

UNWITTING SANCTIONS: UNDERSTANDING ANTI-  
BRIBERY LEGISLATION AS ECONOMIC SANCTIONS AGAINST  
EMERGING MARKETS

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ABSTRACT

Although the purpose of international anti-bribery legislation, particularly the U.S. Foreign Corrupt Practices Act (FCPA), is to deter bribery, empirical evidence demonstrates a problematic collateral effect. In countries where bribery is perceived to be relatively common, the present enforcement regime goes beyond the deterrence of bribery, and ultimately deters investment. Drawing on literature from political science and economics, this Article argues that anti-bribery legislation, as presently enforced, functions as de facto economic sanctions. A detailed analysis of the history of FCPA enforcement shows that these sanctions most often occur in emerging markets, where historic opportunities for economic and social development otherwise exist and where public policy should encourage investment. This effect is contrary to the FCPA's purpose which, as the legislative history shows, is to build economic and political alliances by promoting ethical overseas investment.

These perverse and unanticipated consequences create two policy problems. First, the sanctions literature suggests that capital-rich countries that are not committed to effectively enforcing anti-bribery measures may fill the resulting foreign direct investment void. This dynamic creates myriad ethical, economic, and foreign policy problems, as observed, for example, in China's aggressive investment in Africa, Latin America, and Central Asia. Second, by enforcing these laws without regard to their sanctioning effects, developed nations are unwittingly sacrificing poverty reduction opportunities to combat bribery. This Article concludes with various proposed reforms to the text and enforcement of international anti-bribery legislation that would further the goal of deterring bribery without deterring investment.

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## I. INTRODUCTION

Legislation prohibiting the bribery of overseas officials for business purposes has rapidly risen from relative obscurity to become among the most significant legal issues in international commerce. Although the United States passed the first statute of its kind, the Foreign Corrupt Practices Act (FCPA),<sup>1</sup> over thirty years ago, a number of economic and political factors contributed to an early pattern of only sporadic enforcement by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC).<sup>2</sup> Then in the late 1990s and the following decade, a number of historical events combined to precipitate a dramatic increase in enforcement of anti-bribery legislation.<sup>3</sup> Not least of these was the 1997 adoption by the member states of the Organization of Economic Cooperation and Development (OECD)<sup>4</sup> of a convention obligating signatory countries to enact FCPA-type legislation.<sup>5</sup> The adoption of that convention marked a sea change in worldwide attitudes toward bribery and the emergence of an international, but not universal, commitment in principle to enforcing

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd(1)–(3), 78ff (2006)), amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2006)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2006)).

2. See Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 192–95 (1994).

3. For explanations for the dramatic surge in enforcement, see David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 484–85 (2009). See also Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1447–49 (2008); Eugene R. Erbstoesser, John H. Sturc & John W.F. Chesley, *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 386–94 (2007) (discussing briefly the most significant enforcement efforts); Mike Koehler, *A Malady in Search of a Cure—The Increase in FCPA Enforcement Actions Against Health-Care Companies*, 38 U. MEM. L. REV. 261, 262, 282 (2008).

4. Founded in 1961, the Organization for Economic Co-Operation and Development “brings together the governments of countries committed to democracy and the market economy from around the world to: [s]upport sustainable growth; [b]oost employment, raise living standards; [m]aintain financial stability; [a]ssist other countries’ economic development; [and c]ontribute to growth in world trade[.]” See Organisation for Economic Co-Operation and Development, About OECD, [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36734103\\_1\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1_1,00.html) (last visited Nov. 15, 2009).

5. Organization for Economic Co-Operation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, reprinted in 37 I.L.M. 1 (1998) [hereinafter OECD Convention]. For a catalogue of each member country’s implementing legislation, see Weiss, *supra* note 3, at 488–89 n.101, 490–91 n.103.

bribery prohibitions.<sup>6</sup> No longer at a competitive disadvantage,<sup>7</sup> the United States resolved to finally give teeth to the FCPA, and the rate of enforcement has since accelerated dramatically.<sup>8</sup> This trend is likely to continue, as the DOJ has described the exponential increase in enforcement actions over the last several years as “the tip of the iceberg.”<sup>9</sup>

Although the frequency of anti-bribery law enforcement has risen sharply, it has not yet produced a commensurate rise in legal scholarship. While scholars over the last thirty years have explored such issues as the moral and economic justifications for the legislation,<sup>10</sup> the problem of cultural relativism,<sup>11</sup> the statute’s underlying theories of

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6. See, e.g., Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 485-86 (2000); Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT’L L. 1, 3, 37 (1999).

