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ARTICLES

ENFORCING THE FCPA: INTERNATIONAL RESONANCE AND DOMESTIC STRATEGY

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The Foreign Corrupt Practices Act ("FCPA"), which bans corporations from offering bribes to foreign government officials, was enacted during the Watergate era's crackdown on political corruption but remained only weakly enforced for its first two decades. American industry argued that the law created an uneven playing field in global commerce, which made robust enforcement politically unpopular. This Article documents how the executive branch strategically under-enforced the FCPA, while Congress and the President pushed for an international agreement that would bind other countries to rules similar to those of the United States. The Article establishes that U.S. officials ramped up enforcement only after the United States successfully concluded the Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention in 1997, twenty years after the enactment of the FCPA. Afterward, U.S. officials, desiring to maintain industry support for the FCPA, prosecuted both

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foreign and domestic corporations, thereby minimizing the statute's competitive costs for American companies.

This Article argues that the OECD Convention was critical to the dramatic expansion of FCPA enforcement because it allowed American prosecutors to adopt an "international-competition neutral" enforcement strategy, investigating domestic corporations and their foreign rivals alike. The existence of the treaty was decisive because it established anti-bribery as a binding legal principle and legitimized U.S. prosecutions of foreign corporations. Today, seven of the ten highest FCPA penalties have been against foreign corporations.

This Article advocates, on a theoretical level, for a reevaluation of the multidirectional relationship between international and domestic law in transnational issue areas, such as foreign bribery. National laws are most often viewed as self-contained legal rules that develop or decline based on domestic officials' policy decisions. The evolution of the FCPA, however, demonstrates that some statutes may require "international resonance" to be meaningfully enforced: a domestic statute can create pressure for national leaders to conclude an international agreement, and then that agreement provides the means for the national law to develop into a robust national policy. As this Article establishes, the OECD Convention owed its existence to the FCPA and, in turn, the FCPA owes much of its development and strength to the OECD Convention. A greater appreciation for international resonance's feedback mechanisms is essential to understanding national enforcement of a wide range of transnational commercial, financial, and environmental statutes.

INTRODUCTION

THE Foreign Corrupt Practices Act ("FCPA") is one of the most prominent regulatory statutes in modern corporate law and international business law. Not only does it regulate the underbelly of global commerce—bribery and corruption—but it is also a significant practice area for American lawyers in white-collar crime, mergers and acquisitions, and corporate compliance law.[1] Major domestic and foreign corporations, including Kellog Brown & Root ("KBR") (together with former parent company, Halliburton), Siemens AG, and Alstom, have settled FCPA cases with the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC").[2] These

[1] Joe Palazzolo, FCPA Inc.: The Business of Bribery—Corruption Probes Are Profit Center for Big Law Firms, Wall St. J., Oct. 2, 2012, at B1 (discussing how FCPA practice work is now often one of law firms' "crown-jewel practices").

[2] See Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), https://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million [https://perma.cc/4A4G-NLUK] (discussing KBR's and Halliburton's settlements with the DOJ and SEC: KBR settled with the DOJ for $402 million; both companies settled with the SEC for an additional $177 million; and KBR agreed to a government-imposed independent monitor); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), https://www.sec.gov/news/press/2009/2009-23.htm [https://perma.cc/5SHQ-HEYF] (highlighting the SEC settlement's imposition of an independent consultant on Halliburton to review its FCPA-related practices); Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008) [hereinafter Siemens AG Press Release], https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html [https://perma.cc/RTT8-J3YA] (announcing the Siemens settlement with the DOJ for $450 million, the SEC for $350 million, and German authorities for approximately another $800 million and stating that Siemens also agreed to a government-imposed independent monitor); Press Release, U.S. Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), https://www.justice.

settlements each included at least a half billion dollars in penalties.[3] KBR and Siemens AG also accepted the installation of a government-appointed monitor inside the corporation to ensure future compliance. Former KBR CEO, Jack Stanley, pled guilty to FCPA violations and was sentenced to 2.5 years in prison.[4] In addition to penalties paid to the government, companies facing FCPA charges will often spend hundreds of millions of dollars in legal fees to private law firms for internal investigations.[5]

Given the robust enforcement of the FCPA today by both the DOJ and SEC, the near-complete lack of FCPA enforcement in the statute's first two decades provides a striking contrast. Between 1977 and 1996, the agencies collectively brought only 40 cases (the median year would see two cases or fewer) and settled these charges on sympathetic terms (the average of the ten highest fines was under $10 million).[6] By comparison, between 1997 and 2016, the agencies brought 428 cases and started to collect blockbuster settlements (the average of the ten highest fines in that period was $484 million).[7] Even accounting for inflation, the tenth highest fine today is more than twice the combined penalties of the top ten fines between 1977 and 1996.[8] The number of

gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery [https://perma.cc/QL9M-4G4U] (reporting that the French power and transportation company pled guilty to a widespread bribery scheme and agreed to pay $772 million in fines).

[3] See supra note 2.

[4] Press Release, U.S. Dep't of Justice, Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes (Feb. 23, 2012), https://www.justice.gov/opa/pr/former-chairman-and-ceo-kellogg-brown-root-inc-sentenced-30-months-prison-foreign-bribery-and [https://perma.cc/PB6D-VV8Y].

[5] Palazzolo, supra note 1 (discussing how three companies—Avon, Walmart, and Weatherford International—will have spent over $456 million in lawyers' fees for internal investigations and compliance programs). More recent estimates of Walmart's spending on internal investigations are much higher. See The Anti-Bribery Business, Economist, May 9, 2015, at 62, 62 (estimating that Walmart will pay over $1 billion (and maybe closer to $2 billion) in lawyers' and accountant fees before it concludes its FCPA case with the DOJ).

[6] See infra Section III.A.

[7] See infra Section III.A.

[8] Technip SA, a French corporation, (as of the end of 2016) holds the tenth position for highest FCPA penalty with a $338 million settlement. See infra Section III.A, Table 2.

cases and the size of penalties are of a different order of magnitude in the last two decades than the first two decades.[9]

Corporate attention to the FCPA escalated as enforcement increased in the late 1990s. The FCPA went from a "legal backwater"[10] to being "at the nerve endings of corporate general counsels and executives."[11] Contemporary legal commentators noted that although the statute had been viewed as a "sleepy" area of law, the renewed interest by the DOJ and SEC grabbed the attention of corporate boards.[12] Now, the FCPA is one of the most well-known (and feared) American statutes by corporate executives in the United States and abroad.[13]

What changed between these two periods that made DOJ and SEC attorneys shift from practically ignoring the FCPA to making it a signature enforcement priority?[14] For all of this question's practical and policy importance, it has been largely ignored in scholarly debate. This Article fills this notable silence. The answer is significant for understanding the development of the FCPA regime and, more expansively, for theorizing when countries will enforce laws that engage transnational issues such as foreign bribery.

This Article argues that the FCPA could not be robustly enforced until federal prosecutors could adopt an "international-competition

[9] See infra Section III.A.

[10] Charlie Savage, With Wal-Mart Claims, Greater Attention on a Law, N.Y. Times, Apr. 25, 2012, at B1 (quoting Richard Cassin).

[11] Nelson D. Schwartz & Lowell Bergman, Payload: Taking Aim at Corporate Bribery, N.Y. Times, Nov. 25, 2007, at BU1 (quoting Daniel E. Karson, executive managing director at Kroll Associates).

[12] Carolyn Hotchkiss, The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business, 17 J. Pub. Pol'y & Marketing 108, 108 (1998) (describing the FCPA as a "sleeping dog" that had only recently gained corporate attention); Wendy C. Schmidt & Jonny J. Frank, FCPA Demands Due Diligence in Global Dealings, Nat'l L.J., Mar. 3, 1997, at B16 (reviewing corporate reactions to renewed enforcement of the FCPA by the DOJ and SEC).

[13] Ashby Jones, FCPA: Company Costs Mount for Fighting Corruption, Wall St. J., Oct. 12, 2012, at B1 (noting that firms are spending millions to create FCPA compliance programs and additionally adding compliance committees to their corporate boards); Joe Palazzolo, From Watergate to Today, How FCPA Became So Feared, Wall St. J., Oct. 2, 2012, at B1 (noting that the FCPA is "a big source of anxiety for the world's biggest corporations").

[14] Palazzolo, supra note 13 (noting that the FCPA is the DOJ's number two priority, behind terrorism).

neutral" strategy—that is, an enforcement strategy that allowed them to charge both American corporations and their foreign rivals, thus creating a level playing field in international commerce. To do so, the U.S. government needed an international agreement that established a strong foreign anti-bribery principle in other major exporting states. The Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention provided this necessary piece and emboldened U.S. prosecutors to use their long-standing jurisdiction to target domestic and foreign corporations who violated the FCPA.

Understanding the development of the FCPA and its prominent role in global anti-corruption efforts requires an appreciation of four conjoined elements: (1) the strategic enforcement of the FCPA by the executive branch (through the DOJ and SEC) to maintain American business support; (2) the continued efforts of the United States to secure an international agreement that would extend FCPA-like laws to other nations, particularly those states that are major exporters of goods and capital; (3) the liberating effect of the OECD Convention on U.S. enforcement efforts, allowing prosecutors to pursue American and foreign corporations for FCPA violations; and (4) the expansion of U.S. prosecutors' toolbox to pursue improper corporate payments (including foreign bribery) through the 2002 Sarbanes-Oxley Act. This Article expands on all of these elements and demonstrates their crucial interrelation.

After the initial passage of the FCPA, American industry argued that the FCPA put them at a competitive disadvantage with foreign rivals, who would not be bound to similar anti-bribery rules. When the FCPA was enacted, other major developed countries (such as Germany and the United Kingdom) did not prohibit foreign bribery and even subsidized it by making bribes tax-deductible. This made the enforcement of the FCPA politically unviable. Various efforts were made to repeal the statute, but these efforts were largely muted by the executive branch's decision simply not to dedicate resources to enforcement.

This Article establishes that, early in the FCPA history, the executive branch strategically lowered the perceived costs of the statute to American businesses by only rarely bringing prosecutions and then settling those cases on modest terms. While the law still imposed a potential liability, the expected costs to U.S. corporations were low. Nonetheless, the fact that the United States was the only state with a

foreign anti-bribery law on the books put pressure on legislators and the executive to negotiate an international agreement binding other states to similar rules. Legislators repeatedly demanded that the executive conclude a treaty on foreign anti-bribery rules, and U.S. presidents almost continuously attempted to do so in multiple international fora. In addition, some key U.S. multinational corporations (including General Electric, Boeing, and Merck), determined that anti-bribery policies were good business models and sought increased enforcement of such policies in the United States and abroad. These public and private efforts finally bore fruit in the 1997 OECD Anti-Bribery Convention, which effectively exported the FCPA's restrictions to all of the major developed economies.

This Article argues that the conclusion of the OECD Convention permitted U.S. prosecutors to dramatically increase enforcement of the statute, beginning the era of tough anti-bribery regulation that we currently know. Again, U.S. officials' enforcement of the FCPA was strategic: prosecutors now enforced the FPCA territorially and extraterritorially to capture the widest possible range of domestic and foreign corporations. This broad enforcement strategy minimized the competitive costs to U.S. companies by attempting to hold foreign companies to the same rules as American companies and thereby secured continued domestic support for the statute. This strategy was possible only because the OECD Convention established anti-bribery as a binding principle (legitimating U.S. officials' prosecution of non-national corporations) and required cross-national legal assistance in building cases.

The OECD Convention was instrumental in transitioning from minimal to rigorous enforcement. In 1998 alone, one year after the conclusion of the OECD Convention, the U.S. government opened over seventy-five foreign bribery investigations, entering a new phase of FCPA enforcement.[15] FCPA settlements accelerated when U.S.

[15] Margot Cleveland et al., Trends in the International Fight Against Bribery and Corruption, 90 J. Bus. Ethics 199, 210 (2009) (noting that there has been an "extraordinary increase in both DOJ and SEC actions since 1998" and that "[i]t is not an overstatement to suggest we have entered a new era of enforcement – the first serious international anti-bribery offensive in the history of mankind"); Schmidt & Frank, supra note 12 (stating that the DOJ has at least seventy-five cases under investigation); see also SEC Officials Predict More FCPA Cases in Near Future, 29 Sec. Reg. & L. Rep. (BNA) No. 18, at 607 (May 2, 1997) (noting the SEC declared that they had a number of investigations ongoing).

authorities received even more powerful means of prosecuting cases in 2002 with the passage of the Sarbanes-Oxley Act, which was designed to prevent corporate fraud (as experienced in the Enron and WorldCom scandals).[16] Although it was not aimed specifically at increasing anti-bribery enforcement, it provided prosecutors with yet more tools to investigate FCPA violations and arguably led to the explosion of cases in the late 2000s.

Now prosecutors regularly bring over twenty FCPA cases every year and impose penalties in the hundreds of millions of dollars. Importantly, these fines are brought against both American and non-American corporations. The German corporation Siemens still holds the record for the highest FCPA penalty ($800 million), followed by Alstom S.A. ($772 million). Out of the top ten FCPA fines (from $800 million to $338 million), seven are foreign corporations.[17]

This Article more broadly highlights that certain statutes may be meaningfully enforced only when they have achieved *international resonance*. For a class of statutes that regulate extraterritorial conduct, domestic regulators will robustly enforce the policy only when they can do so broadly, against a wide cross-national swath of private actors. This requires formal extraterritorial jurisdiction (as a matter of national law) but also is conditional on foreign acceptance of this jurisdiction. Foreign governments have to sign onto the principles of the policy and be willing to support prosecutions of their own natural and corporate citizens.

The FCPA would not exist in its current robust and rigorously enforced form but for international treaty law. This Article establishes that the OECD Convention empowered American officials to enforce anti-bribery rules against foreign and domestic corporations, making an international-competition neutral strategy possible. The OECD Convention solidified a shift in the social understanding of bribery from economically harmless to disastrous. The treaty was a milestone for anti-bribery efforts because it established strict and legally binding obligations for governments to prohibit foreign corrupt payments. Foreign governments' acceptance of anti-bribery principles and their subsequent cooperation with American prosecutions was essential for

[16] See infra note 254.

[17] See infra Section III.A, Table 1.

the FCPA to develop from an obscure corporate law statute to one of the cornerstone pieces of modern American market regulation.

Foreign cooperation came in two forms. First, heads of state or top ministry officials accepted expansive U.S. jurisdictional principles over extraterritorial actions and stopped obstructing American prosecutions in an attempt to defend their "home" corporations. Second, foreign governments began actively helping American officials collect evidence, an issue that had effectively stymied efforts to build FCPA cases in the past. This link between the OECD Convention and the enforcement strategy of the modern FCPA regime is critical to explaining current U.S. policy, but has largely been ignored by scholars, as they view FCPA enforcement as a self-contained criminal law or corporate regime.[18]

International resonance also reflects the multidirectional relationship between domestic and international law. International treaty rules on prohibiting foreign corruption almost certainly would not currently exist but for the United States' passage of the FCPA. The statute kept domestic political pressure on legislators and the executive to push internationally for an agreement that would extend anti-bribery rules to a wide class of global market actors. It was this pressure that led to the creation of the OECD Anti-Bribery Convention.

This Article further highlights the often unappreciated relationship among national statutes, domestic politics, and international law. The FCPA was the predicate to U.S. demands in international fora to conclude an anti-corruption pact. Without the domestic political tension created by the FCPA, such a pact would not have been a major foreign policy goal. In turn, the creation of binding international law gave substance to the promise of the FCPA. The existence of a "hard law" anti-bribery principle provided U.S. officials with the power to enforce the agreement widely in a way that previously would not have been

[18] See, e.g., John Ashcroft & John Ratcliffe, The Recent and Unusual Evolution of an Expanding FCPA, 26 Notre Dame J.L. Ethics & Pub. Pol'y 25 (2012); Priya Cherian Huskins, FCPA Prosecutions: Liability Trend to Watch, 60 Stan. L. Rev. 1447 (2008); Mike Koehler, Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era, 43 U. Tol. L. Rev. 99 (2011) [hereinafter Koehler, FCPA Enters a New Era]; Mike Koehler, The Façade of FCPA Enforcement, 41 Geo. J. Int'l L. 907 (2010); Gideon Mark, Private FCPA Enforcement, 49 Am. Bus. L.J. 419 (2012); Drury D. Stevenson & Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar, 80 Fordham L. Rev. 775 (2011); Joseph W. Yockey, Solicitation, Extortion, and the FCPA, 87 Notre Dame L. Rev. 781 (2011).

politically possible. In short, this case highlights how domestic regulation can create a demand for international rules and, reciprocally, how the development of international law can permit dramatic shifts in national policy.

This Article proceeds in three Parts. Part I discusses the passage of the FCPA after the Watergate scandal, the elements of an FCPA violation, and common critiques of the statute. It also reviews the academic commentary on the FCPA, which has overwhelmingly focused on litigation issues. Part II turns to the efforts of the U.S. government and some private groups to establish an anti-bribery treaty. This section describes different U.S. administrations' efforts to conclude a treaty in various international institutions. It discusses the Clinton Administration's choice of the OECD as the appropriate forum and approach to building consensus. Part II also discusses the change in economists' and policymakers' views of corruption from harmless to overwhelming harmful.

Part III is the heart of the paper. Section III.A begins by documenting the enforcement silence in the FCPA's first two decades and then the "explosion" of FCPA cases in the second two decades. It provides information on the number of cases, the size of fines, and the DOJ's and SEC's increased resources. Section III.B then provides this Article's core argument to explain the change in the United States' approach to FCPA enforcement. This Section examines the specific mechanisms that made foreign cooperation and domestic enforcement possible. It highlights how even domestic criminal law statutes do not exist in a "closed" national system. Prosecutors may formally have the jurisdictional tools to charge companies with violations of U.S. law but, without international support for these policies, the political costs of bringing these cases can overwhelm the benefits. As a result, the DOJ and SEC would not invest in FCPA prosecutions until they had the capacity to bring cases against foreign as well as domestic corporations.

Section III.B demonstrates that, once an international competition–neutral enforcement strategy was made possible by the OECD Convention, the DOJ and SEC ramped up enforcement. Both agencies publicly announced that they were targeting foreign corporations as well as domestic ones. This Section further describes how the Sarbanes-Oxley Act and the expansion of U.S. jurisdiction (through more foreign corporations listing directly or indirectly on U.S. exchanges) further

increased U.S. prosecutors' powers and resulted in more FCPA settlements, many through self-reporting.

The Article concludes by highlighting the multidirectional aspects of domestic and international law. The Conclusion argues that the treatment of international law and domestic law as separate spheres is misplaced and in fact deleterious to our understanding of domestic law. The growing interconnectedness of many national and international legal issues means that determining the "enforceability" of a law is not a formalistic inquiry but a political and pragmatic one. Therefore, exploring the connections between international law and domestic enforcement strategies is essential to understanding how domestic law functions in response to significant transnational issues, such as trade, banking and finance, and the environment. The Conclusion also highlights the ways that treaties can be effective: either by leading many states to change their behavior or by providing the means for one state to become the dominant regulator.

