congress passed the FCPA in the late 1970s after the Watergate hearings and the subsequent SEC investigation of corporations' political activities revealed that U.S. companies were bribing foreign government officials. Perhaps most notable was the case of Lockheed: the defense contractor received a \$250 million government loan to avoid bankruptcy and spent over \$100 million of those funds on bribes to various government officials.¹¹ Though the FCPA is often described in terms of post-Watergate moralism (and it certainly was partly that), the statute was predominately a response to a national security concern.¹² In the Cold War of the late 1970s, the success of the capitalist model as the ultimate winner of the global competition for economic and social ordering did not appear assured. National security interests were bound up in supporting a particular model of capitalism in which large transnational corporations were the major actors in global markets. As a result, revelations of corporate bribes to foreign government officials concerned members of Congress because they played into Soviet narratives of how markets were corrupted by corporations, controlled by capital-holding elites, and hopelessly rigged against labor.

The Lockheed case was particularly maddening because Lockheed was viewed overseas as an arm of the U.S. Department of Defense—thus tying

or seek to locate the best original justification for the legislation. See, e.g., Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012); Philip M. Nichols, *The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act*, 53 HARV. J. LEGIS. 203 (2016); Andrew B. Spalding, *The Irony of International Business Law: U.S. Progressivism, China's New Laissez Faire, and Their Impact in the Developing World*, 59 U.C.L.A. L. REV. 354 (2011).

11. See FRANK VOGL, *WAGING A WAR ON CORRUPTION: INSIDE THE MOVEMENT FIGHTING THE ABUSE OF POWER* 165–67 (Rowman & Littlefield 2012); Abbott & Snidal, *Interests and Values*, *supra* note 10, at S161; Koehler, *The Story of the Foreign Corrupt Practices Act*, *supra* note 10, at 934–35.

12. Wesley Cragg & William Woof, *Legislating against corruption in international markets: The story of the US Foreign Corrupt Practices Act*, in *THE POLITICAL ECONOMY OF CORRUPTION* 180, 181–82 (Arvind K. Jain ed., 2001).

corrupt corporate actions to the American government in foreign reporting.¹³ In passing the FCPA, legislators were responding to a future threat as well as realized losses. Friendly right-of-center administrations in Japan and Italy had lost elections to left-of-center and communist parties after revelations that those administrations had accepted bribes from U.S. companies.¹⁴

But the security concerns that led to the passage of the FCPA did not support robust enforcement of the law.¹⁵ The statute represented one state's unilateral policy regulating foreign markets. While the FCPA provided prosecutors with significant extraterritorial jurisdiction, prosecutors' law enforcement powers were still territorially limited. International cooperation is essential to effective enforcement. The ability of a state to prosecute a foreign corporation is limited—particularly if cases depend upon internal corporate records—if neither foreign law enforcement officials, nor the company, are helpful. And, at the time, foreign governments were not generally helpful. Most Western governments failed to see the problem with foreign bribery and refused to impose civil or criminal rules against it.¹⁶ Indeed, most European governments subsidized foreign bribery by making it a tax-deductible business expense.¹⁷

The lack of foreign support for the FCPA created a domestic enforcement problem as well. If the statute could only effectively be enforced against U.S. corporations, then American businesses faced a significant disadvantage in foreign markets.¹⁸ A robust enforcement policy would arguably decrease U.S. exports, particularly for large government procurement sales contracts—a market in which bribes were commonly offered with bids—because only U.S. corporations would fear FCPA enforcement. The expanding U.S. trade deficit in the early 1980s and the concurrent fear of the loss of American economic hegemony to European and Japanese companies further raised the economic costs and the political stakes of prosecuting FCPA cases.¹⁹

B. Bribery: International Political Economy And Coordination

To develop a robust FCPA enforcement program, the U.S. government needed international cooperation. Acting alone, Congress could give the statute a broad jurisdictional scope, including coverage over all companies who list on a U.S. exchange and commit bribery anywhere, but the lack of international cooperation made foreign cases difficult to maintain. Without the foreign

13. Koehler, *The Story of the Foreign Corrupt Practices Act*, *supra* note 10 at 934–35.

14. VOGL, *supra* note 11 at 167–68.

15. See Rachel Brewster, *Enforcing the Foreign Corrupt Practices Act: International Resonance & Domestic Prosecutions* 13 (unpublished manuscript) (discussing the evolution of FCPA enforcement).

16. Tarullo, *supra* note 10, at 673–74.

17. Mark Pieth, *International Cooperation to Combat Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 119, 123–24 (Kimberley Elliot ed., 1997). See also Abbott & Snidal, *supra* note 10, at S167 n.59.

18. Tarullo, *supra* note 10, at 674; Brewster, *supra* note 15, at 23.

19. See Ellen Gutterman, *Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act*, 11 FOREIGN POL'Y ANALYSIS 109, 116–17 (2015).

company component of the enforcement portfolio, strong FCPA enforcement arguably lacked political support.

From the original passage of the FCPA in 1977, and again in 1988 amendments to the statute, Congress recognized the need for international coordination of anticorruption rules. In 1975 and 1988, Congress called for the State Department to engage in state-to-state negotiations to establish an international anti-bribery standard that would be enforced in multiple jurisdictions.²⁰ The State Department sought to form anti-bribery agreements with other states in multiple fora in the 1970s and early 1980s, but with little success.²¹ Within the United Nations, the United States pushed for an anticorruption treaty under the auspices of the UN's Economic and Social Council, but it failed to win support among developing states.²² Within the General Agreement on Tariffs and Trade's Tokyo Round, the United States attempted to bring anticorruption principles into international trade negotiations.²³ This similarly failed when the United States was unwilling to offer greater access to the American market in return.

The State Department finally decided that the best forum was the OECD, which had a smaller membership but included almost all developed states.²⁴ The OECD generally only passed non-binding resolutions, so it was not the obvious choice if the United States wanted a binding treaty, but it appeared to hold the greatest potential for cooperation. Yet even in the OECD, other developed governments were unwilling to reconsider their lax approach to foreign bribery or even its tax-deductible status. Foreign bribery was simply not an issue that other governments saw a need to regulate.

In the 1990s, however, elite views of the need to address foreign corruption, particularly the cost of bribery to development, started to shift. In the 1970s, a prevalent view was that corruption could be "market enhancing," meaning that markets would function better if governments, and particularly developing state governments, could be pushed out of the marketplace through bribes.²⁵

That corruption could be market enhancing was not simply an academic view. Many Western governments and international institutions concurred. World Bank policymakers labeled corruption a political issue, rather than an economic

20. Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 596-97, 610 (2002).

21. Pieth, *supra* note 17, at 122-26; Schroth, *supra* note 20, at 611.

22. Pieth, *supra* note 17, at 124.

23. Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT'L. ECON. L. 275, 280 (2001); Schroth, *supra* note 20, at 596-97.

24. See Abbott & Snidal, *supra* note 10, at S162-69; Pieth, *supra* note 17, at 122-23; Tarullo, *supra* note 10, at 678-80.

25. See SAMUEL HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 64 (1968); Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, AM. BEHAVIORAL SCIENTIST 8-14 (1964); see also J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419-20 (1967) (discussing how corruption could be beneficial in promoting entrepreneurship).

one.²⁶ Under World Bank decisionmaking procedures, policymakers were supposed to avoid “political” issues within the host governments.²⁷ Labeling corruption as political allowed the World Bank to implicitly endorse bribery by their contractors and ignore the economic effects of corruption on host countries. Major Western governments similarly viewed corruption as a constructive means of concluding contracts with developing governments and, on the whole, understood these relationships to be development promoting, or at least not particularly harmful to development goals.²⁸ As a result, American lobbying for programs to curtail the corporate supply of bribes was not particularly persuasive.

The 1990s brought change in this consensus regarding the relationship between bribery and the market. Economists and policymakers in international institutions such as the World Bank and the International Monetary Fund started to re-evaluate the effects of corruption on development. Instead of trying to push the government out of the marketplace, more policymakers discussed the constructive role of governments in establishing markets, regulating markets, and moderating their effects.²⁹

Many World Bank policymakers became convinced that corruption was one of the greatest obstacles to development rather than market grease.³⁰ Corruption incentivized governments to become more engaged in markets (as sources of personal monetary gain), biased government spending to projects where large bribes were possible, and decreased government accountability.³¹ In 1996, the World Bank reclassified corruption as an economic issue, and adopted a robust anti-bribery program that monitored the Bank’s contractors and subcontractors for any illicit payments to governments.³²

This shift in thinking also took place outside of governance institutions. A number of economists focusing on Africa left the World Bank to form Transparency International (TI), an NGO focused on increasing government transparency as a means of decreasing corruption.³³ TI raised the salience of corruption as a political issue, particularly in Western Europe. Similarly, scholars such as Susan Rose-Ackerman built a stronger case that bribery was not

26. VOGL, *supra* note 11, at 176; Abbott & Snidal *supra* note 10, at S159.

27. VOGL, *supra* note 11, at 176; Abbott & Snidal *supra* note 10, at S159.

28. See HUNTINGTON, *supra* note 25; Leff, *supra* note 25.

29. See Ziya Öni & Fikret Senses, *Rethinking the Emerging Post-Washington Consensus*, 36 DEV. & CHANGE 263–64, 275–77 (2005).

30. James D. Wolfensohn, People and Development, Address to the Board of Governors at the Annual Meetings of the World Bank and the International Monetary Fund (October 1, 1996), in JAMES D. WOLFENSOHN, VOICE FOR THE WORLD’S POOR 50 (The World Bank, 2005) (“And let’s not mince words: we need to deal with the cancer of corruption . . . Corruption is a problem that all countries have to confront.”).

31. See, e.g., Daniel Kaufmann, *Corruption: The Facts*, 107 FOREIGN AFFAIRS 144 (1997) (discussing the economic effects of corruption in developing countries).

32. Pieth, *supra* note 17, at 127.

33. See VOGL, *supra* note 11, at 61–63; see also Abbott & Snidal, *supra* note 10, at S163–69; Tarullo, *supra* note 10, at 698 (“At present, Transparency International (TI) is the only non-governmental organization primarily concerned with corruption.”).

economically efficient and harmed developing states.³⁴ These different sources of changing political and economic views combined to challenge the older consensus and re-conceptualize the role of corruption in the functioning of markets.

This conceptual change started to gain traction in national governments' policies when a series of corruption scandals erupted in European capitals between 1995 and 1996. In Germany, France, and the United Kingdom, domestic corruption allegations dominated national politics and became major electoral issues in all three countries. Political candidates promised to change their governments' approach to corruption, both nationally and internationally.³⁵ One outlet to make good on these promises was the OECD, and U.S. efforts to establish an anticorruption agreement there accelerated. OECD members agreed to a binding legal instrument (an oddity for the OECD), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,³⁶ which required each state to adopt its own foreign anti-bribery law.³⁷ The Convention, signed in 1997 and entered into force in 1999, also required governments to provide each other with legal assistance in prosecuting foreign bribery cases.³⁸

C. Domestic Effects Of The OECD Convention

The OECD Convention changed the political economy of bringing anti-bribery cases within the United States.³⁹ The treaty did not meaningfully change the extraterritorial scope of the FCPA,⁴⁰ but it provided the necessary international support for a much wider range of cases. In particular, it allowed prosecutors to bring cases against American corporations and their overseas competitors. U.S. prosecutors did not face diplomatic and political resistance from these cases in which the activity had previously been legal and tolerated abroad. Further, the DOJ and SEC could seek foreign investigative and other legal assistance on anti-bribery cases—assistance they have received even from OECD states that have failed to prosecute firms themselves. This change allowed the DOJ and the SEC to bring more FCPA cases without steeply raising competitive costs for American-based corporations.