I. THE ENACTMENT AND ENDURANCE OF THE FCPA

The FCPA was passed in 1977 in the aftermath of that great theater of American politics, the Watergate hearings. The hearings laid bare how American corporations were making improper payments to President Richard Nixon's election campaign and to governments overseas.[19] Congress, motivated by concerns about national security and good governance, criminalized bribery of foreign government officials and imposed record-keeping obligations on public corporations.[20] For a variety of reasons, those concerns did not produce robust enforcement of the statute after its adoption. In fact, the FCPA was effectively dormant for its first twenty years. Yet in the late 1990s, that situation shifted dramatically, and today the FCPA has become the preeminent global anti-bribery statute.

This Part explains how that shift happened by examining the FCPA's passage, its specific legal requirements, and the internal and external dilemmas the U.S. government faced to maintain support of the FCPA

[19] Stanley Sporkin, The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday, 18 Nw. J. Int'l L. & Bus. 269, 271–72 (1998).

[20] See infra Section I.A.

against foreign ambivalence to corrupt business practices. Section I.A sets out the provisions of the FCPA and describes the politics of the statute's passage. Section I.B analyzes how the statute escaped repeal during the two-decade period when the United States was the only government to have foreign anti-bribery laws on the books. Section I.C addresses existing legal and political commentary on the statute. Part II then turns to the OECD Convention negotiations and analyzes how U.S. policy shifted as foreign anti-bribery laws received the endorsement of the OECD membership (and some non-OECD members).

A. The FCPA

The FCPA is a product of the United States' most famous domestic political scandal, Watergate. Congress held hearings on the Nixon Administration's break-in to the Democratic National Committee headquarters at the Watergate hotel and, in the process, discovered that prominent corporations had made illegal contributions to President Nixon's reelection campaign.[21] The SEC investigation that followed examined "questionable" payments from corporations to foreign leaders as well as domestic officials.[22] The SEC established an amnesty program for corporations to disclose foreign payments, and over 400 companies took advantage of it.[23] Among the most shocking disclosures was Lockheed's revelation that it had distributed over $100 million to various government officials, including Prince Bernhard of the Netherlands and Japanese Prime Minister Kakuei Tanaka.[24] Lockheed's actions were particularly galling to legislators and the public because the

[21] See Kenneth W. Abbott & Duncan Snidal, Values and Interests: International Legalization in the Fight Against Corruption, 31 J. Legal Stud. S141, S161 (2002); Sporkin, supra note 19, at 271.

[22] Sporkin, supra note 19, at 270–76; Cynthia A. Williams, Corporate Compliance with the Law in the Era of Efficiency, 76 N.C. L. Rev. 1265, 1288 n.79 (1998) (citing S. Rep. No. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101).

[23] Daniel J. Grimm, The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and its Consequences, 7 N.Y.U. J.L. & Bus. 247, 256–59 (2010); Sporkin, supra note 19, at 272–73.

[24] Abbott & Snidal, supra note 21, at S161. Prince Bernhard of the Netherlands accepted $1.1 million to influence his nation's procurement decisions. See Anthony Browne, From Beyond the Grave: Prince Finally Admits Taking $1m Bribe, Times (UK), Dec. 4, 2004, at 43.

U.S. government had contemporaneously extended Lockheed a $250 million loan to keep it out of bankruptcy.[25]

Following the SEC report on these foreign payments, Congress considered legislation to prohibit American citizens and corporations from engaging in foreign bribery.[26] The motivations and goals behind the FCPA were plentiful.[27] Morality was certainly one important element.[28] In the aftermath of the Watergate scandal, the nation seemed to have a heightened sensitivity to condoning corrupt acts, domestically or internationally.[29] Many legislators identified the fact that there was "just no disagreement . . . that [bribery] is wrong" as one of several reasons to support legislation that would criminalize foreign bribery.[30]

Yet morality was not the predominant factor for the FCPA's passage, at least according to congressional hearings. Interestingly, to modern commentators, the major motivation for the FCPA was a perception of the national security risks that foreign payments posed.[31] Congressional hearings highlighted the legislators' very strong concern that foreign corrupt payments were harming the United States' ability to win the Cold War.[32] Indeed, the major hearings regarding the design of the FCPA were organized in the Senate Foreign Relations Committee through the Subcommittee on Multinational Corporations. Senators repeatedly commented that bribes offered to foreign government

[25] Mike Koehler, The Story of the Foreign Corrupt Practices Act, 73 Ohio St. L.J. 929, 935 (2012).

[26] Grimm, supra note 23, at 258–89.

[27] Abbott & Snidal, supra note 21, at S161.

[28] 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, 121 (2015).

[29] Id. at 110; see also Koehler, supra note 25, at 941–42.

[30] Abbott & Snidal, supra note 21, at S161 (quoting Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the S. Comm. on Banking, Hous., and Urban Affairs, 95th Cong. 1 (1977) (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs)).

[31] What seems surprisingly absent to today's commentators is any focus on international poverty and development. The major justifications for the anti-bribery laws today almost always include corruption's political and economic damage in developing states. If this was a major concern of some legislators in the mid-1970s, those legislators were not particularly vocal in the congressional debates leading to the passage of the FCPA.

[32] Koehler, supra note 25, at 939–43.

officials by multinational corporations undermined U.S. security by making the capitalist market structure appear corrupt. Their concerns were both immediate—that friendly governments were being forced from office after revelations of the American corporate bribes became public—and long-sighted—that these actions damaged the public's faith in the ability of a capitalist system to produce responsive democratic governments and broad-based economic growth.[33]

The Senate leaders of the fight to enact the FCPA, Senator Frank Church and Senator William Proxmire, were primarily concerned with the foreign affairs ramifications of corporate bribery. They feared that instances of corporate corruption overseas would undermine the Cold War fight.[34] The United States' security position was inextricably linked with a capitalist economic structure, and the specific capitalist structure that the U.S. government supported was one that featured corporations as the primary economic actors in international commerce. The alternative narrative offered by the Soviet Union was one that vilified corporations as capitalist institutions that undermined economic justice, co-opted local elites, and biased public policies against labor.[35]

Thus, the practice of American corporations making payments to foreign government officials posed a security threat, not just a tarnished image. The United States was competing with the Soviet Union for economic and political dominance, and American corporations were damaging U.S. efforts by providing evidence that powerful corporations were cutting secret deals with foreign leaders. Revelations of American

[33] Id.

[34] Senator Church quoted from Professor Gunnar Myrdal's book, *Asian Drama*, to argue that corruption could be the cause of losses in the Cold War:

> The Communists maintain that corruption is bred by capitalism, and with considerable justification they pride themselves on its eradication under a Communist regime.
>
> The elimination of corrupt practices has also been advanced as the main justification for military takeovers. . . . Thus, it is obvious that the extent of corruption has a direct bearing on the stability of governments.

Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations, 94th Cong. 2 (1975) [hereinafter Subcommittee Hearings] (opening statement of Sen. Frank Church) (quoting 2 Gunnar Myrdal, Asian Drama: An Inquiry into the Poverty of Nations 938 (1968)).

[35] See Wesley Cragg & William Woof, Legislating Against Corruption in International Markets: The Story of the U.S. Foreign Corrupt Practices Act, *in* The Political Economy of Corruption 180, 185–86 (Arvind K. Jain ed., 2001); Koehler, supra note 25, at 942–43.

bribes lead to the downfall of several friendly governments, including Japanese Prime Minister Tanaka for his acceptance of over $12 million in illicit payments from Lockheed.[36]

Both Senators Church and Proxmire saw corruption as a security issue, not simply one of business ethics. Senator Church, in his opening statement during the hearing on political contributions to foreign governments, noted that: "[W]hat we are concerned with is not a question of private or public morality. What concerns us here is a major issue of foreign policy for the United States."[37] Senator Proxmire argued:

> Bribery of foreign officials by some US companies casts a shadow on all US companies . . . [and] creates severe foreign policy problems. The revelations of improper payments inevitably tend to embarrass friendly regimes and lower the esteem for the United States among the foreign public. It lends credence to the worst suspicions sown by extreme nationalists or Marxists that American businesses operating in their country have a corrupting influence on their political systems.[38]

This link between corporate behavior and the U.S. government was particularly true with regard to Lockheed due to its intimate relationship with the Department of Defense. As a contemporary Washington Post editorial noted:

> It would have been unfortunate enough to have any American corporation involved in this kind of transaction. But Lockheed is not considered, in other countries, to be just another American company. It is the largest U.S. defense contractor, and it owes its existence to federally guaranteed loans. It is seen abroad as almost an arm of the

[36] Frank Vogl, Waging War on Corruption: Inside the Movement Fighting the Abuse of Power 165 (2012); Patrick Glynn et al., The Globalization of Corruption, *in* Corruption and the Global Economy 7, 17 (Kimberley Elliott ed., 1997); Koehler, supra note 25, at 939–43.

[37] Subcommittee Hearings, supra note 34 (opening statement of Sen. Frank Church) (discussing use of capitalist corruption in communist propaganda).

[38] Hearing before the S. Comm. on Banking, Hous., and Urban Affairs, *cited in* Cragg & Woof, supra note 35, at 185.

> U.S. government. Its misdeeds, thus, have done proportionately great damage to this country and its reputation.[39]

As a result, the security element required that the U.S. government regulate "American" corporations, not because American corporations were the only actors offering bribes abroad, but because the actions of American corporations were linked to public perceptions of the U.S. economic system.

Legislators additionally viewed foreign bribery as a securities law problem (which explains the role of the SEC in investigating corporate payments). SEC Commissioner Stanley Sporkin believed secret payments to foreign governments by public corporations undermined U.S. securities law.[40] These payments were not reported (as the payments were almost always illegal in the states the payments were made) and thus effectively resulted in fraudulent reports to shareholders about the corporation's activities and spending.[41] In addition, the SEC saw its demand for rigorous accounting standards to be undermined by the large slush funds that corporations created to permit foreign bribes.[42] These slush funds not only facilitated bribery, but could also be abused for any number of purposes.[43] Legislators framed the existence of large undisclosed slush funds as a securities law dilemma involving the rights of shareholders to know how a corporation's assets were being used.[44]

[39] 122 Cong. Rec. 30,336 (daily ed. Sept. 14, 1976) (citing Mr. Tanaka and Lockheed, Wash. Post, Aug. 21, 1976, at A10), *cited in* Koehler, supra note 25, at 935.

[40] Sporkin, supra note 19, at 269–76.

[41] Id.

[42] Wallace Timmeny, An Overview of the FCPA, 9 Syracuse J. Int'l L. & Com. 235, 235–41 (1982).

[43] Id. at 240–41.

[44] Sporkin, supra note 19, at 269–76; Timmeny, supra note 42, at 235–41. Other legislators understood the corruption in economic terms, viewing foreign bribery as undermining free market competition and putting honest businesses at a disadvantage. There was an acknowledgement that government officials were demanding bribes and that U.S. companies were facing extortion demands overseas. In congressional hearings, there was an active debate over whether an American statute banning payments to foreign officials would decrease the demands for extortion by effectively tying the hands of the American executives. Several heads of prominent U.S. corporations, who were appearing before Congress because their companies had made questionable foreign payments, argued that it would. Industry representatives, such as the National Association of Manufacturers, argued that it would not, although individual corporate executives apparently did not want to make that argument themselves to Congress.

Together, the national security concerns and the domestic securities law concerns posed by illicit corporate payments abroad were sufficient to achieve legislative passage of the FCPA in the post-Watergate era of Washington politics. Congress passed the FCPA in 1977, and President Jimmy Carter, recently elected, signed it into law.[45] President Carter highlighted the foreign affairs aspects of the legislation as well as the moral aspects, stating: "I share Congress belief [sic] that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries."[46]

The FCPA reflects both the foreign affairs and accounting concerns of the legislative drafters in its two primary requirements.[47] First, it prohibits any U.S. or foreign corporation with registered securities on U.S. exchanges,[48] U.S. domestic concerns,[49] and individuals acting with a territorial nexus to the United States[50] from giving anything of value to

[45] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1 (2012)).

[46] Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill, 2 Pub. Papers 2157 (Dec. 20, 1977).

[47] Lucinda A. Low et al., The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risk, *in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks 95, 104 (Lucinda A. Low et al. eds., Practising Law Inst., 2007); Criminal Div., U.S. Dep't of Justice & Enf't Div, U.S. Sec. & Exch. Comm'n, FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 2–4 (Nov. 14, 2012) [hereinafter Resource Guide to the FCPA], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/9SPR-YBHE].

[48] 15 U.S.C. § 78dd-1. Since 1983, issuers of American Depository Receipts ("ADRs") have been treated by the Securities and Exchange Commission as "issuers" for the purposes of the securities laws. See General Rules and Regulations, Securities Exchange Act of 1934, 48 Fed. Reg. 46,738, 46,739 (Oct. 14, 1983) (modifying 17 C.F.R. § 240.12g3-2). Thus, foreign firms with securities listed on foreign exchanges are nonetheless covered by this section of the FCPA if they issue ADRs in the United States.

[49] 15 U.S.C. § 78dd-2. Domestic concerns include all U.S. citizens and legal residents, all U.S. corporations (whether based on incorporation or their principle place of business), and their agents and employees (regardless of nationality). See Low et al., supra note 47, at 106–07 (discussing who qualifies as a domestic concern).

[50] 15 U.S.C. § 78dd-3. This provision was added in 1998 and was not part of the original 1977 Act.

any foreign official,[51] political party, or candidate for political office[52] for the purposes of influencing any official action or securing any improper advantage.[53] Second, the FCPA imposes on issuers a record-keeping requirement[54] in an attempt to deter corporate foreign bribery slush fund accounts.[55]

In spite of resistance to the FCPA by major industry groups, the FCPA withstood calls for amendments for over a decade. Congress did pass amendments in 1988 as part of the Omnibus Trade and Competitiveness Act: a multi-issue piece of legislation designed to address trade negotiations and the U.S. trade deficit.[56] The amendments clarified particular provisions in the FCPA but did not rollback the ban on illicit payments or the books and records provisions. The amendments clarified that the statute incorporated a "knowing" requirement (including willful blindness or conscious avoidance[57]) for the act of bribery. The legislation also established two affirmative defenses, one for bona fide expenses (i.e., travel for government officials to view manufacturing facilities[58]) and one for payments to government officials that are allowed under the written laws of the host country.[59]

[51] Id. §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1). This provision also applies to instrumentalities of foreign governments. See United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir. 2014) (setting forth relevant factors for determination of whether a given enterprise is a government instrumentality).

[52] 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2).

[53] Id. §§ 78dd-1(a)(1)(A), 78dd-2(a)(1)(A), 78dd-3(a)(1)(A). The "securing an improper advantage" language was added in the 1998 amendments. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 2, 112 Stat. 3302 (modifying 15 U.S.C. §§ 78dd-1(a)(A), 78dd-2(a)(1)(A), 78dd-3(a)(1)(A)).

[54] 15 U.S.C. § 78m(b)(2).

[55] See E. William Cattan, Jr., Foreign Corrupt Practices Act, 25 Am. Crim. L. Rev. 422, 423 (1988) (describing the books and records requirement as "traditionally viewed as a deterrent to the use of slush funds for illegal foreign payments" (citing 18 Sec. Reg. & L. Rep. (BNA) No. 15, at 525 (Apr. 11, 1986) (address by Gary Lynch, American Bar Association Banking Section Meeting, Apr. 4, 1986 (suggesting record-keeping broadly serves financial integrity goals)))).

[56] Gutterman, supra note 28, at 117.

[57] See *United States v. Kozeny*, 493 F. Supp. 2d 693, 704, 713 (S.D.N.Y. 2007), aff'd on other grounds, 541 F.3d 166, 168 (2d Cir. 2008), for an example of a conviction for illicit payments in violation of the FCPA under a theory of conscious avoidance.

[58] Resource Guide to the FCPA, supra note 47, at 3.

[59] Id.; Low et al. supra note 47, at 109.

The FCPA was not amended again until 1998 when Congress revised the statute to implement the OECD Anti-Bribery Convention.[60]

B. Reactions to the FCPA

The FCPA remained controversial after its passage. Business groups bitterly and continuously complained that it would put American industry at a disadvantage with foreign competitors.[61] This was believed to be particularly true in industries that depended on foreign government procurement projects, such as aerospace, defense industries (weapons and other military hardware), and large-scale construction sectors (infrastructure and utilities projects).[62] The election of Ronald Reagan to the presidency and his administration's emphasis on promoting exports further put political pressure on the FCPA.[63] Soon after entering the Oval Office, the Reagan Administration commissioned a General Accounting Office ("GAO") report to evaluate the FCPA's international trade effects.[64] The report surveyed businesses on the effects of the FCPA and reflected the business community's displeasure with the law, noting:

> [A]bout 55 percent of the companies completing a GAO questionnaire believe efforts to comply with the act's accounting provisions have cost more than the benefits received. In addition, more than 30 percent

[60] See United States v. Kay, 359 F.3d 738, 750–53 (5th Cir. 2004) (discussing both amendments particularly in regard to the business nexus required by the statute).

[61] Abbott & Snidal, supra note 21, at S162; Glynn et al., supra note 36, at 18; Daniel K. Tarullo, The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention, 44 Va. J. Int'l L. 665, 674 (2004); Schmidt & Frank, supra note 12; Ben Heineman, Stop Bribery Everywhere, Belfer Ctr. for Sci. & Int'l Aff. (May 19, 2009), https://www.belfercenter.org/publication/stop-bribery-everywhere [https://perma.cc/4DRQ-22HJ].

[62] Schmidt & Frank, supra note 12 ("[C]ertain businesses, such as the aerospace and defense industries, and public highways and utility plant construction, are particularly vulnerable to bribery because of the magnitude of the contracts at issue and the high level of foreign government involvement.").

[63] Gutterman, supra note 28, at 115–16.

[64] U.S. Gov't Accountability Office, B-198581, Impact of Foreign Corrupt Practices Act on U.S. Business (1981) [hereinafter GAO Report]. For a contemporary discussion of the report, see Frederick B. Wade, An Examination of the Provisions and Standards of the FCPA, 9 Syracuse J. Int'l L. & Com. 255, 259–61 (1982).

> of the respondents engaged in foreign business cited the anti-bribery provisions as a cause of U.S. companies losing foreign business.[65]

These complaints did not result in the repeal of the Act, but the Reagan and George H. W. Bush Administrations appeared to respond to these concerns by not providing the enforcement agencies with resources to enforce the Act effectively.[66] This left American businesses in an odd situation. On one hand, the probability that they would be prosecuted under the FCPA was not particularly high. Contemporary commentators referred to the FCPA as a "sleeping dog" and noted that the FCPA was not on the forefront of corporate leaders' minds during this period.[67] In addition, the enforcement actions that were pursued were settled for modest sums.[68] On the other hand, the potential for embarrassing prosecutions (with the possibility that corporate executives could face jail time) did exist. General Electric's ("GE") settlement of FCPA charges was a notable reminder that foreign bribery was illegal and put pressure on American companies to refrain from offering bribes.