The DOJ has not been shy about advertising its enforcement strategy as “fair” to American industry. Former Assistant Attorney General Lanny A. Breuer explicitly argued that the FCPA did not hurt U.S. business because of the scale

34. See, e.g., Susan Rose-Ackerman, *The economics of corruption*, 4 J. PUB. ECON. 187 (1975).

35. Abbott & Snidal, *supra* note 10, at S163-69; Pieth, *supra* note 17, at 122-26.

36. Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999) [hereinafter Convention on Combating Bribery].

37. Tarullo, *supra* note 10, at 681-82.

38. Convention on Combating Bribery, *supra* note 36.

39. Brewster, *supra* note 15, at 23.

40. Congress amended the FCPA in 1998 to ratify the OECD Convention. In doing so, Congress expanded the *territorial* jurisdiction of the statute by expanding the scope of the statute to cover any activities that occurred within the territory of the United States.

of foreign prosecutions, noting, “[W]e do not only prosecute U.S. companies and individuals under the FCPA. Indeed, over the last five years, more than half of our corporate FCPA resolutions have involved foreign companies or U.S. subsidiaries of foreign companies.”⁴¹ Other DOJ officials have similarly stated that FCPA prosecutions are aimed at establishing equal liability for foreign and domestic firms for foreign bribery. Former Assistant Attorney General Alice Fisher argued that targeting foreign firms as well as domestic ones was part of the Department’s effort to address corruption’s long-term harm in emerging markets.⁴²

The OECD treaty was an essential part of opening the door to greater American enforcement of the FCPA. U.S. prosecutors needed more than the broad extraterritorial jurisdiction provided by the statute. They also needed foreign support. Other governments had to lend political support to the idea that corruption should be prosecuted. In addition, foreign prosecutors and police had to help gather evidence and provide other legal assistance. After the passage of the OECD Convention, extraterritorial prosecutions for violations of the FCPA were more viable. OECD governments were adopting, if not also enforcing, their own domestic legislation prohibiting foreign bribery and had formally committed themselves to mutual legal assistance.⁴³ And U.S. prosecutors had further incentives, particular to their political and professional environments, for entering this new legal arena.⁴⁴

The OECD Anti-Bribery Convention was critical, not because other OECD countries began prosecuting cases themselves but because they started supporting U.S. cases.⁴⁵ Although the FCPA offered prosecutors extraterritorial jurisdiction to pursue these cases before the OECD Convention, prosecutors had generally adopted a restrained approach. The treaty invigorated the FCPA by giving American prosecutors the means to take a much more aggressive position towards domestic and foreign firms without being seen as disproportionately harming American industry.⁴⁶

41. Lanny A. Breuer, Assistant Attorney General, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010).

42. See Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES (Nov. 25, 2007).

43. TRANSPARENCY INTERNATIONAL (TI), EXPORTING CORRUPTION, PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATTING FOREIGN BRIBERY 15–16 (2015). See also notes 84–86, *infra*.

44. See *infra* part III.

45. Brewster, *supra* note 15, at 20.

46. *Id.*

III

A DOMESTIC INDUSTRY GROWS

A. Domestic Political Economy Of Federal Prosecution

As the international normative and legal frameworks around bribery shifted, the legal and political stages were set for U.S. prosecutors and enforcers to attempt to dominate the field of international anti-bribery enforcement beginning in the 1990s. That the stage was set did not necessarily entail that they would occupy it. Domestic developments were also instrumental. This part first examines the motivations of government agencies and individual prosecutors in taking up FCPA cases. It then turns to the symbiotic relationship between prosecutors and the criminal defense bar in reporting and resolving FCPA cases. With that relationship established, the defense bar, as in other areas of corporate crime, has continued to play a major role in pushing a steady volume of enforcement actions into the U.S. legal system.

1. Top Down

For at least the last two administrations, the executive branch has pursued an express policy to prioritize and increase prosecutions of FCPA violations by large corporations.⁴⁷ Both White House staffs and the political appointee suites in the DOJ have described this policy initiative as an effort to root out corruption and bribery in global commerce.⁴⁸ The effort has included more FCPA prosecutions, almost all of which concluded in settlements; hiring of more FCPA prosecutors;⁴⁹ and increased efforts to use civil legal mechanisms to freeze and seize the assets of corrupt foreign officials (the Department's so-called "kleptocracy" initiative⁵⁰). This impetus from policy levels has been important, perhaps even essential, to growth of the field. Prosecutors' interests, left unchanneled, could

47. See, e.g., Lanny A. Breuer, Assistant Attorney General, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010); The White House of George W. Bush, *The Millennium Challenge Account*, https://georgewbush-whitehouse.archives.gov/infocus/developing_nations/millennium.html [<https://perma.cc/QRE7-6YQ8>].

48. See, e.g., Tonya Somander, *President Obama's Efforts on Financial Transparency and Anti-Corruption: What You Need to Know* (May 6, 2016), whitehouse.gov; U.S. Dep't of Justice, *Eric Holder Delivers Remarks at the Organization for Economic Co-Operation and Development* (May 31, 2010), available at <https://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-organisation-economic-co-operation-and> [<https://perma.cc/684V-3Q9E>]; U.S. Dep't of Justice, *Assistant Attorney General Lanny A. Breuer Speaks at the United Nations for International Anti-corruption Day* (Dec. 9, 2010), <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-unitednations-international-anti> [<https://perma.cc/4TZJ-CYLR>]; U.S. Dep't of Justice, *Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act* (Nov. 19, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st> [<https://perma.cc/RE32-7MSH>].

49. U.S. Dep't of Justice, Criminal Division, Fraud Section, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download> [<https://perma.cc/YT3M-MKPV>].

50. Joe Palazzolo, *DOJ's Kleptocracy Unit Unveiled*, WALL ST. J. (Feb. 7, 2011).

have led them to prioritize other forms of corporate misconduct than bribery of foreign officials.

A longstanding and atypical coordinating device has empowered this top-down initiative. The United States Attorneys' Manual is an ostensibly binding set of rules concerning the conduct of federal prosecutors that is nonetheless unenforceable in court. In relevant part, it prohibits instituting a criminal investigation or prosecution for violation of the FCPA without the "express authorization" of DOJ's Criminal Division in Washington, wherein an office called the Fraud Section supervises FCPA prosecutions as well as initiates many of them.⁵¹ The Manual contains this sort of control provision for only a few federal criminal statutes, which are otherwise enforced at the pleasure of United States Attorneys and other supervisory federal prosecutors without Washington interference. The Manual explains that centralized control and monitoring are needed in this instance because "violations of the FCPA will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction" and may involve "high-level foreign government officials."⁵²

The rationale for DOJ's control rule for FCPA cases may be outdated. Many federal prosecutions, from business crime to drugs to terrorism to piracy, now routinely implicate the same concerns about interaction with other nations. Prosecutors are free to wield many statutes abroad without DOJ Criminal Division supervision, as for example with the use of the wire fraud statute to prosecute the FIFA corruption cases in the Eastern District of New York.⁵³ Prosecutors could evade the Manual's requirements, in some corruption cases at least, simply by choosing a different legal theory. But now, as a result of DOJ's longstanding FCPA policy, bureaucratic institutions are firmly in place: a fully staffed Fraud Section in Washington understands its mandate to include robust FCPA enforcement. Consequently, FCPA enforcement does not depend on the perhaps changing priorities of United States Attorneys and their staffs over time.

One can take Washington's FCPA initiative at face value without having to take it entirely seriously. That is to say, it is possible that officials in the Clinton, Bush, and Obama Administrations have believed that the U.S. legal system can make corruption less endemic in large commercial transactions in the developing world. That might seem quixotic, a bit like using a hand pump to drain Lake Michigan. The scale of global corruption plainly overwhelms the Department's thirty or forty lawyers bringing their dozen or two prosecutions per year. But perhaps there is some logic, or at least sincerity, in the DOJ's effort. If enough large corporations sufficiently fear even one potentially devastating FCPA

51. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-47.000 (1997), <https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977> [<https://perma.cc/X42H-48NE>].

52. *Id.*

53. See Indictment, *United States v. Webb, et al.*, No. 15 CR 0252 (RJD) (RML) (E.D.N.Y. May 20, 2015).

prosecution—and their managers certainly have been complaining incessantly about that legal risk—they might start to refuse to play the corruption game in enough important markets that some of those markets will begin to change.

Critics might say that DOJ's political appointees have become enamored with the FCPA because of its prosecution friendliness, jurisdictional breadth, and relatively low bar for liability. The SEC's power to gather evidence of the same violations in parallel civil enforcement proceedings has further made FCPA cases the low-hanging fruit of corporate crime. If one wants to look like one is prosecuting major corporate crimes, the FCPA provides a much easier path than, for example, deploying the laws governing securities fraud against large banks for marketing failed mortgage-backed securities. In addition, DOJ appointees in Washington have unusually direct control over the Fraud Section, a unit that has a specialized charter and expertise in FCPA cases, which can be used by DOJ to initiate corporate prosecutions.

A similar dynamic could affect the SEC's priorities, perhaps even more. The SEC has jurisdiction only over the securities laws, which include the FCPA but also, most importantly, the laws against securities fraud. Without diverting into the doctrinal details, FCPA violations are generally far easier to prove than securities fraud. This is especially true in SEC actions because the FCPA includes a provision—frequently invoked by the SEC but rarely by the DOJ—that makes it a violation of the statute simply to fail to maintain “books and records” that are accurate in all material respects.⁵⁴ The SEC commonly invokes this provision, which is nearly impossible for defendants to contest, as a fallback or settlement option when it initiates FCPA cases.

Finally, there is the most cynical view. There are some abroad, especially in Europe, who believe that the United States may be using global corporate enforcement, especially FCPA enforcement, as a means of assisting U.S. firms in the competition for dominance among multi-nationals. Some have maintained that the U.S. policy of prosecuting foreign firms is discriminatory and violates general international legal principles of equal treatment before the law.⁵⁵

One study involving a large original data set found that foreign firms tended to suffer higher penalties than U.S. firms in DOJ resolutions.⁵⁶ However, as the author was careful to discuss, potential selection effects complicate inferences from this data.⁵⁷ Foreign firms represented only eighteen percent of the corporate defendants in the study, and it is plausible that American prosecutors tend to prosecute only larger cases against foreign firms while prosecuting a more diverse set of domestic firms.

54. 15 U.S.C. § 78m. The idea behind this provision was that corporations could be deterred from bribery if they knew they would face liability for failing to book illicit payments—book it and get caught or refuse to and get in trouble for failing to book something, whether or not the SEC could prove bribery.

55. Annalisa Leibold, *The Extraterritorial Application of the FCPA Under International Law*, 51 WILLAMETTE L. REV. 225, 226 (2015).

56. Garrett, *supra* note 8, at 1810.

57. *Id.*

Another study of FCPA settlements found that the DOJ assessed greater penalties against foreign firms than domestic ones, even accounting for the size of the bribe and whether the firm voluntarily disclosed the illegal activity.⁵⁸ These authors also wondered about some of the many questions such findings raise. For instance, do U.S. regulators make stronger cases against foreign firms due to coordination with foreign regulators? Are U.S. firms more successful than foreign ones at lowering their sanctions in settlement because of greater sophistication in dealing with U.S. regulators?

For a brute capture story to be convincing, one would need to point to a path through which U.S. firms influence the decisions of line prosecutors about which firms to choose as targets for FCPA actions. The structure and professional culture of DOJ divisions and U.S. Attorney's Offices, as well as the civil service protections enjoyed by career prosecutors, are not amenable to this kind of influence. As a matter of course, these offices do not provide opportunities for advocates of U.S. firms, such as the Chamber of Commerce, an opportunity to be heard in matters of prosecutorial discretion. The SEC gives its potential defendants the opportunity to formally argue against enforcement action in a written document to the Commissioners themselves called a Wells submission.⁵⁹ But these are litigation documents—briefs on the legal merits—not lobbying submissions designed to exploit interest group pressures.