The result was that American businesses continued to urge lawmakers to undertake policy changes to address the international competition aspects of the statute.[69] Some businesses pushed for repeal.[70] Other

[65] GAO Report, supra note 64, at Digest.

[66] See infra Section III.A; see also Arthur F. Mathews, Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The *Triton Energy/Indonesia* SEC Consent Degree Settlements, 18 Nw. J. Int'l L. & Bus. 303, 305 (1998) (noting that there was a "lull" in enforcement during the Reagan and first Bush Administrations).

[67] Hotchkiss, supra note 12, at 108 (referring to the statute as a "sleeping dog"); see also SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 608 (quoting Mary Keefe's remarks at the 27th Annual Ray Garrett Jr. Corporate and Securities Law Institute) (noting that the FCPA "might not recently have been at the forefront of the thinking of public companies or their directors or auditors").

[68] See infra Section III.A, Table 1.

[69] See Laurence Cockcroft, Global Corruption: Money, Power and Ethics in the Modern World 112–14 (2012); Kimberly Ann Elliott, Introduction *to* Corruption and the Global Economy 1, 3 (Kimberly Ann Elliott ed., 1997); Glynn et al., supra note 36, at 18–19; Gutterman, supra note 28, at 114–19.

[70] Gutterman, supra note 28, at 115–16. To this day, the U.S. Chamber of Commerce continues to argue for a significant weakening of the FCPA. See Andrew Weissmann & Alixandra Smith, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 5–7 (2010). For a critique of these proposals, see Matthew Stephenson, Troubling Signs of a Resurgent Anti-FCPA Lobbying Campaign, Global Anticorruption

businesses, most notably GE, pushed for an international agreement that would bind other major multinational corporations to the same anti-bribery rules.[71] These groups became convinced that a bribery-free business model (an "integrity model") was in their best interests. They became very active—particularly in the International Chamber of Commerce—in lobbying for a treaty agreement that could address international competitiveness issues.[72]

As the Article discusses in the next Section, these international efforts eventually resulted in the OECD Anti-Bribery Convention. The Convention did not function as its designers expected; specifically, it did not lead other OECD members to ramp up anti-bribery enforcement.[73] The OECD Convention was quite effective, however, in permitting U.S. enforcement agencies to robustly prosecute the FCPA extraterritorially, vigorously policing multinational corporations in the United States and other major exporting countries. This Article explores this aspect of the OECD—its empowerment of non-American enforcement—in Part III. In short, the FCPA created a domestic business demand for an international agreement, and, in turn, the international agreement created the conditions to support a more forceful domestic enforcement regime.

C. Academic Analysis

As important as the FCPA has become for multinational businesses, white-collar criminal law, and corporate compliance law, there is little discussion of why the United States has an interest in prosecuting FCPA violations and what motivated its radical change in enforcement practices. For the FCPA's first two decades, the FCPA was only

Blog (June 9, 2015), https://globalanticorruptionblog.com/2015/06/09/troubling-signs-of-a-resurgent-anti-fcpa-lobbying-campaign/ [https://perma.cc/SZ4E-3YMA].

[71] Vogl, supra note 36, at 180–81; Glynn et al., supra note 36, at 18–19; Heineman, supra note 61, at 1; Author Interviews with Frank Vogl (Oct. 18, 2016) and Michael Gadbaw (Oct. 26, 2016) [hereinafter Author Interviews] (on file with the Virginia Law Review Association).

[72] Glynn et al., supra note 36, at 18–19; Author Interviews, supra note 71.

[73] See Author Interviews, supra note 71; see also Rachel Brewster, The Domestic and International Enforcements of the O.E.C.D. Anti-Bribery Convention, 15 Chi. J. Int'l L. 84, 87–88 (2014) [hereinafter Brewster, OECD] ("[W]ell over half of the states that have joined the OECD Anti-Bribery Convention have *never* prosecuted a domestic individual or firm for foreign corruption.").

sparingly prosecuted, but it is now a major area of enforcement for DOJ and SEC attorneys.

Most academic analysis of the FCPA focuses on actual litigation practices of the DOJ and SEC and the proper scope of the law. Top on the list of legal scholarship in the field is the exploration of the wisdom of entering into deferred prosecution agreements or non-prosecution agreements.[74] Others argue that the DOJ has been "overly aggressive" in its enforcement of the FCPA, particularly with regard to who qualifies as a government official and the necessary nexus between the bribe and the business advantage.[75] Others debate whether there should be an "adequate program" defense.[76]

[74] See Ashcroft & Ratcliffe, supra note 18; Brandon L. Garrett, The Corporate Criminal as Scapegoat, 101 Va. L. Rev. 1789 (2015); Brandon L. Garrett, Globalized Corporate Prosecutions, 97 Va. L. Rev. 1775 (2011); Mike Koehler, The Facade of FCPA Enforcement, 41 Geo. J. Int'l L. 907 (2010); Virginia Gallaher Maurer & Ralph Emmett Maurer, Uncharted Boundaries of the US Foreign Corrupt Practices Act, 20 J. Fin. Crime 355 (2013); Peter Spivack & Sujit Raman, Essay, Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements, 45 Am. Crim. L. Rev. 159 (2008); Joseph W. Yockey, FCPA Settlement, Internal Strife, and the "Culture of Compliance," 2012 Wis. L. Rev. 689.

This literature also discusses issues such as the use of corporate monitors and private rights of action. See Daniel J. Grimm, The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences, 7 N.Y.U. J.L. & Bus. 247 (2010); Gideon Mark, Private FCPA Enforcement, 49 Am. Bus. L.J. 419 (2012); Daniel Pines, Amending the Foreign Corrupt Practices Act to Include a Private Right of Action, 82 Calif. L. Rev. 185 (1994); F. Joseph Warin et al., Somebody's Watching Me: FCPA Monitorships and How They Can Work Better, 13 U. Pa. J. Bus. L. 321 (2011); Amy Deen Westbrook, Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations, 73 Ohio St. L.J. 1217 (2012).

[75] See Koehler, FCPA Enters a New Era, supra note 18; Koehler, The Story of the FCPA, supra note 25; Koehler, The Facade of FCPA Enforcement, supra note 74; Steven R. Salbu, Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act, 54 Wash. & Lee L. Rev. 229 (1997); Andrew B. Spalding, The Irony of International Business Law: U.S. Progressivism and China's New Laissez Faire, 59 UCLA L. Rev. 354 (2011) (focusing on policy reasons to decrease enforcement of the FCPA).

[76] Shaun Cassin, The Best Offense Is a Good Defense: How the Adoption of An FCPA Compliance Defense Could Decrease Foreign Bribery, 36 Hous. J. Int'l L. 19 (2014); James R. Doty, Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act, 62 Bus. Law. 1233 (2007); Eric Engle, I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act, 44 Int'l Law. 1173 (2010); Jon Jordan, The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act, 17 Stan. J.L. Bus. & Fin. 25 (2011); Mike Koehler, Revisiting a Foreign Corrupt Practices Act Compliance Defense, 2012 Wis. L. Rev. 609; Matthew

While this commentary is important, it addresses immediate litigation concerns rather than taking a more holistic view of the law's development. The exceptions are commentary by Professors Kevin Davis and Ellen Gutterman. Davis argues that states that are home to major exporting corporations may have an interest in enforcing foreign anti-bribery law for altruistic and economic reasons.[77] Altruistically, the state may wish to help shut off the supply of bribes to foreign officials and help decrease corruption in other states.[78] In addition, the state may have an economic interest in fostering better conditions for foreign investment, which are associated with lower bribery, abroad.[79] This Article builds off of Davis's excellent points. I focus on the specific political economy issues involved with the FCPA's forty-year history and how international law provided a critical mechanism for strengthening enforcement.

Gutterman provides an alternative political account of the FCPA. She argues that the FCPA is inexplicable under rationalist approaches to international relations and domestic politics.[80] She posits that the only "explanation for this [FCPA non-repeal] puzzle emerges under a Constructivist analysis."[81] Gutterman argues that FCPA costs on American businesses would have probably led to its repeal.[82] However, legislators who opposed the FCPA were effectively hamstrung because voting to permit corruption went against inviolable American norms.[83]

Stephenson, Dear Governments: Please Don't Make Private Certification the Touchstone of an Adequate Anti-Bribery Program!!!, Global Anticorruption Blog (Feb. 5, 2015), https://globalanticorruptionblog.com/2015/02/05/dear-governments-please-dont-make-private-certification-the-touchstone-of-adequate-anti-bribery-program/ [https://perma.cc/KYL2-2VAP].

[77] Kevin E. Davis, Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?, 67 N.Y.U. Annual Survey Am. L. 497 (2012) [hereinafter Davis, Why Regulate]; Kevin E. Davis, Self-Interest and Altruism in the Deterrence of Transnational Bribery, 4 Am. L. & Econ. Rev. 314 (2002) [hereinafter Davis, Self-Interest].

[78] Davis, Why Regulate, supra note 77, at 498, 503–11; Davis, Self-Interest, supra note 77, at 316, 318–20.

[79] Davis, Why Regulate, supra note 77, at 497, 501–11; Davis, Self-Interest, supra note 77, at 316, 320–27.

[80] Gutterman, supra note 28, at 110–18.

[81] Id. at 110.

[82] Id. at 110–18.

[83] Id. at 110.

Regardless of the high costs or lack of anti-corruption benefits, politicians had no choice but to continue to support the statute.[84] As Gutterman phrases it:

> A deeply held American norm against corruption made continued state support for "foreign corrupt practices," as well as any repeal of the FCPA's anti-bribery provisions, politically untenable—regardless of the material, strategic trade benefits offered by such a move. . . . [P]olicymakers could not [give principled reasons for the FCPA's repeal] under the terms of the highly resonant norm of anti-corruption and were therefore constrained to endorse a materially costly policy.[85]

She concludes that "[i]n the case of the US FCPA, the Constructivist lens explains the course of US foreign policy where a rationalist, materialist explanation cannot."[86]

While Gutterman is certainly correct that American moralism regarding corruption is an important factor in understanding the enactment and endurance of the FCPA, I argue more rationalist approaches can explain much of the anti-bribery statute's survival and eventual vigorous enforcement. In adopting a rationalist approach, I am not arguing that the survival of the FCPA was inevitable or even politically easy. Rather, I contend that a norm of anti-corruption, standing alone, is not sufficient to explain the continued political support for the statute (in the past and currently). Avoiding high material costs and achieving security benefits were critical to comprehending legislators' (and the executive's) actions. Furthermore, policymakers had to act strategically to maintain support for the FCPA. The statute was not preordained to survive due to a "highly resonant norm" against corruption. Without active intervention by concerned policymakers to adjust the costs and benefits of the policy, the statute would not continue to exist.

Explaining the FCPA's development requires an appreciation of how the executive acted purposefully to lower the costs of the FCPA to firms and the U.S. economy both before and after the passage of the OECD

[84] Id.

[85] Id.

[86] Id.

Convention (although the strategy changed dramatically).[87] The FCPA did not achieve major anti-corruption benefits before the implementation of the OECD Convention, but it did address legislators' national security concerns. The FCPA's major impact on anti-corruption has come in the United States' support for international accords and developing a new economic understanding of the costs of corruption. In addition, economic research has revealed the incredible costs of corruption and this has changed how policymakers, researchers, and the public understand the role of corruption in international development, income inequality, social welfare, and government accountability.[88] Post-OECD prosecutions have also arguably had some impact on lowering the level of global corruption in certain sectors, but, even here, the greater effect is shifting global norms regarding whether governments should tolerate such activities.[89]

II. THE OECD ANTI-BRIBERY CONVENTION

From the initial passage of the FCPA through the 1990s, American legislators had repeatedly urged the executive branch to negotiate a multilateral agreement that would commit other states to the same anti-corruption principles. In 1975, a unanimously passed Senate resolution called for the introduction of anti-bribery rules into multilateral trade negotiations.[90] The Ford Administration resisted this call and suggested that the OECD might be a better forum for major exporting states to negotiate a specific agreement.[91] The following year, a Senate Report requested that the executive branch start negotiations soon, but was more flexible on the form, calling for negotiations of multilateral or

[87] A post on this Global Anticorruption Blog site also identifies the OECD as a possible reason for increased American enforcement of the FCPA. See Phil Underwood, The OECD Bribery Convention as Cover for U.S. FCPA Enforcement Abroad, Global Anticorruption Blog (Mar. 28, 2014), https://globalanticorruptionblog.com/2014/03/28/the-oecd-bribery-convention-as-cover-for-us-fcpa-enforcement-abroad/ [https://perma.cc/E7VE-44HT].

[88] See infra note 120; see also Abbott & Snidal, supra note 21, at S159–60 (discussing how this research changed minds about corruption).

[89] See 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, 764–65 (2011); Elizabeth K. Spahn, Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention, 53 Va. J. Int'l L. 1, 10–11 (2012).

[90] S. Res. 265, 94th Cong. (1975), *cited in* Koehler, supra note 25, at 982–83.

[91] Id.

bilateral agreements, although the report noted that American action should not wait on the creation of an international convention.[92] Some legislators appeared to think that an international agreement would be easy to conclude and that other states might unilaterally adopt provisions similar to those of the United States' provisions. In fact, several senators argued that the passage of the FCPA would demonstrate U.S. leadership on anti-corruption and provide the United States with more leverage to conclude an international agreement.[93]

The United States' optimism regarding the ease of creating an international agreement was misplaced. In the 1970s, the executive branch pushed for an international agreement in three fora: the United Nations ("UN"), the OECD, and the International Chamber of Commerce.[94] The United States made its hardest push for an international agreement at the UN's Economic and Social Council ("ECOSOC").[95] The proposed agreement would have banned "illicit payments" to foreign officials, but failed to achieve a consensus due to Cold War politics and North-South fights regarding whether all payments to South Africa's apartheid regime should qualify as illicit.[96] The United States achieved more success in the OECD with the passage of the 1976 Declaration on International Investment and Multinational Enterprises, which included a general anti-bribery principle.[97] The OECD did not follow up on this declaration, however, so this initiative did not result in any policy changes in OECD states. The United States also succeeded in having the International Chamber of Commerce issue a report that called for greater self-regulation by corporations, but this report similarly did not result in any significant change in policy.[98]

The United States continued to promote the idea of an international agreement in various international fora with greater or lesser degrees of effort. The United States attempted to include anti-bribery provisions

[92] S. Rep. No. 94-1031, at 6 (1976), *cited in* Koehler, supra note 25, at 982–83.

[93] Koehler, supra note 25, at 949.

[94] Peter W. Schroth, The United States and the International Bribery Conventions, 50 Am. J. Comp. L. 593, 596–97 (2002).

[95] Mark Pieth, International Cooperation to Combat Corruption, *in* Corruption and the Global Economy, supra note 36, at 119, 122.

[96] Id.

[97] Id.

[98] Id.; Schroth, supra note 94, at 596–97.

into the General Agreement on Tariffs and Trade's ("GATT") Tokyo round of trade negotiation.[99] That effort was completely stymied by other member states who did not view corruption as a trade issue.[100] The World Trade Organization ("WTO") (the successor to the GATT) still has next to no regulations on corruption except for the plurilateral Agreement on Government Procurement, which simply includes calls for transparency in government bidding.[101] Efforts in the WTO have arguably failed because U.S. trade negotiators have been unwilling to "trade" for it.[102] Other nations have demanded additional concessions on access to the American market in return, including an anti-corruption provision, and the U.S. negotiating position has been that anti-bribery should be included as a general principle to improve competitive markets.[103] The WTO's new Trade Facilitation Agreement ("TFA") arguably also could reduce corruption by standardizing customs procedures at ports, but the agreement itself does not include any anti-corruption requirements; rather, the agreement might make it harder for government officials to receive bribes.[104]

When Congress amended the FCPA in 1988, legislators again demanded that the executive branch push for a multilateral anti-corruption accord, identifying the OECD as the preferred forum.[105] This time, the United States found the OECD to be more welcoming of its campaign, albeit quite slowly.[106]

Although the United States only weakly enforced the FCPA, the American push in international fora for a multilateral agreement to stem

[99] Schroth, supra note 94, at 596–97.

[100] Id.

[101] Kenneth W. Abbott, Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption, 4 J. Int'l Econ. L. 275 (2001); Krista Nadakavukaren Schefer & Mintewab Gebre Woldesenbet, The Revised Agreement on Government Procurement and Corruption, 47 J. World Trade 1129 (2013).

[102] Abbott, supra note 101, at 293.

[103] Id. at 286.

[104] Evelyn Suarez, Does Trade Facilitation Matter in the Fight Against Corruption?, Global Trade Mag. (Sept. 10, 2015), http://www.globaltrademag.com/global-trade-daily/commentary/does-trade-facilitation-matter-in-the-fight-against-corruption [https://perma.cc/Y2F3-Z9PW].

[105] Gutterman, supra note 28, at 117.

[106] Abbott & Snidal, supra note 21, at S163–65; Pieth, supra note 95, at 122–26; Tarullo, supra note 61, at 667–68.

the supply of bribes forced the issue onto the international agenda. The support by one of the globe's largest exporters for anti-bribery policy provided policy space for other institutions to reconsider and shift their own policies. Both the U.S. position and the growing body of economic research that highlighted the developmental damage done by corruption were important in changing the perception of bribery in international organizations and some foreign capitals.

Between the 1970s and the late 1980s, many OECD members' views of foreign corruption shifted. The primary factors behind that shift were changing views of the damage wrought by corruption and the need to respond to domestic corruption scandals. By the late 1990s, greater economic evidence existed of corruption's damage to international development. Economic research (done by the World Bank and others) made it harder for government officials to maintain that foreign corruption was a harmless (or even efficiency-enhancing) means of engaging in international trade.[107] Policy initiatives against foreign bribery no longer seemed like a quixotic American crusade.[108]

The World Bank was one of the most important international organizations to reconsider its approach to bribery.[109] Historically, the World Bank considered corruption a "political" problem, not an economic one.[110] This distinction was important to internal World Bank decision making, because the institution's rules required policymakers to evaluate projects based on their economic effects, but not political ones.[111] As a result, World Bank officials could support projects that

[107] Abbott & Snidal, supra note 21, at S159. The World Bank officially rejected the implicit use of corruption as a means to speed development in 1996. See James D. Wolfensohn, President, The World Bank, Address to the Board of Governors at the Annual Meetings of the World Bank and the International Monetary Fund (Oct. 1, 1996).

[108] Pieth, supra note 95, at 122–26.

[109] See Vogl, supra note 36, at 174–77; Fredrik Galtung, A Global Network to Curb Corruption: The Experience of Transparency International, *in* The Third Force: The Rise of Transnational Civil Society 17, 19–23 (Ann M. Florini ed., 2012); Augusto Lopez-Claros, Why is Corruption Today Less of a Taboo than a Quarter Century Ago?, World Bank Blog (Jan. 24, 2014), http://blogs.worldbank.org/futuredevelopment/why-corruption-today-less-taboo-quarter-century-ago [https://perma.cc/N9K8-STJY].

[110] Vogl, supra note 36, at 62; Dick Carozza, Chipping Away at Corruption: An Interview with Dr. Peter Eigen, Fraud Mag. (May/June 2014), http://www.fraud-magazine.com/article.aspx?id=4294982416 [https://perma.cc/5MXS-LLZF].

[111] Vogl, supra note 36, at 174–76.

involved corrupt payments—rarely directly, but knowing that subcontractors and agents would be bribing government officials. This policy fit with a worldview that understood bribery to be a necessary and possibly even an efficiency-enhancing aspect of international trade.[112] In the 1960s, many political scientists and economists viewed corruption as a lesser of evils.[113] Professor Samuel Huntington viewed bribery as necessary to circumvent government procurement processes, noting that "the only thing worse than a society with a rigid, over-centralized, dishonest bureaucracy is one with a rigid, over-centralized, honest bureaucracy."[114] Similarly, Professor Joseph Nye argued that corruption could be costly but also beneficial in promoting economic development, national integration, and governmental capacity.[115]

The 1990s saw a substantial change in views on the effects of corruption. World Bank officials, disheartened by the failure of many of their projects in corrupt regimes, pushed internally for a change in policy that would address the role of bribery in undermining development projects.[116] While this push faced initial resistance, the World Bank did dramatically alter its policies starting in 1996 when James Wolfensohn became the bank's president.[117] Wolfensohn reframed corruption as an economic issue, which the bank would have to address in future projects, noting:

> [L]et's not mince words: we need to deal with the cancer of corruption.
>
> In country after country, it is the people who are demanding action on this issue. They know that corruption diverts resources from the

[112] Nathaniel H. Leff, Economic Development Through Bureaucratic Corruption, Am. Behav. Scientist 8, 8–14 (1964).

[113] See, e.g., id.; Samuel P. Huntington, Political Order in Changing Societies 64–69 (1968) (arguing that corruption helped development in many societies).

[114] Huntington, supra note 113, at 69.

[115] J.S. Nye, Corruption and Political Development: A Cost-Benefit Analysis, 61 Am. Pol. Sci. Rev. 417, 419–23 (1967).

[116] The internal fight at the World Bank over corruption had the beneficial effect of leading to the creation of Transparency International, which became an important actor in the negotiations for the OECD Convention. See Abbott & Snidal, supra note 21, at S159.

[117] Carozza, supra note 110 (noting that the World Bank embraced an anti-corruption approach in 1996); Jonathan Finer, World Bank Focused on Fighting Corruption, Wash. Post, July 4, 2003, at E1.

> poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors. . . . And we all know that it is a major barrier to sound and equitable development.[118]

The World Bank established rules banning bank officials, contractors, and subcontractors from offering illicit payments to government officials. The Bank now has a relatively robust anti-bribery sanctioning program that has the power to suspend or debar contractors involved (directly or indirectly) with bribery.[119] In addition, more developmental economists began to emphasize the need for good governance to establish well-functioning markets (rather than simply having reduced government regulation).[120] Some of these economists formed a non-governmental organization ("NGO"), Transparency International, which has become an important lobbying force in demanding international accords as well as promoting government and industry transparency.[121]

Although the U.S. government was not solely (or even mostly) responsible for this change in policy framing, the consistent American push in international negotiations to limit bribery provided a platform for NGOs and the World Bank to enter a broader dialogue on the benefits of regulating multinational corporations' payments to foreign government officials. By this point, the United States had established a strong anti-bribery negotiating position at the OECD, although the only harvest of its efforts had been nonbinding recommendations to reconsider government policies, such as tax exemptions for bribes, that permitted (and effectively encouraged) multinationals to engage in foreign corruption.[122] But the existence of ongoing negotiations at the OECD provided a policy outlet for this research and advocacy. The long-standing U.S. negotiating efforts and the more recent economics-

[118] Wolfensohn, supra note 107.

[119] Sope Williams, The Debarment of Corrupt Contractors from the World Bank-Financed Contracts, 36 Pub. Cont. L.J. 277, 286–87 (2007).

[120] See Alberto Ades & Rafael Di Tella, The New Economics of Corruption: A Survey and Some New Results, 45 Pol. Stud. 496, 514–15 (1997) (discussing the intellectual development of views on the effects of corruption in economics, political science, and law); Pierre-Guillaume Meon & Khalid Sekkat, Does Corruption Grease or Sand the Wheels of Growth, 122 Pub. Choice 69, 70–71 (2005) (reviewing the literature and independently finding that even "grease" payments harm growth in nondemocratic regimes).

[121] Abbott & Snidal, supra note 21, at S165.

[122] Pieth, supra note 95, at 122–23.

based movements together were able to successfully conclude the binding OECD Convention that hardened anti-corruption rules.

The U.S. and various NGOs (particularly Transparency International) demanded that OECD governments confront the consequences of their policies of tolerance of (and even enabling) foreign corruption by their multinational corporations.[123] In the 1980s and early 1990s, most OECD governments not only refused to prohibit foreign bribery, they subsidized it by making bribes a tax deductible business expense.[124] Governments could not even agree on an OECD recommendation that states should end this tax exemption until 1996.[125] In addition to subsidizing bribery, many governments effectively aided corruption by having embassy staff (or even higher level government officers) helping corporations identify the foreign government officials to be bribed and arranging for third-party "consultants" who would deliver bribes.[126] Changing economic attitudes towards corruption at the World Bank, and in some developing states, made it harder for major exporting nations to justify their de facto pro-corruption policies.[127]

In the late 1990s, several European governments were also experiencing their own Watergate-style domestic bribery scandals.[128] Corruption, both domestic and foreign, achieved greater political

[123] Abbott & Snidal, supra note 21, at S163–65.

[124] Pieth, supra note 95, at 126.

[125] See Org. for Econ. Co-operation & Dev., Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (adopted Apr. 11, 1996) (OECD recommends ending tax deductibility); Org. for Econ. Co-operation & Dev., Recommendation of the Council on Bribery in International Business Transactions, art. III(iii) (adopted May 27, 1994) (stating that governments *should* take steps to combat foreign bribery and "[t]hese steps may include: . . . tax legislation, regulations and practices, insofar as they may indirectly favour bribery"); see also Pieth, supra note 95, at 126 (1990s anti-bribery negotiations).

[126] See The BAE Files, Guardian (UK) [hereinafter Guardian BAE Files], https://www.theguardian.com/world/bae [https://perma.cc/UN8W-83XQ] (last visited Feb. 2, 2017) (history of BAE Systems ("BAE") sales to Iran, Saudi Arabia and others); Richard Norton-Taylor & Rob Evans, Margaret Thatcher's Lobbying of Saudi Royals Over Arms Deal Revealed, Guardian Wkly. (UK) (July 15, 2015), https://www.theguardian.com/politics/2015/jul/16/margaret-thatcher-lobbying-saudi-royals-arms-deal [https://perma.cc/5AFE-PB26].

[127] Tarullo, supra note 61, at 678–80, 692 n.73.

[128] Abbott & Snidal, supra note 21, at S163–65; Pieth, supra note 95, at 122; Tarullo, supra note 61, at 678.

salience in the electoral politics of Germany, France, and the United Kingdom.[129] Addressing corruption through an international agreement provided mechanisms for committing to political reform and moving the topic off the political agenda.[130] Transparency International and other NGOs took the lead in turning this political opening into acceptance of the OECD Convention.[131] The International Chamber of Commerce (within which GE was a leader) lobbied governments to support the Convention.[132] Similarly, Transparency International worked with the United States' lead OECD negotiator, Daniel Tarullo, to build a consensus in favor of collective action against foreign bribery.[133] OECD governments were initially reluctant to sign on fearing that their corporations might lose major arms or infrastructure projects if bribes were prohibited.[134] The British, French, and German governments all initially resisted the treaty on economic grounds,[135] yet domestic electoral pressure from bribery scandals and business lobbying from the International Chamber of Commerce and Transparency International pushed governments to join (if not rigorously implement) the OECD Convention.[136]

[129] Pieth, supra note 95, at 123; Tarullo, supra note 61, at 678.

[130] Abbott & Snidal, supra note 21, at S163–65; Tarullo, supra note 61, at 678–79; see also R. Michael Gadbaw & Timothy J. Richards, Anticorruption as an International Policy Issue, *in* Trade Strategies for a New Era: Ensuring U.S. Leadership in a Global Economy 223, 228 (Geza Feketekuty ed., 1998) (explaining that the French supported the OECD anti-corruption initiative because "domestically they could not appear soft on corruption" when scandals were playing out in France itself and other European countries).

[131] Cockcroft, supra note 69, at 155–57; Vogl, supra note 36, at 180–82; Pieth, supra note 95, at 122.

[132] Vogl, supra note 36, at 180; Pieth, supra note 95, at 128; see also Fritz F. Heimann, Combatting International Corruption: The Role of the Business Community, *in* Corruption in the Global Economy, supra note 36, at 147, 150–55 (discussing the role of the International Chamber of Commerce in developing commercial codes against bribery and working with governments to pass the international agreements covering international business).

[133] Vogl, supra note 36, at 181.

[134] Id.

[135] Cockcroft, supra note 69, at 156–57; Glynn et al., supra note 36, at 20–21.

[136] Vogl, supra note 36, at 180–84; Gadbaw & Richards, supra note 130, at 228 (noting that "the French supported the groundbreaking OECD anti-corruption initiative in 1994 because domestically they could not appear soft on corruption at a time when politically charged scandals were playing out in Italy and Germany and notorious corruption scandals involving French parties were starting to break"); Pieth, supra note 95, at 123.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was opened for signature in December 1997. Unlike previous OECD drafts on corruption, this agreement was both binding and contained strongly worded obligations for nations to prohibit foreign bribery by their nationals (natural and legal).[137] The agreement also requires states to establish accounting standards aimed at preventing corporations from concealing bribes in their internal record-keeping.[138] The Convention did receive sufficient support and entered into force in February 1999. Since that time, all OECD members have joined the agreement as well as several non-OECD members (such as Brazil, South Africa, and Argentina).[139]

Notwithstanding the OECD Convention's legal obligation, implementation of the agreement by many countries has not been particularly robust.[140] Until the last five years, most OECD nations did

[137] Cecily Rose, International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems 65–67 (2015); see Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1(1), Nov. 21, 1997 [hereinafter OECD Anti-Bribery Convention] ("Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."); see also Tarullo, supra note 61, at 680–82 (criticizing the OECD Anti-Bribery Convention as ineffective).

[138] See OECD Anti-Bribery Convention, supra note 137, art. 8(1) ("In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.").

[139] Org. for Econ. Co-operation & Dev., OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of May 2017, http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf [https://perma.cc/6M73-NV8V].

[140] Brewster, OECD, supra note 73, at 90; Michael D. Goldhaber, Leveling Playing Field on Foreign Bribes: Other Governments Have to Crack Down on Corruption, Though They Still Lag Far Behind U.S. Enforcement, Nat'l L.J., Jan. 3, 2005 (noting that although foreign

not make anti-bribery enforcement a priority, although they did provide legal assistance to American prosecutors when their own firms faced FCPA charges in the United States. More recently, some of the larger OECD economies have started enforcing their anti-bribery laws more actively. Germany, Switzerland, and the United Kingdom have revised their anti-bribery laws and now regularly bring foreign corruption cases against domestic firms.[141] Other OECD nations, including France and Canada, are reforming their anti-bribery legislation and possibly could become more active enforcers.[142] Nevertheless, the vast majority of OECD states have limited to no enforcement of their anti-bribery laws.[143]

III. INTERNATIONAL RESONANCE: THE EVOLUTION IN THE FCPA'S ENFORCEMENT

How did the FCPA survive for over twenty years without any international support? When a multilateral accord was concluded, how did it alter the United States' approach to anti-bribery policy? This Part addresses these questions and, in doing so, integrates the theoretical framework with the narrative of the survival of the FCPA through the 1980s and 1990s to the strong FCPA regime that exists today. This Part highlights the importance of the OECD Convention as the multilateral cooperative tool that has allowed the United States to have a robust anti-bribery policy.

Section III.A analyzes how the U.S. anti-corruption policy was effectively toothless for much of its early history. The Act was not a policy priority, particularly given the growing U.S. trade deficit in the

states have begun to crack down on transnational bribery, "it's U.S. prosecutions that overseas companies have to fear first" because "[t]he FCPA is still driving corruption compliance").

[141] Transparency Int'l, Exporting Corruption, Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery 12 (2015) [hereinafter Transparency International Report].

[142] Frederick Davis et al., Compliance & Enforcement, France's New Anti-Corruption Framework: Potential Impact for Businesses in a Multijurisdictional World (Dec. 7, 2016), https://wp.nyu.edu/compliance_enforcement/2016/12/07/frances-new-anti-corruption-framework-potential-impact-for-businesses-in-a-multijurisdictional-world/ [https://perma.cc/37UT-N5F2] (discussing anti-bribery law in France); Editorial, Cracking Down on Bribes, Ottawa Citizen, Feb. 7, 2013, 2013 WLNR 3018655 (discussing anti-bribery law in Canada).

[143] Transparency International Report, supra note 141.

1980s. The Section demonstrates how dramatic the change in enforcement was in the FCPA's first two decades (1977–1996) and the second two decades (1997–2016). Not only was there extraordinary increase in the number of prosecutions, but the penalties that firms faced for violations were of an entirely different order of magnitude. The FCPA went from being an obscure statute to one that was frequently on corporate executives' minds. Section III.B provides an explanation for the change in the U.S. enforcement strategy.

Section III.B has two Subsections. It begins by revisiting the first two decades of FCPA enforcement, highlighting how American businesses believed that the FCPA disadvantaged them in global commerce and how the government internalized these concerns. It then examines how some American businesses, notably GE, decided that a bribery-free model was better for their business and sought to "level-up"[144] by having these laws applied more rigorously and by more countries.

Second, it describes the effect of the OECD Convention's negotiation and entry into force. Subsection III.B.2 describes how the OECD Convention permitted U.S. prosecutors to crack down on foreign bribery in a manner that did not hurt American businesses relative to foreign businesses and, therefore, was politically acceptable. The international resonance of anti-bribery norms in the treaty gave the DOJ and SEC legal and socially legitimate bases to use the FCPA's long-standing jurisdictional net covering any firm (foreign or domestic) that listed on an American exchange. With this in hand, federal prosecutors could adopt a strategy (that they openly advertised) of targeting foreign and domestic firms in a manner that did not give foreign firms an international advantage.

This Subsection also discusses the subsequent passage of the Sarbanes-Oxley Act of 2002. This measure was a response to the bankruptcy of Enron and other large American corporations due, in part, to fraudulent record-keeping. The law increased the requirements for listed firms to provide financial information to U.S. regulators. Although this act was not aimed specifically at increasing anti-bribery enforcement, it provided prosecutors with yet more tools to investigate FCPA violations.

[144] See Heineman, supra note 61, at 1 (using the term "level up" to describe GE's approach to anti-corruption law).

A. Enforcement Silence and Then an Enforcement Explosion

In the two decades after the passage of the FCPA in 1977, prosecutions for foreign bribery were quite rare.[145] Contemporary commentators and lawyers noted that the enforcement of the statute was weak.[146] One SEC director acknowledged that the lack of prosecutions meant that the FCPA "might not recently have been at the forefront of the thinking of public companies . . . or their directors or auditors."[147] Former SEC Commissioner and one of the law's architects, Stanley Sporkin, even admitted that the FCPA "may not have been taken very seriously when it was first enacted."[148] For all of the drama of the Watergate hearings that led up to the passage of the FCPA, the follow-through was silent.[149]

The political considerations that led to the passage of the Act apparently did not translate into support for enforcement. This was certainly related to the vociferous complaints of U.S. businesses that the FCPA would put them at a competitive disadvantage with foreign corporations that did not have such constraints.[150] At the time, foreign firms were not only allowed to bribe abroad, but also often received support from their governments in the form of tax deductions and

[145] See Enforcement Actions, Foreign Corrupt Practices Act Clearinghouse [hereinafter FCPAC], http://fcpa.stanford.edu/enforcement-actions.html (last visited Feb. 2, 2017); see also Savage, supra note 10 (noting that "[f]or its first few decades, the law was enforced only rarely").

[146] See Mathews, supra note 66, at 305 (noting in 1998 that enforcement of the FCPA was receiving renewed interest only "[a]fter a prolonged lull in the Reagan and Bush Administrations"); SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 608 (noting that the 1997 prosecution of Triton Energy Corporation for FCPA violations was the first one that the SEC had brought "in quite a while"); Schmidt & Frank, supra note 12 ("In fact, the government has not enforced the FCPA aggressively for much of its history.").

[147] See SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 608.

[148] Sporkin, supra note 19, at 270.

[149] Hotchkiss, supra note 12, at 108 (referring to the FCPA as a "legal 'sleeping dog'" due to limited number of enforcement actions).

[150] GAO Report, supra note 64; see also Schmidt & Frank, supra note 12 ("The U.S. business community bitterly fought passage of the statute, complaining that the FCPA would tilt the playing field against U.S. companies in international marketplace . . . .").

embassy support in identifying the right individuals to contact.[151] The competitive concerns of American businesses arguably had an impact on the federal government's enforcement efforts.[152] At the very least, these concerns were one of the factors that lead to the dearth of prosecution between 1977 and 1996.

Yet the U.S. government's interest in prosecuting FCPA cases picked up dramatically beginning in 1997.[153] The Clinton Administration's negotiation push was concluding on the international stage: enough states had signed and ratified the agreement that the treaty was set to enter into force by 1999. With the impending launch of the treaty, the executive branch prioritized FCPA enforcement domestically and increased DOJ and SEC resources for these cases.[154] The DOJ substantially increased the number of attorneys who could bring FCPA cases with the goal of investigating more cases.[155] In 1998, the DOJ was thought to have over 75 FCPA cases under investigation and was anticipated to have significantly more by 2000.[156] Similarly, the SEC was ramping up its investigative and prosecutorial resources.[157] The SEC publicly advertised its intention to investigate more claims of foreign

[151] See The OECD Convention on Bribery: A Commentary 539 (Mark Pieth et al. eds., 2007); Sporkin, supra note 19, at 276; Guardian BAE Files, supra note 126 (series detailing, inter alia, ongoing U.K. ministerial support for BAE bribery).

[152] Members of Congress were well aware of this complaint. For instance, Representative Michael Oxley, Chairman of the House Commerce and Finance Committee, explained, "America has the world's strongest anti-bribery laws and a powerful Justice Department to enforce them. The problem is that our competitors have much looser rules and enforcement mechanisms against bribery." See Rachel Witmer, House Panel Clears Bill to Strengthen Anti-Bribery Laws Under New Treaty, 30 Sec. Reg. & L. Rep. (BNA) No. 37, at 1353 (Sept. 18, 1998).

[153] See Cleveland et al., supra note 15, at 210 (discussing the new era of FCPA enforcement by the DOJ and SEC in 1998).

[154] Hotchkiss, supra note 12, at 110 (noting that the Clinton Administration stepped up enforcement of the FCPA through SEC and DOJ actions); Schmidt & Frank, supra note 12.