In respect to their enforcement arms, the DOJ and SEC differ significantly from other executive branch institutions like the Departments of Agriculture or Commerce in which industry groups routinely enjoy transparent access to decisionmaking and, by law, to the rulemaking process. Conventional political discourse in Washington, at least in its rhetoric, condemns efforts to “politicize” the government’s prosecution of criminal offenses. Accordingly, the White House routinely and vocally disavows any influence over Justice Department investigations and prosecutions. Any skew of FCPA case selection towards foreign firms would thus have to result from subtler and perhaps unconscious effects on the decisions of line prosecutors and enforcers.

2. Bottom Up

The U.S. corporate crime prosecutor operates within the context of a particular political economy. The prosecutor also works within an influential professional economy. In investigations of why the government has so quickly increased the volume of FCPA enforcement matters, the forces of this economy have been underemphasized if not unnoticed. For several reasons, the legal professional economy has been directing the federal prosecutor’s attentions overseas in recent years.

The typical, though not mandatory, career path of the white collar prosecutor in Main Justice or a major U.S. Attorney’s Office is as follows: graduation with a

58. Choi & Davis, *supra* note 8, at 437–39.

59. See U.S. Secs. & Exchange Comm’n, Division of Enforcement, *Enforcement Manual* (June 4, 2015) at § 2.4.

strong academic record from a top law school, often followed by a federal judicial clerkship; several years as an associate at a global or at least national law firm with a corporate practice, often including junior work on the defense of corporations and their managers in civil and criminal government enforcement actions; a stint of somewhere between four and ten years as a federal prosecutor; and then, for most, a partner or of-counsel position at the same sort of large law firm. More recently, others have taken up senior in-house counsel or compliance positions at major corporations as companies have discovered the benefits of having the advice and experience of former prosecutors and enforcement lawyers readily at hand.

This is the so-called “revolving door” of corporate white collar practice. This door has come to spin faster as the practice of defending corporations in internal investigations and enforcement matters has mushroomed over the last two decades, now constituting a major slice of the revenues of America’s 100 largest law firms.⁶⁰

There is a familiar capture story told about this career arc. In her first period of law firm service, the young lawyer becomes inculcated with the views of the corporate sector towards criminal enforcement. She thus begins government service with an ideological slant in favor of the plight of the white collar target over others in the criminal justice system. Then, as she advances through the Justice Department ranks and begins to meet corporate adversaries across the table and on the rare occasion in court, she inevitably begins to think about the implications of her relationships with those adversaries for her exit from the government. Wishing to curry favor with future employers, she cultivates a reputation for “reasonableness” by crediting arguments she hears from opposing counsel and settling most or all of her cases with corporate defendants and their managers on lenient terms.

This facially plausible story omits important facts, principally on two dimensions: the psychology of this cohort of lawyers and the actual market for former Justice Department prosecutors. First, as to psychology, this lawyer tends to be ambitious and interested in government practice for the opportunity it affords to impact some corner of social policy. These are people who went to law school “to make a difference” and who eventually realize that, given their material and familial goals in life, their relatively short stint in government may end up being their one chance to do something big and important. This is a powerful drive and it directs the lawyer into big cases and towards trials and punitive sentences, not away from them. If these highly credentialed lawyers only care about material rewards, they have easier and more lucrative paths readily available to them in the private sector without enduring the more Spartan conditions of government service.

60. Charles D. Weisselberg & Su Li, *Big Law’s Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1249–53 (2011).

Federal law is highly amenable to these motivations. The American prosecutor is famously the king or queen of discretion: discretion to decide whom to prosecute for what offenses and whom to leave unmolested by legal action. Though the SEC's processes are more bureaucratized than those of the DOJ, initial discretion also rests with the securities enforcement attorney. The discretionary authority to charge is both initial—in the sense that the prosecutor starts the case and the case does not start without the prosecutor—and nearly absolute—in the sense that judicial review of the charging or declination decision is available only for invidious discrimination and never for qualitative judgment.⁶¹

No prosecutor is vested with more of this discretion than the federal prosecutor charged with handling corporate crime. That prosecutor, whether she works in one of the Justice Department's ninety-three U.S. Attorney's Offices spread across the land or in one of the offices at "Main Justice" in Washington that deal exclusively with business crime, has no conventional lawyer's caseload that is brought to her for prosecution by agents of a roving police force. Instead, in consultation with investigative agents, civil enforcement agencies, and her colleagues and supervisors, she chooses the few cases she wishes to expend her time and energies pursuing. Indeed, she enjoys not just the discretion to prosecute but also the discretion to investigate in the first instance.

In the sphere of international business, the jurisdictional provisions of the relevant statutes allow the federal prosecutor to consider extending her reach to a great deal of conduct that occurs abroad. American criminal law treats most complex white collar crimes, especially if conspiracy charges are involved, as "continuing offenses" that are committed at all places and times when and where acts occur during the period of the offense.⁶² Often all the prosecutor needs to file her indictment in a U.S. district court is a wiring through that district, or a company's incorporation or headquartering in the United States, or in the case of the FCPA, some material part of the bribery offense that was "within the territory of the United States."⁶³

As for principles of international law regarding states' assertions of extraterritorial jurisdiction, United States law affords them a very limited role in this area—using them at most as tie-breakers on close questions of statutory interpretation. Congress is free to legislate extraterritorially; there is no Constitutional prohibition against it. However, Congress must clearly state such intention to overcome a judicially enforced presumption against extraterritorial application of statutes.⁶⁴ As a body of legislation expressly designed to reach overseas, the FCPA easily fits this bill.

61. See *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996); *United States v. Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher v. Hayes*, 434 U.S. 367, 365 (1978); *Brady v. United States*, 397 U.S. 742, 752–53 (1970).