[155] Schmidt & Frank, supra note 12 ("Until recently, only a few prosecutors in the Criminal Division of the DOJ's Fraud Section had responsibility for FCPA cases. Now all of them, as well as prosecutors in field offices of the U.S. attorney, are authorized to investigate potential FCPA violations.").

[156] See Mathews, supra note 66, at 306–08, 307 n.7; Schmidt & Frank, supra note 61 ("DOJ sources indicate that at least 75 cases are under investigation . . . .").

[157] Phyllis Diamond, McLucas Predicts More FCPA Cases, Says Agency Will Still Bring Insider Actions, 29 Sec. Reg. & L. Rep. (BNA) No. 10, at 310 (Mar. 7, 1997); SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 607.

bribery, claiming that "Corporate America ha[d] gotten a little loose" about compliance with the FCPA[158] and that these investigations were meant to "underscore the responsibilities of corporate management in the area of foreign payments."[159] Although the number of convictions or settlements in 1997 was not particularly high, the redirection of DOJ and SEC resources toward FCPA enforcement set the stage for the cases that would follow.

1. Number of Enforcement Actions

These investments in greater investigative and prosecutorial resources resulted in a spike in FCPA convictions and settlements for both agencies within a few years. Contemporary discussions of FCPA enforcement highlight that the shift in the government policy appears to have begun in 1997, when the enforcement agencies increased their capacity and started a number of investigations.[160] There was, however, a lag in the resulting actions. This would probably be true in any enforcement area; it takes time for investments in investigations to pay off in convictions or settlements. It was particularly true with foreign bribery cases—where evidence of wrongdoing may be overseas or otherwise difficult to find.[161] As a result, a marked increase in FCPA settlements did not appear until 2001. After that period, the number of FCPA settlements continued to climb until the "explosive" record year of 2010, when there were fifty-six (in part due to the passage of Sarbanes-Oxley and the growth of corporate self-reporting that followed). FCPA prosecutions have continued to stay high after that period, with at least twenty enforcement actions a year.

[158] Diamond, supra note 157, at 310 (quoting SEC Enforcement Division Director William McLucas).

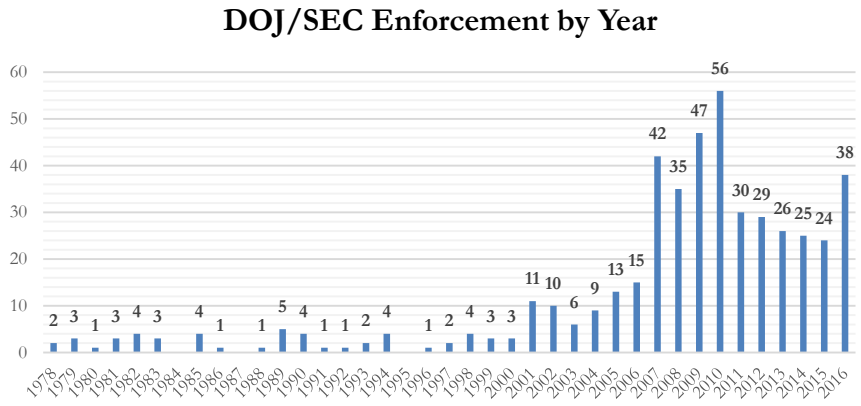
[159] SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 607 (quoting SEC Midwest Director Mary Keefe in relation to the SEC's hope that its prosecution of Triton Energy for FCPA violations would be a "real message case" to issuers).

[160] See SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 607; Schmidt & Frank, supra note 12.

[161] See SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 608 (reporting that SEC actions took a long time to resolve because in FCPA cases, "it takes an 'enormous amount of time' to find the violations and then to do the necessary investigation, including finding documents that might not be readily accessible").

Figure 1 provides the total number of FCPA settlements or convictions by either the DOJ or the SEC between 1977 and 2016. Figure 2 and Figure 3 break out the DOJ and SEC prosecutions separately, illustrating that the two agencies had a similar pattern of increased prosecutions after 1997.

Figure 1[162]



[162] Data from FCPAC, supra note 145 (data last compiled by author Feb. 2, 2017).

Figure 2[163]

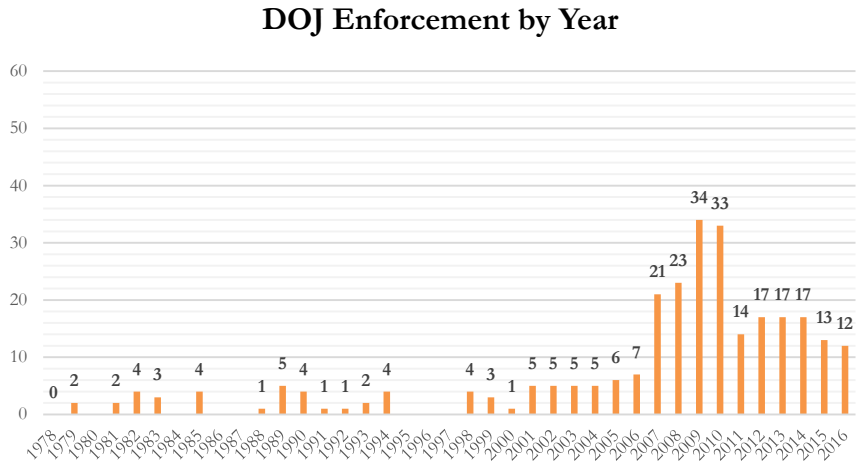
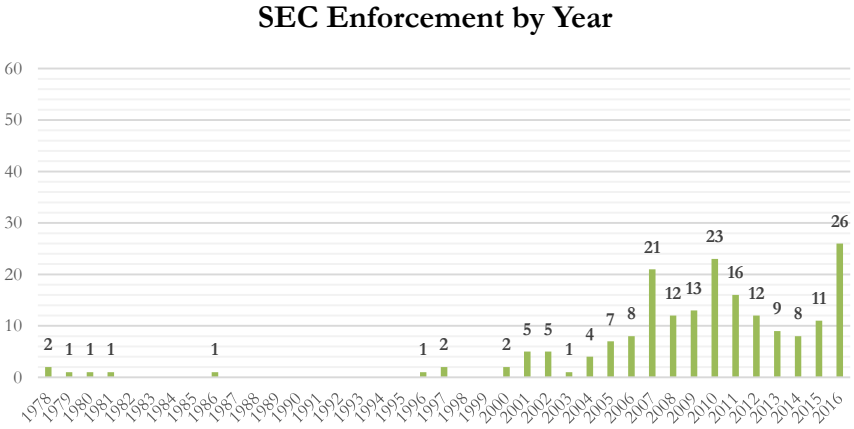


Figure 3[164]



The numbers are startling. Before 2001, the U.S. government never brought more than five cases in any one year.[165] The most common

[163] Id.
[164] Id.
[165] Id.

outcome was to have one case or less brought by either agency in a given year.[166] This situation changed radically in 2001 when the federal government brought twelve prosecutions, with each agency bringing six.[167] The fifty-six prosecutions that were pursued in 2010 represent an all-time high for enforcement.[168] Enforcement by the DOJ and SEC has continued to be robust, both in terms of the number of prosecutions and in the aggregate value of penalties from sanctioned entities (although there has been a slight drop in the absolute number of cases).[169]

2. Penalties from Enforcement Actions

Not only have the absolute number of cases increased in the post-1997 enforcement era, but government prosecutors have extracted significantly higher penalties as well.[170] In terms of penalties, 2016 was a record.[171]

The penalties collected were not only higher because of the increased number of cases but also because of the higher penalties in each case. Table 1 compares the top ten FCPA penalties in the two enforcement eras and highlights two important issues. First, penalties are notably higher in the present era (1997–2016). Second, the majority of the top penalties were assessed against foreign corporations in the present era; by comparison, almost none of the top penalty cases were brought against foreign corporations before 1997 (foreign firms are shaded in Table 1). This is the key element of the U.S. government strategy that this article explores in depth.[172]

[166] Id.

[167] Id.

[168] Id.

[169] Id.

[170] See infra Table 1 and accompanying text.

[171] Richard L. Cassin, The 2016 FCPA Enforcement Index, FCPA Blog (Oct. 4, 2016), http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html [https://perma.cc/L9BV-R7KY].

[172] See infra Section III.B.

Table 1: Top 10 FCPA Penalties, pre- and post-OECD (nominal $USD)[173]

Pre-OECD FCPA Penalties	
Firm (Headquarters, Year)	**Enforcement Penalty (Nominal $USD)**
General Electric (USA, 1992)	68,500,000
Lockheed (USA, 1994)	25,000,000
Crawford Enterprises (USA, 1982)	4,000,000
Herbert Steindler (USA, 1994)	1,700,000
Napco International (USA, 1989)	1,000,000
Ruston Gas Turbines (USA, 1982)	750,000
Gary D. Bateman (USA, 1981)	530,000
Sam P. Wallace, Inc. (USA, 1983)	530,000
Young and Rubicam (USA, 1989)	500,000
Goodyear International (USA, 1989)	250,000

Post-OECD FCPA Penalties	
Firm (Headquarters, Year)	**Enforcement Penalty (Nominal $USD)**
Siemens (Germany, 2008)	800,000,000
Alstom (France, 2014)	772,000,000
KBR/Halliburton (USA, 2009)	579,000,000
Och-Ziff (USA, 2016)	412,000,000
BAE (UK, 2010)	400,000,000
Total SA (France, 2013)	398,000,000
VimpelCom (Netherlands, 2016)	397,600,000
Alcoa (USA, 2014)	384,000,000
Snamprogetti Netherlands B.V. / ENI S.p.A. (Netherlands/Italy, 2010)	365,000,000
Technip SA (France, 2010)	338,000,000

[173] This table aggregates data from the FCPAC, supra note 145, and Richard L. Cassin, Och-Ziff Takes Fourth Spot on Our New Top Ten List, FCPA Blog (Oct. 4, 2016) [hereinafter Cassin, Och-Ziff Takes Fourth Spot], http://www.fcpablog.com/blog/2016/10/4/och-ziff-takes-fourth-spot-on-our-new-top-ten-list.html [https://perma.cc/9PJ4-DZ3L]. In the remainder of 2016, Teva Pharmaceuticals (Israel) and Odebrecht/Braskem (Brazil) also settled FCPA cases that could be considered as top ten, though there remains some debate as to aggregation of the value of settlement. See Richard L. Cassin, Reconsidered: Odebrecht and Braskem Are on Our FCPA Top Ten List, FCPA Blog (Dec. 29, 2016) [hereinafter Cassin, Reconsidered Top Ten List], http://www.fcpablog.com/blog/2016/12/29/reconsidered-odebrecht-and-braskem-are-on-our-fcpa-top-ten-l.html [https://perma.cc/9CXM-Y9GW].

In the pre-1997 period, the largest FCPA penalty assessed was $68.5 million against GE in 1992.[174] That penalty was more than double the next highest ($25 million), levied against Lockheed in 1994.[175] Lockheed's fine was more than ten times larger than the third highest fine of $1.5 million.[176] By comparison, none of these fines would make the top ten in the post-1997 period. The highest penalty remains $800 million for Siemens SA in 2008, with a similar penalty assessed against Alstom ($772 million) in 2014.[177]

The pre-1997 penalties are simply not comparable to those levied by prosecutors now, even accounting for inflation.[178] Table 2 provides the

[174] Memorandum on Behalf of General Electric Company Concerning Plea Agreement, United States v. Gen. Elec. Co., No. 92-CR-087 (S.D. Ohio July 22, 1992). While this fine was not particularly large, particularly given GE's financial resources, the case was important in that it altered GE's policy to one of no tolerance for foreign bribery. See Author Interview with Michael Gadbaw, supra note 71 (noting that then-CEO Jack Welsh decided that foreign bribery interfered with the company's operations and it would no longer permit such practices domestically or overseas). Instead, GE built a business model based on business integrity, which included a ban on bribery. See Ben W. Heineman, Jr. & Fritz Heimann, The Long War Against Corruption, 85 Foreign Aff. 75, 83–85 (2006) (discussing the role of corporations in fighting corruption); Ben W. Heineman, Jr., Avoiding Integrity Land Mines, 85 Harv. Bus. Rev. 100, 101–03 (2007) (citing corruption). GE also became instrumental in lobbying the American government to form an international agreement that would bind non-American multinational companies to the same anti-bribery rules. See Abbott & Snidal, supra note 21, at S162–63; Tarullo, supra note 61, at 675.

[175] Press Release, U.S. Dep't of Justice (Jan. 27, 1995) [hereinafter Lockheed Press Release] (announcing settlement with Lockheed).

[176] Plea Agreement, United States v. Saybolt Inc., No. 98-CR-10266-WGY (D. Mass. Aug. 18, 1998).

[177] Siemens AG Press Release, supra note 2; Press Release, U.S. Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery [https://perma.cc/2NBG-8247] (announcing settlement with Alstom).

[178] This study cannot demonstrate with any statistical confidence that pre-2000 defendants received more lenient treatment given all of the factors present in their particular cases. It does not attempt to account for the extensiveness of the bribery, the participation of senior management in illegal activity, the profits made from the corrupt practices, the cooperation of the company with prosecutors, or any of the other multitude of factors that prosecutors consider when settling cases or seeking penalties in court. Indeed, it is not feasible to collect all of the information that would be necessary for such an analysis, including extensiveness of cooperation or quality of the prosecutor's evidence. See the discussion in Garrett, Globalized Corporate Prosecutions, supra note 74. For an excellent study that attempts to analyze what is driving penalties with some variables omitted, see Stephen J. Choi & Kevin

top ten lists adjusted to 2016 dollars. The Technip SA penalty, the tenth highest in the present era, is easily more than double the combined ten highest penalties from the pre-1997 period, even accounting for inflation.[179] The GE fine would not fall within the top twenty now, again accounting for inflation.[180]

E. Davis, Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act, 11 J. Empirical Legal Stud. 409 (2014).

However, there is no particular reason to believe that the post-2000 cases were fundamentally more egregious than the pre-2000 cases. More importantly, the extent of the evidence of egregious behavior is itself dependent on how hard prosecutors scrutinize conduct. In the pre-2000 period, prosecutors did not prioritize FCPA cases and appear to have not been looking particularly hard for foreign bribery. For instance, very few attorneys at the DOJ or SEC worked on FCPA cases before the conclusion of the OECD Convention in 1997. See SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 607; Schmidt & Frank, supra note 12.

In addition, prosecutors now regularly require companies to undergo extensive internal investigations into whether any other instances of bribery can be found. This practice did not exist in the earlier era of FCPA enforcement. See Mathews, supra note 66, at 456. As a result, even if this study could account for all of the factors that went into a particular FCPA case, the comparison would still be not level because the investigative and prosecutorial practices changed over the period. Nonetheless, the magnitude in the difference in monetary penalties and the number of cases brought strongly indicates that there has been a shift in the U.S. government's *strategy* of FCPA enforcement.

[179] The Technip fine ($374 million in 2016 USD) is more than double the combined amount of the pre-OECD top ten ($174 million in 2016 USD).

[180] Depending on treatment of certain settlement arrangements involving corporate subsidiaries, GE is either the 23rd or 24th largest fine in the 1977–2016 period. See FCPAC, supra note 145.

Table 2: Top 10 FCPA Penalties, pre- and post-OECD (2016 $USD)[181]

Pre-OECD FCPA Penalties	
Firm (Headquarters, Year)	**Enforcement Penalty (2016 $USD)**
General Electric (USA, 1992)	116,580,000
Lockheed (USA, 1994)	40,280,000
Crawford Enterprises (USA, 1982)	9,900,000
Herbert Steindler (USA, 1994)	2,740,000
Ruston Gas Turbines (USA, 1982)	1,970,000
Napco International (USA, 1989)	1,930,000
Gary D. Bateman (USA, 1981)	1,392,000
Sam P. Wallace, Inc. (USA, 1983)	1,270,000
Young & Rubicam (USA,1989)	962,000
Goodyear International (USA, 1989)	481,000

Post-OECD FCPA Penalties	
Firm (Headquarters, Year)	**Enforcement Penalty (2016 $USD)**
Siemens (Germany, 2008)	897,000,000
Alstom (France, 2014)	787,000,000
KBR/Halliburton (USA, 2009)	652,000,000
BAE (UK, 2010)	443,000,000
Och-Ziff (USA, 2016)	412,000,000
Total SA (France, 2013)	412,000,000
Snamprogetti Netherlands B.V. / ENI S.p.A. (Netherlands/Italy, 2010)	404,000,000
VimpelCom (Netherlands, 2016)	397,600,000
Alcoa (USA, 2014)	392,000,000
Technip SA (France, 2010)	374,000,000

In sum, the U.S. government undertook a complete revolution in its enforcement policy of the FCPA around 1997. The fact that this shift occurred in two different agencies and has lasted for over two decades now indicates that this was not simply a change of priorities under one set of agency heads. Instead, the U.S. government consciously adopted a different approach to the statute that included substantial investments in investigations and prosecutions. While the Clinton Administration began

[181] This table aggregates data from FCPAC, supra note 145, and Cassin, Reconsidered Top Ten List, supra note 173.

this process, it is a policy that has continued through changes in administrations from different political parties.[182]

What changed between 1977 and 1997 to convince the U.S. government to so dramatically reverse its enforcement policy? This Article argues that the international acceptance of anti-bribery principles made the U.S. government capable of strengthening its enforcement of the statute without imposing a competitive loss on American businesses. International acceptance of foreign anti-corruption norms, predominantly the entry into force of the OECD Anti-Bribery Convention, allowed American prosecutors to successfully target foreign and domestic corporations. Thus the U.S. government could ramp up prosecutions and yet provide the same "neutrality" for transnational business competition—that is, initially failing to enforce the FCPA before the OECD Convention and then bringing domestic and extraterritorial cases after the treaty. Federal prosecutions take several years to investigate and prosecute, so there is a natural lag between the event (here, the OECD Convention) and legal outcomes (FCPA convictions or settlements with domestic and foreign corporations). The next Section explores this dynamic in greater depth.

B. Assessing the Change in Enforcement

This Section examines the elements that ended the FCPA's enforcement silence and created today's vigorous enforcement regime. Two factors were critical in allowing the U.S. government to change its approach to enforcement in a manner that was politically viable. The first was the negotiation and conclusion of the OECD Convention. The treaty provided three essential components of the current enforcement picture: it created a consensus among the major exporting countries that foreign bribes should not be tolerated, it led to cross-national cooperation in gathering evidence to prosecute cases, and it held off foreign government resistance to the prosecution of "their" corporations. The second was the eventual passage of the Sarbanes-Oxley Act.[183] The Sarbanes-Oxley Act did not come into existence until 2002, so it was not

[182] See Vogl, supra note 36; Hotchkiss, supra note 12, at 108; Mathews, supra note 66, at 305–08; Tarullo, supra note 61, at 677.

[183] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7201 note (2012)).

part of the initial U.S. government decision to reinvigorate FCPA enforcement. However, the passage of Sarbanes-Oxley provided DOJ and SEC attorneys with a much wider toolkit to prosecute FCPA cases and was almost certainly a cause of the spike in FCPA cases in the mid-2000s.

This Section unpacks the history of FCPA enforcement with reference to American business competitiveness concerns and the U.S. government's strategy for addressing these concerns. The entry into force of the OECD Convention allowed the U.S. government to implement a new strategy toward enforcement that did not decrease the competitiveness of American businesses. The passage of Sarbanes-Oxley then sped up this enforcement trend.

1. Revisiting the FCPA's First Two Decades

From the outset, it seemed that the FCPA would be a difficult statute to enact and defend from repeal.[184] The statute arguably was quite costly to American businesses, depriving them of the ability to compete for international contracts against foreign multinational corporations, which were not similarly regulated.[185] The FCPA was also allegedly costly to the American economy, exacerbating U.S. trade deficits and undermining U.S. competitiveness in overseas markets.[186]

In the first two decades after the enactment of the FCPA, American business losses from the statute were arguably moderate to low.[187] While the statute existed on the books, the DOJ and SEC did not make the FCPA a priority and did not dedicate substantial resources toward its enforcement.[188] While the existence of anti-bribery laws on the books might well have deterred some American businesses from bribing

[184] Gutterman, supra note 28, at 109–11.

[185] Id. at 114; GAO Report, supra note 64, at 17.

[186] GAO Report, supra note 64, at 14.

[187] See supra Section III.A; see also Cleveland et al., supra note 15, at 217 (arguing that, in its first two decades, the FCPA's "expected cost [to American companies] was close to zero").

[188] Cleveland et al., supra note 15, at 205. In the first five years, only one company was prosecuted for overseas bribery and was fined a mere $50,000. See Plea Agreement, United States v. Kenny Int'l Corp., No. 79-CR-372 (D.D.C. filed Aug. 2, 1979). In the first ten years of the statute, the DOJ brought a total of fourteen cases and, again, settled these cases for low monetary fines.

foreign government officials, both the risk of getting caught and the sanctions for a violation did not support a high level of deterrence.[189] National business groups certainly lobbied for changes to weaken the law, including heightened knowledge requirements (thus making payments to intermediaries an easier way to bribe) and lower accounting standards (making such payments easier to hide).[190]

Much of what business groups wanted—very light monitoring and sympathetic settlements—could better be achieved through unilateral executive branch action.[191] With the election of President Reagan in 1981, the executive branch was particularly concerned with the U.S. trade deficit and maintaining U.S. competitiveness.[192] Reagan appointees were openly skeptical of the FCPA, further lowering expectations of enforcement.[193] In effect, American firms could continue to see bribery as a (slightly higher) cost of doing business internationally. This is not to say that bribery was (or is) a good business model, but rather that American businesses' perceived costs of the FCPA were likely not overly significant through the first twenty years.[194]

During the mid-1990s, some major American businesses started to change their views concerning what their preferred level of FCPA enforcement was.[195] Most notably, GE determined that it did not want to weaken the FCPA but, rather, to apply it to more firms, both in the United States and overseas.[196] GE was one of the few companies prosecuted for an FCPA violation in the early 1990s. In 1992, the DOJ alleged that GE had paid $11 million in bribes while selling aircraft

[189] See SEC Officials Predict More FCPA Cases in Near Future, supra note 15, at 608 (noting that the FCPA had not been at the forefront of the minds of corporate executives due to the SEC's lack of enforcement).

[190] Gutterman, supra note 28, at 114–18.

[191] In 1988, the business groups did successfully lobby Congress to amend the statute, but the changes did not substantially weaken the formal legal constraint. See supra Section I.A.

[192] Gutterman, supra note 28, at 115–17.

[193] Id. at 117, 122.

[194] See Schmidt & Frank, supra note 12 (discussing how American businesses had been ignoring the FCPA as the DOJ and SEC failed to enforce the statute's provisions).

[195] Tarullo, supra note 61, at 675; Michael Gadbaw, A 21st Century Strategy for Combating Corruption, Speech to Center for Strategic and International Studies (Jan. 21, 2014).

[196] Heineman, supra note 61 (discussing the desire to level up rather than weaken enforcement of the FCPA).

engines to the Israeli government (the deal netted GE $300 million in revenue).[197] GE settled the case and agreed to penalties totaling $68.5 million.[198] While the penalties were modest given GE's size and revenue from the project, Jack Welch, GE's CEO, reportedly determined that GE would establish internal systems to make sure that such corrupt payments would not be repeated.[199]

GE determined that if it was going to play by strong anti-bribery rules, then it wanted its competitors, foreign and domestic, to do so as well.[200] GE and other like-minded American firms became very active in lobbying at home and overseas for more robust anti-bribery measures.[201] American companies became key players in the International Chamber of Commerce (the major business group that pushed for the negotiation and ratification of the OECD Convention) and helped support NGOs such as Transparency International.[202]

This shift in the outlook of American businesses toward foreign corruption was necessary for the political viability of strong FCPA enforcement. It produced a demand among large American multinational companies (such as GE, Boeing, and Merck) to increase enforcement globally.[203] The key was to make these anti-bribery rules effective against domestic and foreign competitors. To do so, these American businesses joined the U.S. government (specifically, the new Clinton Administration) in pushing other developed economies to adopt similar rules.[204]

[197] See FCPAC, supra note 145, Enforcement Action 22.

[198] Id.

[199] Author Interview with Michael Gadbaw, supra note 71. Welch viewed corruption as a "quality issue." He decided that just like having systems that would catch engine failures, the company had to establish procedures to end any foreign corruption. Id.

[200] Heineman, supra note 61.

[201] Vogl, supra note 36, at 180–81.

[202] Id.

[203] Id.; see also Goldhaber, supra note 140 (discussing how American businesses were pushing for international anti-bribery laws as far back as the Reagan administration but that their lobbying efforts did not pay off until the late 1990s).

[204] Tarullo, supra note 61, at 675–76.

2. The Effects of the OECD Convention

The negotiation and conclusion of the OECD Convention represented an agreement by all of the major exporting countries that foreign bribery was illegitimate and should be criminalized. Countries further agreed to provide each other with mutual legal support for any national prosecution. While the OECD Convention has been described as disappointing in its stated goal of having every OECD member aggressively enforce foreign anti-corruption laws,[205] it has been incredibly effective in enabling a robust and broadly extraterritorial enforcement of the FCPA by American regulators. The OECD Convention was (and is) instrumental in allowing the United States to establish a strong enforcement regime that covers most major multinational firms. The treaty did not turn out to be effective in the manner that the designers had expected, namely establishing multiple nation-based enforcement centers.[206] But the treaty nonetheless has been responsible, at least in part, for ushering in a new era of foreign anti-bribery law enforcement. The treaty has been incredibly effective in increasing anti-bribery enforcement by enabling robust U.S. efforts. OECD member states support these American enforcement efforts, in part through active evidence collection, even though these states do not bring many cases of their own.[207]

This Article argues that the OECD Convention is an essential part of the modern FCPA enforcement approach because it has established a clear path for prosecuting American and foreign firms equally. In this sense, other countries' enforcement was not necessary (although their cooperation with prosecutions was) for the treaty to be effective, because the United States could prosecute dominant American and

[205] Id. at 666–67 (describing the OECD Convention as ineffective); Heineman, supra note 61.

[206] Author Interview with Michael Gadbaw, supra note 71. More OECD nations are now becoming serious enforcers of their own national foreign anti-bribery statutes. See Transparency International Report, supra note 141, at 7; Brewster OECD, supra note 73, at 109; Spahn, supra note 89, at 1. For a discussion of why other nations have increased their enforcement, see Kaczmarek & Newman, supra note 89, at 760. For a discussion of where the international regime might be headed, see Rachel Brewster & Christine Dryden, Building Multilateral Anticorruption Enforcement: Analogies Between International Trade & Anti-Bribery Law (unpublished manuscript) (on file with author).

[207] See infra notes 228–38 and accompanying text.

foreign firms on its own. This capability to increase enforcement dramatically, but not hurt the international competitiveness of American businesses abroad, was a critical issue, one that the U.S. government and some American corporations had been working toward for years. With other major exporting countries in agreement that foreign bribery was an activity that must be condemned and prosecuted, American prosecutors had the legitimacy and the cross-national legal assistance to enforce the FCPA against foreign and domestic companies.

The OECD was decisive because it provided three valuable pieces to the enforcement puzzle: social, political, and legal justifications for American prosecutions. While U.S. prosecutors had long had broad jurisdictional authority over foreign companies,[208] they did not have foreign government support for these claims, which made prosecutions difficult. The treaty addressed these issues and provided a path for greater American enforcement. Table 3 summarizes these effects.

Table 3: Causal Effects of the OECD Convention on U.S. Enforcement

Social Effects	(1) Cements the growing consensus that foreign bribery should not be tolerated. (2) Establishes a binding legal principle that member governments must criminalize foreign bribery in their domestic law.
Political Effects	(1) Resolves the collective action concern of OECD states that they will suffer adverse economic effects unless they act in unison. (2) Provides for the very broad use of states' extraterritorial jurisdiction in prosecuting foreign bribery.
Legal Effects	(1) Demands nations aid each other in the collection of evidence through formal channels. (2) Creates anti-bribery offices in other OECD countries whose regulators provide information sharing formally and informally.

[208] Prosecutors had jurisdiction for issuers (including ADRs) but did not (pre-1998) have the broad territorial jurisdiction that they now possess. See supra Section I.A.

First, the OECD Convention solidified the changing social understanding of foreign corruption by NGOs, the World Bank, and development economists into a clear and unequivocal rejection of foreign bribery by OECD governments. This was a significant step in building a government consensus against tolerance of bribes. Foreign governments had resisted previous U.S. treaty overtures and anti-bribery prosecution because they did not agree with the policy. The treaty effectively eliminated the argument that the United States was being morally imperialistic and unreasonable in bringing criminal cases against firms for foreign corrupt practices.[209]

Until the OECD Convention established that these acts should be criminalized, there was a veneer of legitimacy to foreign "improper payments." OECD governments might not accept corruption as legitimate in their own country, but it was acceptable abroad. For instance, British Trade and Industry Minister Lord Young opined, "When you are talking about kickbacks, you're talking about something [that] . . . you wouldn't dream of doing . . . here. But there are parts of the world I've been to where we all know it happens. And if you want to be in business, then you have to do [it]."[210] Other national leaders viewed corruption as a legitimate means of competing with American economic and political power.[211] A World Bank official recounts that:

> Swedish diplomats explained to me . . . that it was all very well for the United States to tell its arms manufacturers not to pay foreign bribes

[209] See Michael J. Hershman, Criminalized Foreign Bribery Will Improve Trade, Nat'l L.J., Apr. 27, 1998, at A23 ("[T]he OECD treaty will directly challenge those countries that have resisted change and have continually claimed that America was simply trying to export its own brand of morality.").

[210] Fredrik Galtung, supra note 109, at 19–20 (also cited in Carozza, supra note 110, at 2). Galtung also quotes a German source, noting:

> Father Lay, a leading German theologian and management consultant on business ethics, went so far as to state . . . that the only "moral issue pertaining to corruption in international trade is jobs," by which he presumably meant the potential loss of jobs—in particular, German jobs—that might ensue from corruption exposure and prosecution.

Id. at 20; see Abbott & Snidal, supra note 21, at S158–59.

[211] See Cockcroft, supra note 69, at 112, 156 (discussing foreign industrial resistance to the OECD and noting that "Prime Minister Callaghan of the UK was reported to have said that his country, with an eye on arms sales to the Middle East, 'could not afford [domestic legislation comparable to the FCPA]'").

> while at the same time deploying the huge power of the White House and US embassies around the world to twist the arms of host governments to buy American products. . . .
>
> Similar attitudes prevailed in many European governments. A senior French official told me that in the arms industry the French were forced to use bribes to compete with the major American companies, which received huge subsidies from the Pentagon and the US Export-Import Bank . . . .[212]

The OECD agreement was an unmistakable statement that foreign bribery was illegitimate and could not be justified by a nation's commercial interests, such as maintaining jobs or promoting exports, or foreign policy.[213] The treaty not only crystallized the growing social opposition to foreign bribery, but it also established as a hard legal principle that all OECD states must criminalize such activity in their own national law. The OECD demand to prohibit foreign bribery was particularly strict. Article 5 of the treaty emphasized that enforcement "shall not be influenced by considerations of national economic interest, the potential effect of relations with another State or the identity of the natural or legal persons involved."[214]

This joint agreement to an anti-corruption principle contradicted foreign governments' previous position that the U.S. policy did not reflect other major exporting countries' policies or values.[215] The OECD Convention was a major breakthrough in constituting a new international legal regime that upended older views of corruption as harmless and acceptable.[216] Anti-bribery efforts were no longer a naïve,

[212] Vogl, supra note 36, at 181.

[213] See Peter J. Cullen, Article 5: Enforcement, *in* The OECD Convention on Bribery: A Commentary 289, 289–93 (Pieth et al. eds., 2007).

[214] OECD Anti-Bribery Convention, supra note 137, art. 5.

[215] See Mark Pieth, Introduction *to* The OECD Convention on Bribery: A Commentary, supra note 213, at 3, 14–19 (discussing the OECD parties' 1997 informal agreement to criminalize foreign bribery and the transition to the formal Convention with an anti-corruption "system").

[216] Contemporary commentators also viewed the OECD as a significant breakthrough in terms of rejecting corrupt practices. See Matt Morley, Combatting Bribery, Nat'l L.J., Mar. 27, 2000, at B7 (law firm partner and corporate department head arguing that the OECD "convention represents an enormous step towards global anti-bribery standards"); Goldhaber, supra note 140 (observing that "[b]y far the most important step that non-U.S. players have taken against corruption came in 1998 with the signing of the OECD [treaty]");

overly moralistic American ideal. As a result, foreign governments were no longer able to push back against U.S. prosecutions as foreign interference that represented unique American norms or policies.[217]

On the social dimension, the OECD Convention was itself a consequence of much of the policy debate about the harms of bribery in the World Bank and elsewhere. The treaty was clearly following the anti-corruption social movement and reflected the views of government officials that the status quo of openly permitting (if not subsidizing) foreign corruption by domestic corporations was probably unsustainable. Nonetheless, the OECD Convention was itself important because it represented a turn from a diffuse change in the social understanding of bribery to a legal regime binding on all major exporting governments. The treaty was not inevitable.[218] The binding nature of the convention (an exception to the OECD's normal practice of issuing nonbinding recommendations) and the strong principles against foreign bribery all represented significant moves forward in cementing a new government consensus that foreign corruption was no longer tolerable. The U.S. negotiators advocating for the treaty were not ahead of the anti-bribery social movement; however, they did not waste the opportunity presented to secure a legal agreement.[219]

The OECD Convention also solved two political problems for OECD countries. The first was one of assurance among OECD members that they would act collectively. The OECD's major exporting states were concerned that if they did not act in unison then they might suffer economic losses. This concern was evident in the OECD Convention's notable provision that the treaty would not enter into force until "five of the ten countries which have the ten largest export shares . . . and which represent by themselves at least sixty per cent of the combined total

Matt Kelly, Mobil Investigation May Be Harbinger: FCPA Probes on the Rise, Nat'l L.J., May 26, 2003, at 13 (noting that the OECD Convention's standardization of international anti-corruption rules in 1998 was critical to bringing extraterritorial enforcement actions).

[217] See Hershman, supra note 209 (discussing how one of the major effects of the OECD Convention will be to end the perception that American officials were simply exporting their own unique brand of morality).

[218] See Tarullo, supra note 61, at 668–80; see also Kenneth W. Abbott, supra note 101, at 278–79, 293–94 (discussing the failure to achieve these policy goals in GATT/WTO negotiations); Gadbaw & Richards, supra note 130, at 231–34 (similarly discussing the difficulty of achieving any of these goals through WTO negotiations).

[219] Abbott & Snidal, supra note 21, at S164, S167; Tarullo, supra note 61, at 678–79.

exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification."[220] The treaty provided major exporters with reassurance that they would not undercut each other's anti-bribery efforts in an attempt to win greater foreign market share.

The treaty also solved an American political problem of jurisdictional aggressiveness. While U.S. law may allow prosecutors broad extraterritorial jurisdiction or permit Congress to adopt policies that affect foreign business, such uses for adjudicative or legislative jurisdiction can lead to pushback by foreign governments.[221] Other governments can threaten to retaliate by targeting American firms or otherwise impose political costs on the broad exercise of American jurisdictional power.[222] Even if the foreign governments agree with the principles being promoted, they can object to the means by which countries promote these principles. The FCPA had long included jurisdiction for prosecutors to act with only minor territorial ties, but the use of this jurisdiction, without multilateral consent, could be controversial abroad and counterproductive to promoting legal assistance.

To address claims that the FCPA would be jurisdictionally overreaching by pursuing foreign persons or corporations with limited territorial ties to the United States, American negotiators included very broad bases for jurisdiction into the OECD Convention. Article 4 highlights that countries "shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."[223] The

[220] OECD Anti-Bribery Convention, supra note 137, art. 15.

[221] See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction." (citations omitted)).

[222] Such threats are not uncommon. See, e.g., Gernot Heller & Alissa de Carbonnel, Germany Threatens Retaliation if U.S. Sanctions Harm Its Firms, Reuters (June 16, 2017), https://uk.reuters.com/article/uk-usa-russia-sanctions-germany/germany-threatens-retaliation-if-u-s-sanctions-harm-its-firms-idUKKBN19715L [https://perma.cc/V24Z-HWNR] (discussing German threats of retaliation if American sanctions on Russia included German firms that had outstanding contracts with Russia).

[223] OECD Anti-Bribery Convention, supra note 137, art. 4(1). The article also permits claims against nationals acting anywhere in the world without any territorial ties. See id. art. 4(2). Pursuing nationals is less controversial than pursuing non-nationals when there are only limited territorial ties.

official commentary states that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[224] This explicit multilateral endorsement of broad jurisdictional rules provided for American FCPA enforcement when any act in furtherance of a foreign bribe touched on American territory, including uses of the American banking system.[225] As Professor Mark Pieth, an observer of the negotiations, stated, "The Convention interpretation is clear: even the slightest of connections is sufficient."[226] By unambiguously endorsing a very broad jurisdictional approach, the OECD Convention blunted foreign government objections that the FCPA jurisdictional provisions were overly aggressive.[227] As a result, it was politically more difficult for foreign governments to threaten retaliation in response to FCPA prosecutions.

Finally, the treaty addressed the critical legal problem of collecting evidence. Before the OECD Convention, the lack of cooperation in

[224] OECD Anti-Bribery Convention, supra note 137, cmt. 25.

[225] See Mark Pieth, Article 4: Jurisdiction, *in* The OECD Convention on Bribery: A Commentary, supra note 213, at 267, 276–77.

[226] Id. at 277.