62. 18 U.S.C. § 3237; *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d Cir. 1989).

63. 15 U.S.C. § 78dd-3(a) (2012).

64. See *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010); *Pasquantino v. United States*, 544 U.S. 349, 371 (2005); Lauren Ann Ross, Note, *Using Foreign Relations Law to Limit Extraterritorial Applications of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 471–75 (2012).

In criminal law, possession of the body is nine-tenths of the law when it comes to jurisdiction to adjudicate. Only the individual defendant who manages to position himself beyond successful extradition proceedings will end up in a winning posture. A recent study found only one case in which a federal court rewarded a defendant's due process challenge to the assertion of U.S. criminal jurisdiction over him.⁶⁵ Even kidnaped defendants have been denied jurisdictional relief once the government has, by brute force, successfully positioned them before U.S. courts.⁶⁶ Extraterritorial prosecution—or, perhaps better, prosecution with minimal territorial contact—is, as a matter of law, readily available to American prosecutors deploying the FCPA.

Like many bureaucratic actors who exercise substantial discretion, the federal business crime prosecutor acts for a combination of reasons, some that are direct and purposeful and others that arise indirectly. The sum total of the enforcement decisions of “line” attorneys is an essential aspect of government policy. Enforcement, it bears emphasis, is a type of law or at least a lawmaking practice.⁶⁷

Federal prosecutors understand their mandate to be solvers of big problems. It is hard to say exactly where this understanding comes from, other than a combination of their enormous legal discretion, enduring traditions and cultures of the offices in which they work, and the reality that in the U.S. system, federal law enforcement is a complement to state law enforcement and is rarely seen as the first line of defense against any form of routine crime.⁶⁸ It is natural that the problem-solving federal prosecutor would see problems of corporate malfeasance and the public demand for legal responses to those problems as an attractive and useful place to direct her resources—especially where those problems appear to result in part from the failures or even absences of non-criminal regulatory programs.

Whether she arrives in the government with it or it is inculcated through mentoring and institutional norms, the federal prosecutor has a particularly strong affinity to the idea that maintenance of the rule of law requires respect for

65. Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 516–17 (2016). Farbiarz argues that, contrary to recent practice, courts should treat this constitutional “nexus” requirement as irrelevant (or easily satisfied) in most cases since a defendant prosecuted in the United States for conduct also criminalized in the principal location of the offense cannot claim any unfair surprise.

66. *United States v. Noriega*, 117 F.3d 1206, 1212–13 (11th Cir. 1997); *see also* *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (“This Court has never departed from the rule . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’”).

67. *See* Daniel C. Richman, *Accounting for Prosecutors* (Colum. L. Sch. Pub. L. & Legal Theory Working Paper Grp., Paper No. 14-506, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757811 [<https://perma.cc/PWG9-E6QJ>]; Margaret H. Lemos, *Accountability and Independence in Public Enforcement* (Duke L. Sch. Pub. L. & Legal Theory Working Paper No. 2016-23, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748720 [<https://perma.cc/53LF-WAAE>].

68. *See generally* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); Daniel C. Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749 (2003); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

and compliance with the law, especially among the wealthy and powerful. Indeed, the DOJ's entire policy rubric for dealing with corporate criminal liability starts from the principle that the joint promotion by the Department and firms of "good corporate citizenship" is a basic premise of social welfare.⁶⁹ Thus the Department was willing, for example, to devote years—with mixed success but some important victories—to taking on a series of novel and extremely difficult cases of sophisticated tax shelter design, a perhaps paradigm instance of complex legal evasion.⁷⁰

Given this posture towards evasion, it is predictable that the Department's lawyers would have begun to worry about cross-border forms of regulatory arbitrage, or other means by which firms might seek shelter from harsher U.S. laws in more legally favorable jurisdictions or ones that are harder for U.S. prosecutors to reach as a practical matter. The view of the American federal prosecutor about large corporations that are based or doing business in the United States, or even using the U.S. financial system, could hardly be farther from the old parental policy of "I can't stop you but don't do it in my house."

This approach is likely to extend to activities involving bribery, something a federal prosecutor will understand to be a core domestic criminal offense under federal law as well as statutes in all state jurisdictions.⁷¹ The idea that companies could be freely gaining business across the globe through the kinds of criminal payments they would not dream of attempting to convey to U.S. officials would strike the prosecutor as a glaring case of criminal evasion and extremely bad corporate citizenship.⁷² She then need only turn briefly to the FCPA to see that Congress has provided her with a ready means to venture out on a campaign to block that kind of evasion.

A second area of misunderstanding with regard to the revolving door concerns the job market. Former prosecutors who have done complex, demanding, adversarial cases are much more valuable to firms than those who have not done such work. Firms and their corporate clients want experience in the trenches, not lawyers who made careers out of standing down. They need those who know how to dig deep and relentlessly in investigations and how to judge whether a case is worth fighting to the end or must be settled—which requires meaningful trial experience. Most of all, large law firms and their clients seek lawyers who will carry the highest credibility into negotiations with prosecutors and other government officials. Among their former colleagues, DOJ prosecutors and SEC lawyers will listen most attentively to those they respect the most for having worked the hardest and on the biggest cases during past government service.

69. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.000.

70. See TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 273–75 (2014).

71. 18 U.S.C. §§ 201, 666; e.g., N.Y. PENAL LAW § 200.04.

72. See Stuart P. Green, *Official and Commercial Bribery: Should They Be Distinguished?*, in MODERN BRIBERY LAW: COMPARATIVE PERSPECTIVES 219 (J. Horder & P. Alldridge eds., 2013).

Although FCPA prosecutions have the substantial drawback of rarely affording trial experience, they are among the most complicated and sprawling investigations federal prosecutors can be tasked with handling. Their scale and international dimension present particular problems that generate a particular experience and expertise that are prized by large law firms.