[227] Although FCPA cases are often called "extraterritorial," there is always some territorial connection to the defendant when the defendant is not a national and is thus addressed by the OECD interpretation. The territorial connection may not be the offer or acceptance of the bribe but may instead be some other territorial connection such as depositing the bribe in an American bank account. These cases are nonetheless referred to as extraterritorial because some key elements did occur outside the nation's territory. The U.S. Supreme Court has found cases to involve the extraterritorial application of American law notwithstanding territorial links to the claim. See Morrison v. Australian Nat'l Bank Ltd., 561 U.S. 247, 266 (2010) (finding that whether a claim involves an extraterritorial application of law "[i]s not self-evidently dispositive, but . . . requires further analysis. For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States . . . . In *Aramco*, for example, the Title VII plaintiff had been hired in Houston, and was an American citizen. The Court concluded, however, that neither that territorial event nor that relationship was the 'focus' of congressional concern but rather domestic employment." (citations omitted). Thus the claim involved an extraterritorial application of the law.).

Completely non-territorial prosecutions are possible for nationals. 15 U.S.C. § 78dd-2(i)(1) (2012). For natural persons, nationals include U.S. citizens or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States," but not permanent residents. 8 U.S.C. § 1101(a)(22); see 15 U.S.C. § 78dd-2(i)(2); Donald Zarin, The Foreign Payments Provisions, *in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks 11, 28 & n.33.5 (Lucinda Low et al. eds., 2007). For legal persons, nationals include corporations incorporated in or with a principal place of business in the United States. 15 U.S.C. § 78dd-2(i)(2); see Zarin, supra, at 28.

evidence gathering was a severe problem to bring cases against foreign corporations. OECD governments, resisting the idea that foreign bribery should be prosecuted, refused to cooperate with American efforts.[228] Without access to key documents, prosecutors might have had the jurisdictional power to charge foreign corporations but were hamstrung in their efforts to bring FCPA cases against foreign firms.[229]

The OECD Convention has promoted information sharing both formally and informally. On a formal level, the treaty committed governments to providing mutual legal assistance in gathering evidence and sharing information.[230] Prosecutors can make requests to their overseas counterparts for documents or to find individuals. This formal legal assistance is frequently acknowledged by the DOJ in their settlements.[231] Aid in evidence gathering also often occurs in a less formal and less centralized manner. Investigators and prosecutors are able to reach out to foreign counterparts without necessarily going

[228] Kelly, supra note 216 (observing that, until the OECD Convention, FCPA "cases have been difficult to prove because other nations didn't bother to cooperate with U.S. authorities").

[229] Id.; Goldhaber, supra note 140 (discussing how the OECD has finally extended the reach of the FCPA by promoting cross-national evidence sharing).

[230] Timothy L. Dickinson et al., The Year in Review, *in* White Collar Crime 2009: Prosecutors and Regulators Speak 677, 685 (James Benjamin, Jr. & Claudius Sokenu eds., 2009) ("The Siemens and KBR cases illustrate new levels of international collaboration. The SEC press release regarding the KBR settlement thanked law enforcement entities in France, Italy, Switzerland, and the United Kingdom for their assistance. At a press conference announcing the Siemens settlement, U.S. Attorney for the District of Columbia, Jeffrey A. Taylor, praised the working relationship established among enforcement authorities in the U.S. and Germany, stating that 'the coordinated efforts . . . in this case set the standard for multinational cooperation in the fight against corrupt business practices.'").

[231] See, e.g., Press Release No. 10-209, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010) (recognizing British assistance); Press Release No. 09-112, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009) (recognizing that "[s]ignificant assistance was provided by the SEC's Division of Enforcement and by the authorities in France, Italy, Switzerland and the United Kingdom"). There is reason to believe that there is more cooperation than is publicly acknowledged. The U.S. prosecution of a home corporation is not politically popular, and foreign counterparts might find that publicly cooperating with the United States is not a career advancing move. In these instances, foreign officials have been known to quietly pass information and evidence over to U.S. authorities. See Author Interview with Frank Vogl, supra note 71 (discussing such instances).

through their national governments.[232] As a result, cooperative relationships can form even without the encouragement (or even with the discouragement) of high-level political (and often elected) leaders.[233]

In addition, the OECD's requirement that countries enact domestic laws to criminalize bribery has created government offices whose regulators are responsible for investigating claims of bribery. Even if foreign governments do not prosecute many cases themselves, the fact that all OECD states have government offices with jurisdiction over foreign corrupt practices provides American officials with a host of foreign regulators who share their mandate.[234] These foreign investigations can be fertile ground for evidence sharing. For instance, the French government's investigation into Technip's bribery of Nigerian officials resulted in tips to American officials regarding Technip's and Halliburton's activities in Nigeria.[235] Similarly, the American case against BAE Systems ("BAE") was built on the British investigations into the company, an investigation that was shut down for political reasons in the United Kingdom but later resulted in a joint U.S.-U.K. settlement.[236]

Through formal and informal channels, the OECD Convention has resulted in much more transnational cooperation in evidence gathering.[237] Both the treaty's legal obligations and greater foreign law enforcement interest in corruption has resulted in more investigations and greater willingness to share evidence.[238] This expanded cooperation has been critical to a spike in successful American prosecutions.[239]

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[232] Alan W.H. Gourley & Carrie F. Fletcher, Combating Corruption: Lessons and Trends from 2008 FCPA Enforcement, Int'l Gov't Contractor, Jan. 2009, at 4–5 (discussing how international cooperation occurred at the sub-national level in Germany and France).

[233] Author Interview with Frank Vogl, supra note 71.

[234] Goldhaber, supra note 140 (observing that "the new OECD laws have spawned a worldwide cadre of corruption regulators that can cooperate with U.S. corruption fighters").

[235] Id.; see also Kelly, supra note 216 (discussing how foreign tips and evidence sharing have resulted in several FCPA cases).

[236] Guardian BAE files, supra note 126.

[237] Kelly, supra note 216 (discussing the effects of the OECD Convention on evidence sharing in specific cases); Goldhaber, supra note 140 (same).

[238] Even in the early years of the OECD Convention, commentators noted the importance of foreign evidence sharing to American prosecutions. See Raymond Banoun, Corporate Self-Policing Avoids Trouble, Nat'l. L.J., June 17, 2002, at B13 ("The number of [bribery] investigations of such questionable payments and the misuse of corporate assets has soared

The OECD Convention was fundamental to the U.S. strategy of providing international-competition neutral enforcement, not because it depended on other OECD countries also enforcing their laws, but because it opened a legal and politically clear path for enforcing the FCPA against foreign and domestic firms. The DOJ and the SEC then proceeded down this path.

U.S. government officials were not shy in advertising their transnational enforcement strategy. Top officials at the DOJ were (and are) clear that they planned to pursue a cross-national portfolio of FCPA cases as a means of leveling the playing field of international commerce. Former Assistant Attorney General Lanny A. Breuer, after making a more general argument that anti-bribery laws were good for business by ensuring the integrity of international markets, explicitly argued that the FCPA did not hurt U.S. business because of the scale of foreign prosecutions:

> Another unfounded criticism that I'm aware of is that FCPA enforcement puts American businesses at a competitive disadvantage vis-à-vis their foreign counterparts. I could not disagree more. First, we 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.
>
> Second, the United States, through its FCPA enforcement efforts, leads by example; and other countries are following.[240]

as a result of increasing international cooperation by law enforcement agencies."); Kelly, supra note 216 (discussing the importance of the greater evidence sharing to successful FCPA prosecutions in the late 1990s and early 2000s).

[239] Dickinson, supra note 230, at 5–6; see Gourley & Fletcher, supra note 232, at 4–5.

[240] Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrupt [https://perma.cc/9Y5M-RNZE]. Breuer's more general anti-bribery message was:

> [T]here are some who have suggested recently that FCPA enforcement is "bad for business." To me, this is a little like saying that our public corruption prosecutions are "bad for government." It's exactly upside down. As Attorney General Holder explained to an audience earlier this year, bribery in international business transactions weakens economic development; it undermines confidence in the marketplace; and it distorts competition.

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 DOJ's effort to address corruption's long-term harm in emerging markets, noting:

> But let me be very clear about one point. We are not combating corruption and enforcing the FCPA just because it is good for the Justice Department. We are doing so because it is good for U.S. business.
>
> For those of you who are employed by or represent U.S. companies that want to play by the rules, the Justice Department's FCPA enforcement efforts benefit you and your clients.
>
> By enforcing the FCPA, and by encouraging our counterparts around the world to enforce their own anti-corruption laws, we are making sure that your competitors do not gain an unfair advantage when competing for business overseas.[241]

Fisher then continued by highlighting the DOJ's FCPA case against the Norwegian company Statoil.[242]

> So let me be perfectly clear about the Justice Department's views on that topic: FCPA enforcement is not bad for business; it is, instead, vital to ensuring the integrity of our markets. Our FCPA enforcement program serves not only to hold accountable those who corrupt foreign officials, but in doing so it also serves to make the international business climate more transparent and fair for everyone. FCPA enforcement both roots out foreign corruption and deters it from taking hold in the first place.

Id.

[241] Alice S. Fisher, Assistant Attorney Gen., U.S. Dep't of Justice, Prepared Remarks of Alice S. Fisher, Assistant Attorney General United States Department of Justice at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), at 2–3, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/10-16-06AAGFCPASpeech.pdf [https://perma.cc/KZ7A-4Y32]. Other contemporary sources also discuss the DOJ and SEC strategy of expanding their enforcement targets to foreign and domestic firms. See Goldhaber, supra note 140 ("The biggest news for bribers is that Foreign Corrupt Practices Act (FCPA) investigations have spiked, and companies abroad are being targeted. If foreign palms are getting less greasy, it's because foreign bribers fear the long arm of U.S. law.").

[242] Fisher, supra note 241, at 3. For other discussions of Fisher's FCPA strategy, see Nelson D. Schwartz & Lowell Bergman, Payload: Taking Aim at Corporate Bribery, N.Y. Times (Nov. 25, 2007), http://www.nytimes.com/2007/11/25/business/25bae.html.

The results of this strategy are immediately noticeable looking at the top ten all-time FCPA fines. The Table suggests (but does not demonstrate) that the U.S. government is concerned with not imposing a disproportionate burden on U.S. businesses. Seven of the top ten cases are foreign firms; the top U.S. fines come in at third, fourth, and eighth.[243] France alone has as many companies on the top ten list (second, sixth, and tenth) as the United States. Foreign firms also hold the number eleven and twelve spots.[244]

This Table (while suggestive) does not control for the size of the bribe, the level of corporate benefit from the bribe, the degree to which top management was involved in the bribery scheme, the level of cooperation with U.S. officials, or the quality of evidence; so it is not evidence that the DOJ and SEC are making sure that as many foreign firms face prosecution as American ones. However, some commentators have maintained that the U.S. policy of seeking high fines against foreign firms is discriminatory and violates general international legal principles of equal treatment before the law.[245] While most commentators (including the author) would strongly resist the idea that the DOJ or SEC are purposefully discriminatory toward foreign firms, one study has found that foreign firms face higher FCPA fines than American ones.[246] Professors Stephen Choi and Kevin Davis find that the DOJ assesses greater FCPA penalties against foreign firms than domestic ones, even accounting for the size of the bribe and whether the firm voluntarily disclosed the illegal activity, although not controlling

[243] This Table aggregates data from the FCPAC, supra note 145, and Cassin, Reconsidered Top Ten List, supra note 173.

[244] Eleventh place is held by JGC Corporation (Japan) with a $218.8 million resolution in 2011; the twelfth-place finisher is Daimler AG (Germany) with a $185 million resolution in 2010. As noted supra note 173, Teva Pharmaceuticals (Israel) and Odebrecht/Braskem (Brazil) also settled FCPA cases in 2016 that could be considered as top ten, though there remains some debate as to aggregation of value of settlement across national sanctions and across corporate subsidiaries. See Richard L. Cassin, Reconsidered Top Ten List, supra note 173.

[245] Annalisa Leibold, The Extraterritorial Application of the FCPA Under International Law, 51 Willamette L. Rev. 225, 253–60 (2015) (arguing that the United States' "targeting" of foreign firms for FCPA prosecution is a violation of international law and has the effect of giving U.S. companies an unfair competitive edge in the global marketplace).

[246] Choi & Davis, supra note 178, at 409, 440.

for the quality of the evidence, the participation of senior executives, or the level of cooperation.[247]

At minimum, there is little doubt that American officials are interested in pursuing cases against foreign, as well as domestic, companies. This U.S. government strategy of lowering the *competitive costs* of the FCPA to American firms is not accidental. While violations of the FCPA are certainly costly for American firms that make illicit payments overseas, the U.S. government strategy is not to make it disproportionately harmful to American industry compared to other major exporting states. It is important to emphasize that the DOJ and SEC appear to be even-handed in their application of the FCPA. Most FCPA cases are brought against American companies or their foreign subsidiaries.[248] The largest fines have been against foreign corporations, but there is not strong evidence that these settlements are unrelated to important sentencing factors such as the level of executive involvement in the corrupt practices and the quality of the evidence. The U.S. government also primarily brings cases when the foreign firms' home regulators have failed to act. When other national prosecutors have adopted strong enforcement policies, the DOJ and SEC have been willing to defer to those prosecutions.[249]

The OECD Anti-Bribery Convention allowed U.S. authorities to achieve a competition-neutral strategy by making use of the FCPA's (long dormant) expansive jurisdiction. U.S. prosecutors had the jurisdiction to bring these cases since the FCPA's 1977 enactment, and several post-1977 legal and economic developments widened the FCPA's long-standing jurisdictional net. The original FCPA statute gave U.S. authorities jurisdiction over any company, foreign or domestic, that listed on an American exchange. At the time, there were few foreign companies that did so—although some offered American Deposit Receipts ("ADRs"). In 1977, the SEC did not classify the foreign companies offering an ADR (which is essentially a dollar-denominated mirror of a foreign listing) as issuers under its information-supplying

[247] Id. at 419–20, 424, 440.

[248] FCPAC, supra note 145.

[249] An example is the U.K. Serious Fraud Office's ("SFO") anti-bribery prosecution against Rolls Royce. In that case, American prosecutors not only deferred but also provided legal support to the SFO. See Author Interview with SFO officials (Apr. 21, 2016) (on file with the Virginia Law Review Association).

exemption for certain offerings.[250] In the early 1980s, however, the SEC changed its definitions and classified foreign issuers of exchange-listed ADRs as subject to SEC treatment as "issuers," which brought them under FCPA coverage.[251] At the time, the number of foreign-issuer

[250] The SEC adopted Rule 12g3-2 in 1967 in the course of implementing the 1964 amendments to the Exchange Act. This rule allowed the SEC to exempt certain foreign securities from registration. U.S. Sec. & Exch. Comm'n, Release Notice, Release No. 8066, 32 Fed. Reg. 7845, 1967 WL 88908 (Apr. 28, 1967). Among the types of securities issued by foreign issuers specifically eligible for exemption under Rule 12g3-2 were ADRs. Id. at 7847 ("American Depositary Receipts for the securities of any foreign company are also exempted from registration under Section 12(g) [now 15 U.S.C. § 78l(g)] of the Act. These ADR's are exempt because their registration by the issuer of the receipt would provide investors with no significant information concerning the deposited securities.").

Exemptions for ADRs were available if the foreign issuer provided the SEC with the information the foreign issuer provided to its own foreign regulator. Id. ("The exemption will continue so long as all such information continues to be furnished promptly after it is made public or sent to security holders. The required information may be furnished either by the issuer or by a government official or agency of the issuer's country. Issuers exempt under this provision are not required to file reports pursuant to Section 13 of the Act.").

[251] In 1982, the SEC issued a notice "publishing for comment revisions of a current rule exempting certain foreign securities from registration under the Securities Exchange Act of 1935 that would generally treat foreign securities quoted in NASDAQ the same as foreign securities listed on a United States ('U.S.') exchange." U.S. Sec. & Exch. Comm'n, Foreign Securities, Release No. 6433, 1982 WL 529098, at *1 (Oct. 28, 1982). The changes were intended to address in part the practice of foreign issuers utilizing Rule 12g3-2 exemptions to list on NASDAQ (which was, at the time, not considered a traditional exchange, but, rather, an "automated interdealer system for electronically disseminating quotations"). Id. at *2. The SEC noted that participation in and listing on NASDAQ (and utilization of similar mechanisms involving quotations, like ADRs) constituted behavior sufficiently voluntary to fall under the regulatory ambit of "issuing" a security. Id.

Because most ADR-issuing foreign firms fit into a similar "information-supplying exemption," similar treatment of the ADR exemptions made its way into the final promulgated rule. In both instances, the SEC took issue with the inadequacy of the "information-supplying exemption" given the perceived equivalence of behavior in listing securities on such exchanges. Id. at *2, *4; Mark A. Saunders, American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies, 17 Fordham Int'l L.J. 48, 58–61 (1993) (discussing application of the "voluntarism principle" to ADR issuers on U.S. exchanges). In October 1983, the SEC adopted the proposed revisions. U.S. Sec. & Exch. Comm'n, Foreign Securities, Release No. 6493, 1983 WL 408103 (Oct. 6, 1983). The 1983 rules changed the definition of "Foreign Private Issuer" under the Securities Act to encompass all non-governmental foreign issuers. Id. at *6–7.

Exchange-listed ADRs were thereby brought under the ambit of SEC registration, and issuers of such ADRs were treated as foreign private issuers. Thus, all foreign issuers listing an ADR on American exchanges became issuers for the purposes of the Securities Act and the Exchange Act. Id.

ADRs was limited, but it had expanded notably by 1997, with almost all major multinational corporations listed on American exchanges (either directly or indirectly through ADRs). In addition, in passing the 1998 amendments to the FCPA, Congress expanded the statute's jurisdiction to include any bribery activity that touches U.S. territory. As a result, U.S. jurisdiction over foreign corporations is now very broad, including almost all major multinational corporations and many small- to medium-sized foreign enterprises.[252]

U.S. prosecutors gained another important tool in 2002 with the passage of the Sarbanes-Oxley Act ("SOX"). The Act was the first Congressional statute to regulate internal corporate controls since the FCPA's 1977 passage.[253] Enacted in response to the fraudulent accounting practices that were revealed by Enron's bankruptcy and other corporate accounting scandals, SOX was designed to increase the SEC's power over corporate governance.[254] The statute had a number of

While *exchange-listed* ADRs became subject to registration requirements and foreign issuers utilizing exchange-listed ADRs became regulated as issuers, there are certain classes of ADRs that are still eligible for exemptions. Under the modern framework, there are three levels of "sponsored" ADRs. See, e.g., Types of ADRs, Deutsche Bank https://www.adr.db.com/drweb/public/en/content/4233.html [https://perma.cc/G55F-F8PA] (last visited Oct. 22, 2017) (providing a primer on contemporary SEC treatment of ADRs). Level I ADRs are traded on over-the-counter securities markets and can qualify from registration exemptions under Rule 12g3-2. Id. Level II ADRs allow foreign firms to more directly access U.S. securities markets, can be listed on U.S. exchanges, and must be registered with the SEC. Id. Level III ADRs can be used to raise capital in a public offering, can be listed on U.S. exchanges, must be registered, and require the issuer to submit additional documentation to the SEC. Id. Functionally, the 1982–83 rule changes appear to have applied registration requirements to the previously exemption-qualified Level II and Level III ADR categories.

[252] 15 U.S.C. § 78dd-3 (2012). For an analysis, see Derek A. Cohen et al., The Ever-Expanding Jurisdiction in FCPA Cases, Corp. Couns. (Jan. 24, 2014), http://www.corpcounsel.com/id=1202639676547 [https://perma.cc/2P65-GENW].

[253] Weili Ge & Sarah McVay, The Disclosure of Material Weaknesses in Internal Control After the Sarbanes-Oxley Act, 19 Acct. Horizons 137, 139 (2005) ("Prior to SOX, the Foreign Corrupt Practices Act of 1977 (FCPA) was the only statutory regulation to address internal control . . . . The Sarbanes-Oxley Act does not substantially alter requirements for *maintaining* internal control over those expressed in the FCPA. Instead, SOX mandates new disclosures about and assessments of international controls.").

[254] Stavros Gadinis, From Independence to Politics in Financial Regulation, 101 Calif. L. Rev. 327, 342 (2013); see also Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 Yale L.J. 1521, 1523 (2005) (discussing the history of

provisions, but some of the most notable were Sections 302 and 404, which required, respectively, that corporations disclose their internal controls system and report their conclusions on the effectiveness of their internal controls to the SEC.[255]

These SOX provisions (which came with personal liability for corporate executives) grabbed corporations' attention.[256] These additional requirements had the effect of making corporations conduct more reviews of their internal control systems and, in doing so, determine whether they were complying with the FCPA.[257] This resulted in two outcomes that led to the late-2000s expansion of FCPA cases. First, prosecutors had greater tools to demand (now more comprehensive) corporate records and, thus, had better access to the evidence to bring FCPA cases. Second, corporations were conducting more internal investigations and discovering FCPA violations on their own.[258] Given the renewed vigor of the DOJ and SEC in prosecuting FCPA cases after 1997, many corporations chose to self-report their

SOX passage and being critical of the statute); Joel Seligman, No One Can Serve Two Masters: Corporate and Securities Law After Enron, 80 Wash. U. L.Q. 449, 451–52, 516 (2002) (reviewing the history and supporting the statute).

[255] Ge & McVay, supra note 253, at 139–40.

[256] Lawrence G. Baxter, Understanding Regulatory Capture: An Academic Perspective from the United States, *in* Making Good Financial Regulation: Towards a Policy Response to Regulatory Capture 53, 68–69 (Stefano Pagliari ed., 2012) ("These kinds of proposals tend to arouse great hostility from the industry, as we saw with the enactment of Section 404 of the Sarbanes-Oxley Act in 2002. Yet a vivid personal experience for me was the change in how fellow executives and I focused on financial reporting once we became aware that we were personally on the hook for their reliability. There is nothing like personal liability in the midst of great corporate brumes to focus the mind on what is important.").

[257] Karen T. Cascini & Alan DelFavero, An Assessment of the Impact of the Sarbanes-Oxley Act on Investigating Violations of the Foreign Corrupt Practices Act, 6 J. Bus. & Econ. Res. 21, 32 (2008) ("The passage of the Sarbanes Oxley Act of 2002 . . . has significantly increased the number of investigated violations under the Foreign Corrupt Practices Act of 1977. Since 2002, there have been more violations discovered than in all of the 1980's and 1990's combined. This is a clear indicator that SOx [sic] has enhanced the FCPA in this regard.").

[258] Priya Cherian Huskins, FCPA Prosecutions: Liability Trend to Watch, 60 Stan. L. Rev. 1447, 1449 (2008) (arguing that the increase in FCPA cases "may result from the tendency of companies in the post-Sarbanes Oxley world to conduct internal investigations and 'self-report' violations in hopes of gaining leniency from regulators").

violations to U.S. authorities with the aim of receiving more lenient treatment for their voluntary cooperation.[259]

Self-reporting has become an important aspect of FCPA enforcement. The DOJ encourages self-reporting (with the reward of more sympathetic settlement terms) in its speeches[260] and its resource guide.[261] Self-reporting allows the government to resolve more cases without necessarily increasing agency resources.[262] Companies often choose to self-report (although certainly not always) when they discover FCPA violations during internal investigations to resolve liability concerns. These internal investigations can themselves be quite costly (they are also large sources of revenue for law firms).[263] Walmart reportedly paid over $100 million in legal fees conducting its own internal investigation of its global operation after allegations of bribery in Mexico.[264] The *Wall*

[259] Id. ("Fearing the harsh penalties that the SEC and the DOJ may exact for failure to take FCPA concerns seriously, many companies today are quick to launch an internal investigation in the face of credible suspicion of a potential FCPA violation. For their part, the SEC and the DOJ have enthusiastically embraced the role that self-monitoring and cooperation play in assisting their investigations.").

[260] See Fisher, supra note 241, at 5–6 ("Let me begin with voluntary disclosures. When serious FCPA issues do arise, we strongly encourage you and your clients to voluntarily disclose those issues. I know that there is a concern out there that there is not enough certainty in the voluntary disclosure process. And frankly, there are good reasons for that . . . [but] [t]he fact is, if you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you will get a benefit. It may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit.").

[261] See Resource Guide to the FCPA, supra note 47, at 54 ("Under DOJ's Principles of Federal Prosecution of Business Organizations, federal prosecutors consider a company's cooperation in determining how to resolve a corporate criminal case. Specifically, prosecutors consider whether the company made a voluntary and timely disclosure as well as the company's willingness to provide relevant information and evidence and identify relevant actors inside and outside the company, including senior executives.").

[262] Drury D. Stevenson & Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775, 808 (2011) ("With limited resources at their disposal, federal prosecutors encourage companies to disclose cases in which the company believes it may have violated the FCPA. Doing so allows prosecutors to devote more of their time and energy towards prosecuting cases in which a suspected corporate wrongdoer has taken steps to conceal its corrupt practices.").

[263] Palazzolo, supra note 1.

[264] Peter J. Henning, Dealing with the Foreign Corrupt Practices Act, N.Y. Times (Mar. 4, 2013), https://dealbook.nytimes.com/2013/03/04/dealing-with-the-foreign-corrupt-practices-act/?_r=0 [https://perma.cc/V3EB-ASWZ].

Street Journal reported that the internal investigations of three companies—Avon, Walmart, and Weatherford International—collectively cost nearly a half billion dollars.[265] Self-disclosure also happens in the merger and acquisitions context when one of the parties discovers a potential FCPA violation and insists on resolving the issue before concluding the deal.[266]

The turn toward greater enforcement of the FCPA had already occurred by the time that SOX was passed in 2002—in terms of the number of investigations, attorney resources, and settlements[267]—but SOX accelerated enforcement. It gave prosecutors more mechanisms with which to investigate issuers (foreign and domestic), and it created incentives for firms to conduct internal investigations and self-report their findings to the government.

In sum, the robust FCPA regime that is familiar to commentators today emerged only once the United States had secured multilateral support for the legal principle that foreign bribery should be criminalized. The existence of a treaty was critical to this stark increase in enforcement because it established a legitimate basis for American prosecutors to go after domestic and foreign corporations. This made a competition-neutral enforcement strategy available to domestic prosecutors in the DOJ and SEC.

The effect of the OECD Convention on domestic enforcement strategies can be seen in the number of investigations and the resources each agency directed to FCPA cases. The ramp up in FCPA enforcement—in both prosecutions and penalties—did not take place until 1997, when negotiations for the OECD Convention successfully concluded. From 1997 to the late 2000s, the DOJ and SEC prosecuted 200 cases (more than five times the previous two decades) and dramatically increased the fines for violations.[268] It is during this period that the first blockbuster corruption cases emerged, with the DOJ reaching settlements with companies that included hundreds of millions of dollars in fines, the placement of monitors within firms to verify the

[265] Palazzolo, supra note 1.

[266] Lucinda Low et al., Global Anti-Corruption Standard and Enforcement: Implications for Energy Companies, 3 J. World Energy L. & Bus. 166, 177–78 (2010).

[267] See supra Section III.A.

[268] See supra Section III.A.

company's ongoing business practices, and significant prison sentences for corporate executives. Powerful multinational corporations like Siemens, Baker Hughes, and Halliburton settled with U.S. regulators and revised their business practices.[269]

CONCLUSION: INTERNATIONAL RESONANCE AND TREATY EFFECTIVENESS

While international resonance is theoretically important for understanding the pattern and practice of enforcing the FCPA, it has implications for other domestic statutory regimes as well. Competitive pressures on domestic corporations from national rules can create demand for government officials either to weaken the rules (reducing constraints through legislation or agency rulemaking or informally doing so by limiting enforcement) or to extend the rules to a broader audience, thereby decreasing the competitive costs by spreading them among a larger body of participants. This can create a feedback effect between domestic rules and international agreements. The existence of a domestic rule can generate the demand for the international agreement. Without the international agreement, the domestic statute may exist on the books but fail to have a significant policy impact. It is the presence of the international agreement—and either active or passive acceptance of the agreement among other countries—that allows the national government to make the statute effective. The domestic statute creates the demand for the international agreement, and the international agreement makes enforcement of the statute politically possible.

This feedback effect is discernible in the FCPA context. The FCPA existed on the books but was never seriously enforced by either the DOJ or the SEC until the U.S. government successfully negotiated the OECD Anti-Bribery Convention.[270] American companies loudly and consistently complained that they were disadvantaged in international commerce by this domestic law. The executive branch responded by de-emphasizing enforcement. But the existence of the FCPA created a demand by U.S. corporations for a broader jurisdictional net that would

[269] Timothy L. Dickinson et al., supra note 230, at 681; see Michael D. Berman, Siemens Rethinks Bribery as a Business Strategy, ABA Litig. News (Feb. 26, 2009), https://apps.americanbar.org/litigation/litigationnews/top_stories/siemens-FCPA.html [https://perma.cc/9NMX-5BWW] (discussing all three cases).

[270] See supra Section III.B.

bind their foreign competitors to the same rules. The American government pushed this anti-corruption agenda in several international fora and finally culminated with the OECD Convention. There is little doubt that the OECD Convention would not exist without the continuous American insistence for anti-bribery rules that would mirror the FCPA.[271]

The treaty in turn allowed the U.S. government to turn around its FCPA enforcement policies without putting American firms at a competitive disadvantage. The treaty gave the FCPA "international resonance" that allowed the U.S. government to use the statute's long-standing extraterritorial provisions to pursue domestic and foreign firms alike. Although the OECD Convention did not lead other governments to enforce their own anti-bribery laws aggressively, the treaty was quite effective. In effect, the OECD Convention permitted the United States to expand its enforcement regime to all of the world's major exporters. It led to increased cooperation between U.S. and OECD countries' authorities, which allowed U.S. prosecutors to build cases against a wide range of multinational corporations. Now more OECD states have started to undertake robust anti-bribery policies themselves, and the pattern of enforcement actions may again be changing.[272]

American commentators generally do not question the enforceability of domestic statutes, but they are often quite skeptical of international agreements, wondering aloud if they are "real law" or if they can be enforced adequately.[273] This Article does not seek to enter that well-

[271] See Vogl, supra note 36, at 178–82; Abbott & Snidal, supra note 21, at S161–63; Tarullo, supra note 61, at 666–67.

[272] To see an analysis of the likely trajectory in cross-national anti-bribery prosecutions, see Brewster & Dryden, supra note 206.

[273] See, e.g., John R. Bolton, Is There Really "Law" in International Affairs?, 10 Transnat'l L. & Contemp. Probs. 1, 4 (2000) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. This is not domestic law at work. Accordingly, there is no reason to consider treaties as 'legally' binding internationally, and certainly not as 'law' themselves."); Robert H. Bork, The Limits of "International Law," 18 Nat'l Int. 3, 4 (1989/90) (arguing that international law is not law because it is not enforceable through police or courts).

known debate.[274] Instead, this Article argues that this is the wrong way to conceive of the relationship between domestic and international law. The issue is not whether one is enforceable and the other is not, but rather how the two are interdependent and how these different forms of law can mutually provide the political conditions needed for a robust enforcement regime. International law can be a necessary part of national law enforcement.

Domestic statutes and international agreements alike can be weak where there is a lack of political will to enforce them.[275] As this Article highlights, in areas of global competition, national policymakers may be reluctant to enforce domestic laws in a manner that makes its industries less internationally competitive. The FCPA was essentially shelved from 1977 to 1996 when the executive branch viewed it as detrimental to major American corporations.[276] Nothing significant about the law had changed; the FCPA was theoretically "enforceable" as a matter of domestic jurisprudence. But there was not the political will to enforce it and thus strategic choices made the statute moribund.

From this vantage, the important issue is how national and international legal arrangements can interact to regulate transnational legal problems. Governments face difficulty regulating many cross-national agreements on their own. Countries can pass national legislation, but this legislation will not necessarily be effective in addressing policy problems. Such issues are common today, including climate change, conflict minerals, money laundering, and bank regulation. National governments can take unilateral actions, but these actions can be both ineffective (if they do not address non-territorial entities) and politically unpopular (if they undermine domestic industries' ability to compete globally). This Article provides a

[274] See, e.g., Anthony D'Amato, Is International Law Really "Law"?, 79 Nw. U. L. Rev. 1293, 1293 (1985); Oona Hathaway & Scott J. Shapiro, Outcasting: Enforcement in Domestic and International Law, 121 Yale L.J. 252, 255, 261 (2011).

[275] Christopher A. Whytock, Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law, 36 Geo. J. Int'l L. 155, 158, 181–82 (2004) (arguing that domestic politics can influence the degree to which both domestic and international laws are enforced domestically). For a parallel argument focusing on constitutional rules and international law, see Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791, 1794–95 (2009).

[276] See supra Section III.A.

framework for thinking through the multidirectional relationship between domestic law, national interest groups, shifting beliefs (or new information), transnational bargaining, and international law. Developing a coherent policy regime can require both international agreements and domestic regulations, with each providing different tools. Success can nonetheless be difficult to achieve: there is not a single, uniform approach to these issues. The process can be long, and international-national regimes can evolve over time.

This Article emphasizes how such an international resonance feedback effect can both create international law and embolden domestic authorities to enforce national law. Using the example of the FCPA, this Article provides the micro-foundations for understanding how a domestic law can accelerate demand for international law and then, subsequently, be enriched by international law. Multiple factors were (and are) important in the case of the FCPA: private industry demands to "level-up" on anti-bribery policy and regulate competitors, changing academic and policymakers' views on the harms of corruption, shifting norms on the legitimacy of state policies subsidizing foreign bribery, transnational legal assistance, and an expansion of prosecutors' toolkits through the Sarbanes-Oxley Act. But these features are similar to those of most transnational policy problems, which tend to be multifaceted and include complex elements and numerous conflicted constituencies.

International law was not the only necessary element in the evolution of the FCPA into a robust regulatory regime, but it was the critical piece for making an internationally competition-neutral enforcement strategy possible. The United States is at the vanguard of anti-bribery enforcement due, in part, to the OECD Convention. In turn, the OECD Convention has been a success by expanding anti-bribery enforcement globally because of U.S. enforcement. Understanding the current anti-bribery regime, and other transnational issues, requires an appreciation of the mutually dependent relationship between the two types of law. Extending that understanding from anti-bribery regimes would also produce clarity on a number of other transnational issue areas, like international finance or tax evasion, that currently seem to present insuperable problems for regulators.

International resonance also has important implications for conceptions of treaty effectiveness. The dominant definition of effectiveness emphasizes the causal impact of the treaty on

governments' actions, particularly whether the government adopts a different policy than they would have without the treaty.[277] Other definitions of effectiveness focus on whether the treaty is followed by member governments or whether the treaty has a positive impact on the international issue that it addresses.[278] This Article demonstrates that a treaty can be "policy effective"—in the sense of having a positive impact on the policy issue that it addresses—while having a poor record of compliance by the majority of member states.[279] The Article also provides a more nuanced definition of what "a causal impact on government action" entails. In the anti-corruption context, governments may not bring their own prosecutions but may participate in the evidence collection of other states' prosecutions. This type of decentralized cooperation can qualify as changing government behavior, although legal analysts may overlook this type of activity in their focus on more centralized state activity, namely independent prosecutions.

The OECD Anti-Bribery Convention has generally been described as a less than effective agreement.[280] The major complaint is the well-documented fact that a majority of the states that have joined the treaty have failed to adopt robust systems to prosecute foreign bribery.[281] While more countries are taking up its requirements to enforce national anti-bribery laws (and those countries are home to some of the biggest multinational corporations), most countries are still reluctant enforcers of the agreement.[282] In this sense, the treaty is not effective because governments have not changed their policies from what they were before the treaty. That is, governments formally changed their law to prohibit foreign bribery but have failed to enforce these laws by bringing their

[277] Kal Raustiala, Form & Substance in International Agreements, 99 Am. J. Int'l L. 581, 610 (2005).

[278] See Lisa L. Martin, Against Compliance, *in* Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 591, 606 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

[279] Rachel Brewster, The Effectiveness in International Law and Stages of Governance, *in* Research Handbook on the Politics of International Law 55, 55–61 (Wayne Sandholtz & Christopher A. Whytock eds., 2017).

[280] Tarullo, supra note 61, at 680–90; see Transparency International Report, supra note 141, at 4.

[281] See Transparency International Report, supra note 141, at 7; Brewster, OECD, supra note 73, at 87, 100–01.

[282] See Spahn, supra note 89, at 6.

own prosecutions.[283] Under this definition, the OECD Anti-Bribery Convention would certainly be characterized as a less than effective treaty during its first two decades.[284]

This definition of effectiveness, however, misses an important dynamic in how the OECD has been notably effective in making an impact on anti-corruption enforcement globally. As this Article highlights, the OECD Convention was able to have an important impact on the enforcement of anti-corruption law by creating a legally and politically clear path for American prosecutors to adopt an expansive anti-corruption enforcement strategy. The OECD Convention did not need to get the majority of member governments to prosecute foreign bribery to succeed. The United States' energetic adoption and enforcement of the treaty (and the now-subsequent activities by other large-market governments) was sufficient to make a major dent in the enforcement of anti-bribery law for most major multinational corporations. Here, the treaty achieved significant "policy effectiveness," in terms of addressing foreign bribery, by having only a few governments actively change their policy post-treaty.

The concept of international resonance also highlights a different idea of what effectiveness in "changing government policy" means. Most legal analysts have focused on governments' independent prosecutions as the operative measure in assessing whether OECD member states are complying with the OECD Convention.[285] This is fair given that the treaty requires governments to do so. However, when assessing effectiveness, full compliance may not be necessary. Most OECD governments have changed their policies because of the OECD Convention, but the change has come at the level of cooperation with foreign prosecutions. This cooperation is often decentralized (occurring at the level of local police and prosecutors) and can be informal (performed in response to a phone call or email instead of a formal request for mutual legal assistance). Nonetheless, this cooperation is a form of government action that is in response to the acceptance of the OECD Convention by government officials in the member states. This

[283] Brewster, OECD, supra note 73, at 87, 100–01.

[284] See supra Part II.

[285] Tarullo, supra note 61, at 683; see Transparency International Report, supra note 141, at 2–4.

type of cooperation is harder to measure than the number of national prosecutions but can be just as important for the treaty's policy effectiveness.