It is widely believed that FCPA defense may be the most expensive and thus lucrative service that law firms sell in the field of internal investigations and defense against government enforcement. For example, Siemens spent at least \$1 billion on professional services, mostly provided by the law firm Debevoise & Plimpton and the accounting firm Deloitte, in dealing with its massive bribery scandal.⁷³ Walmart has spent at least \$400 million so far managing its FCPA problem relating to bribery in Mexico, and the meter is still running on that unresolved case.⁷⁴

In winning these rewarding representations from corporate clients, firms will want to demonstrate that their stable of partners includes former DOJ lawyers who handled the largest, most complicated, and most global FCPA matters. The senior prosecutor naturally will understand that grabbing some of those cases in the prime of her prosecutorial career will position her well for a secure career following government service.⁷⁵

B. Symbiosis In The Corporate Crime Bar

In the case of FCPA enforcement, the relationship between the private and public sectors is more complex than, and perhaps just as powerful as, the metaphorical revolving door by which the private captures the public. This symbiotic relationship characterizes the enforcement of corporate criminal offenses, and their civil analogues, in general. It arises from a kind of organic process over the last several decades by which the government, through incremental moves by enforcement lawyers and their defense counterparts, has come to cope with the massive problem of detecting and investigating corporate wrongdoing.

In short, the government uses corporate criminal liability as a lever to compel firms to monitor their own employees, discover wrongdoing, and report it to the government.⁷⁶ In turn, the government allows firms to settle criminal matters

73. See U.S. Dep't of Justice, *Department's Sentencing Memorandum*, United States v. Siemens (D.D.C. Dec. 12, 2008).

74. Davis Voreacos & Renee Dudley, *Wal-Mart Says Bribe Probe Cost \$439 Million in Two Years*, BLOOMBERG BUS. (Mar. 26, 2014), <https://www.bloomberg.com/news/articles/2014-03-26/wal-mart-says-bribery-probe-cost-439-million-in-past-two-years> [<https://perma.cc/G9FM-5PZC>].

75. Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 12, 2012) (quoting one major law firm partner, "If you get one or two of these [FCPA matters] a year as a partner, you're pretty much set. You're not going to break any records, but you're doing well.").

76. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS TARGET CORPORATIONS* 14 (2014); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (A. Harel & K. Hylton eds., 2012); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 690-92 (1997); Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613,

before indictment and prosecution and on somewhat more lenient terms. Firms trade self-policing and self-reporting for lower sanctions.

It is unlikely that anyone, including law firm managers themselves, foresaw in the early 1990s that a tremendous explosion was coming in the practice of corporate criminal defense. Nevertheless, the emergence of this now-bastion of major law firm practice was a natural result of the government's designed strategy to deal with large-scale corporate crime. A sophisticated bar with expertise in both investigating crime and negotiating with prosecutors, enforcement lawyers, and their supervisory agencies was essential for this process to function and grow.

A highly influential, though not strictly necessary, factor in the growth of this process was the government's emphasis on self-reporting. Again and again, in speeches, policy manuals, press releases, and settlement documents, DOJ officials have stated that corporations will be rewarded for bringing criminal conduct to the attention of the government and penalized for failing to do so in instances in which the government learns of the conduct independently through whistleblowers, press reports, regulatory inspections, informants, civil lawsuits, and other avenues.⁷⁷ DOJ has been particularly eager to emphasize this point in the FCPA context, where it is believed that far-flung international bribery might be impossible to discover in most cases without corporate confessions.⁷⁸ Sometimes this approach may backfire; practitioners now talk about whether a client's self-reporting of an FCPA violation can cause the government to insist upon a far more expensive and exhaustive investigation than the company would have undertaken on its own accord.⁷⁹

Whether the prosecutors and the defense bar—in their constant skirmishing over the wisdom of particular cases and contours of FCPA doctrine—are willing to admit so or not, they need each other. Without predictable enforcement of the statute, as well as aggressive programs to reward self-reporting, FCPA practice groups at large law firms cannot justify their expensive efforts to their corporate clients. Without a large defense bar that gathers evidence, reports to the government, and otherwise facilitates enforcement, DOJ and SEC would be able to bring only a few of the cases they currently pursue and collect only a fraction of the sanctions that flow into the government's coffers. While this dynamic applies to all corporate crime, it is especially influential in the FCPA context. FCPA cases involve evidence located abroad that is vastly more onerous for

1618 (2007).

77. E.g., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.000. See also U.S. Dep't of Justice, *Memorandum of the Deputy Attorney General on Individual Accountability for Corporate Wrongdoing*, Sept. 9, 2015 ("Yates Memo"), <https://www.justice.gov/dag/file/769036/download> [<https://perma.cc/CD5N-JQQU>]; U.S. Secs. & Exchange Comm'n, Division of Enforcement, *Enforcement Manual* (June 4, 2015) at § 6; U.S. Secs. & Exch. Comm'n, *Securities & Exchange Act of 1934 Release No. 44969* (Oct. 23, 2001) ("Seaboard Report").

78. U.S. Dep't of Justice, Criminal Division, Fraud Section, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download> [<https://perma.cc/2CZP-6F3W>].

79. Che Odom, *Companies Alter Approach to Bribery Due to DOJ Push*, BLOOMBERG BNA WHITE COLLAR CRIME REPORT, May 4, 2016.

enforcers to obtain through official legal channels than through voluntary disclosure by the companies that possess it.

What is most interesting about the professional economy in FCPA enforcement—and must remain less than fully explained for now—is that this symbiosis seems to have arisen later and independently of any initial impetus to enforce the FCPA. That is, the chicken of the international and domestic politics of anticorruption enforcement came before the egg of a large (and still maturing) professional legal establishment for generating and handling FCPA cases. Yet, as of now, it might be said that developed institutions for prosecuting and sanctioning international business corruption are driving the American initiative as much as, or even more than, any centrally designed policy program—much less the now somewhat lost origins of the FCPA legislation itself.

IV

CONCLUSION: COMPETITION IN THE ENFORCEMENT MARKET EMERGES

The United States remains the most important enforcer of foreign anticorruption laws by a significant margin.⁸⁰ The United States has brought more cases both total and relative to its world exports, and has imposed greater penalties than any other state.⁸¹ Though success in establishing a global enforcement market was made possible by the OECD treaty's requirement for mutual legal assistance and cooperation, the treaty has not been equally effective in convincing other OECD members to enforce their own foreign anticorruption laws. The majority of OECD states still have little to no enforcement of their own foreign anti-bribery laws.⁸² Both the OECD Anti-Bribery Working Group and Transparency International have documented how most members of the treaty have failed to provide any political support or material resources to foreign anti-bribery prosecutions.⁸³

Within the last decade, however, a few countries have begun to prioritize anticorruption law. Germany, Switzerland, and the United Kingdom have all significantly revised their laws and started investing political capital in investigations and prosecutions. Some of these cases have been brought in active coordination with U.S. authorities but others involve independent investigations and sanctions. Notably, several states have amended their laws to permit increased flexibility for prosecutors to settle cases. For instance, the United Kingdom revised its Foreign Anti-Bribery Act in 2011 to permit deferred

80. TRANSPARENCY INTERNATIONAL, *supra* note 43, at 15–16.

81. *Id.*

82. *Id.* See also Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84, 100 (2014) (detailing the record of domestic enforcement in OECD countries).

83. The OECD Anti-Bribery Working Group publishes phase 1, 2, and 3 reports on each OECD treaty member. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN HUNGARY 22 (2012). See also TRANSPARENCY INTERNATIONAL, *supra* note 43, at 15–16.

prosecution agreements as seen in the United States.⁸⁴ The French government is also attempting to revise its anti-bribery laws, the so-called Loi Sapin II.⁸⁵ The French proposal would establish a foreign anti-bribery agency with power to enter into non-prosecution agreements and U.S.-style corporate monitoring.⁸⁶

It remains uncertain whether greater foreign prosecution efforts will complement or challenge the current U.S. dominance in anti-bribery enforcement. So far, other OECD states' efforts seem to be complementary. Many early European bribery prosecutions were brought in conjunction with U.S. investigations and prosecutions—for instance, the Siemens case with the German government⁸⁷ and the BAE case with the UK government.⁸⁸ In addition, one empirical study of foreign government behavior found that coordination with the United States on a bribery case was the best predictor that a state would later bring its own independent prosecutions.⁸⁹

Yet the possibility of future tensions exists. Foreign governments are starting to question whether U.S. authorities are even-handed in their sanctioning of foreign corporations and may grow more protective of their own exporters.⁹⁰ With the increase in home-grown prosecutions, foreign governments may believe that they have a greater authority to prosecute many of these cases and resist the application of extraterritorial American law. Such issues may hamper American prosecutors' ability to maintain their global portfolio of cases, but it may also lead to stronger anticorruption enforcement overall.

84. Celia Wells, *Enforcing Anti-Bribery Laws against Transnational Corporations – A UK Perspective*, in DEBATES OF CORRUPTION AND INTEGRITY 73 (Peter Hardi et al. eds., 2015). See also Charlie Monteith, *Bribery and Corruption: The UK Framework for Enforcement*, in MODERN BRIBERY LAW: COMPARATIVE PERSPECTIVES 263 (J. Horder & P. Allridge eds., 2013). Monteith also reports that the UK did not prosecute overseas bribery cases before 2008, but then after 2008, the Serious Fraud Office collected over 100 million pounds in penalties and recoveries. *Id.* at 257.

85. *La loi Sapin 2 contre la corruption arrive à l'Assemblée nationale*, LEMONDE.FR (June 6, 2016, 4:55 PM), http://www.lemonde.fr/politique/article/2016/06/06/la-loi-sapin-ii-contre-la-corruption-arrive-a-l-assemblee-nationale_4938050_823448.html [<https://perma.cc/X8KT-SFLQ>].

86. *Id.* See also Brian Whisler & Jessica Norrtant-Eyme, *Anticipating New French Anti-Corruption Rules: France Signals Willingness to Strengthen Legislation to Combat Bribery and Corruption*, GLOBAL COMPLIANCE NEWS (Sept. 15, 2015), <https://globalcompliancenews.com/anticipating-new-french-anti-corruption-rules-france-signals-willingness-to-strengthen-legislation-to-combat-bribery-and-corruption/> [<https://perma.cc/HB62-PWV5>].

87. Dep't of Justice Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, Dec. 18, 2008 (discussing the case's joint conclusion with Germany authorities).

88. See Christopher Drew & Nicola Clark, *BAE Settles Corruption Charges*, N.Y. TIMES, Feb. 5, 2010, at B1 (discussing BAE's settlement with the DOJ and UK authorities).

89. Sarah C. Kaczmarek & Abraham L. Newman, *The long arm of the law: Extraterritoriality and the national implementation of foreign bribery legislation*, 65 INT'L ORG. 745, 760 (2011).

90. This tension was already on display between the U.S. and the UK governments over the BAE case. The Blair government ordered the UK Serious Frauds Office to halt its investigation of BAE due to national security concerns. American authorities refused to respect the UK government's authority to release BAE from liability, however, and brought its own investigation. This political fight was resolved in part because the Blair government's decision was very unpopular domestically. Critics maintained the government was undermining the rule of law. Ultimately the UK decided to re-open its investigation of BAE and coordinate with the American prosecution.

At present, the political economy of anti-bribery prosecutions in foreign jurisdictions, and thus the international market for anticorruption enforcement, is still developing. The United States may not continue to enjoy relatively unfettered control over and access to legal matters involving bribery in international business affairs. More participants in the market for global anti-bribery enforcement may change the dynamic for prosecutors in unpredictable ways. However, a broadening international base for pursuing foreign corruption may also boost the legitimacy and effectiveness of anti-bribery regimes to the mutual benefit of all. Although global corruption is notoriously hard to measure, it is safe to say that present levels of prosecution have not begun to plumb its depths.