7. For the legislative history reflecting initial concerns about a competitive disadvantage and an ultimate determination that the OECD convention would supply the remedy, see *infra* Part IV.A, Part IV.C.

8. SHEARMAN & STERLING LLP, FCPA DIGEST: CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at 2 (2009), available at [http://www.shearman.com/files/upload/FCPA\\_Digest.pdf](http://www.shearman.com/files/upload/FCPA_Digest.pdf) [hereinafter FCPA DIGEST]. Another prominent FCPA practice has characterized the recent enforcement pace as “frenetic.” Gibson, Dunn & Crutcher LLP, Publications, 2008 Mid-Year FCPA Update (July 7, 2008), <http://www.gibsondunn.com/Publications/Pages/2008Mid-YearFCPAUpdate.aspx>.

9. For example, the number of FCPA-related enforcement actions by the SEC and DOJ over the last four years is roughly ten times the number of actions from the five years preceding the OECD Convention. See, e.g., CHRISTOPHER J. STESKAL, FENWICK & WEST LLP, SECURITIES LITIGATION ALERT: THE FOREIGN CORRUPT PRACTICES ACT: THE NEXT CORPORATE SCANDAL? 3 (2008), available at [http://www.fenwick.com/docstore/Publications/Litigation/sec/Sec\\_Litigation\\_Alert\\_01-28-08.pdf](http://www.fenwick.com/docstore/Publications/Litigation/sec/Sec_Litigation_Alert_01-28-08.pdf).

10. See, e.g., Beverley Earle, *The United States’ Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won’t Work, Try the Money Argument*, 14 DICK. J. INT’L L. 207, 207-09 (1996) (exploring the influence of Transparency International on the corruption debate); Marie M. Dalton, Note, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J. L. & BUS. 583, 583-84 (2006) (juxtaposing moral and economic justifications for prohibiting bribery); Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 861-62 (2001).

11. See, e.g., Padideh Ala’i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT’L L. 877, 894 (2000) (arguing that claims of universal morality have justified exploitation by the “north” of the “south”); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT’L L. 419, 421-22 (1999) (casting anti-bribery legislation as a form of cultural imperialism); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 280 (1997) (characterizing such legislation as culturally insensitive); Christopher J. Duncan, Comment, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?*, 1

liability,<sup>12</sup> and issues associated with extraterritorial application,<sup>13</sup> they have yet to engage the more fundamental questions concerning whether the statute's impact is congruent with its underlying policies. The surge in enforcement activity provides a data set from which scholars can begin to study these effects. While the legislation has almost certainly succeeded to some extent in achieving its manifest purpose of curbing bribery,<sup>14</sup> the data thus far strongly suggest an additional and more problematic outcome: Companies subject to anti-bribery legislation are investing less in countries where bribery is perceived to be more prevalent.<sup>15</sup> The difference is subtle, but critically important: Enforcement of anti-bribery legislation is not just deterring bribery, but

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ASIAN-PAC. L. & POL'Y J. 16:1, 16:3--6, & 16:4 n.14 (2000) (exploring, generally, the cultural clash that anti-bribery enforcement creates in developing countries).

12. See, e.g., H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 2 (1998) (analyzing parent liability under both the accounting and anti-bribery provisions); Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 285-86 (2007) (describing the theories of liability behind the new era of enforcement); Pines, *supra* note 2, at 195.

13. See, e.g., H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239 (2001) (exploring various justifications for international jurisdiction); Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997) (looking at the problem of extraterritorial criminal prosecution).

14. Many have argued that enforcement could, or should, be more effective. See, e.g., Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 85, 92 (2007) (contending that the legislation has had insufficient impact on bribery); Henry H. Roszbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509, 511 (1997) (finding the pre-OECD legislation to be ineffective at curbing bribery); Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT'L L. 169, 175 (2006) (concluding that legislation is under-enforced due to enforcement costs); Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 669-73 (2004) (using game theory to explain why enforcement has not been more rigorous); Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments*, 25 PENN. ST. INT'L L. REV. 251, 254 (2006) (suggesting repealing the grease payment exemption to combat lower-level corruption); Andrea Goldberg, Note, *The Foreign Corrupt Practices Act and Structural Corruption*, 18 B.U. INT'L L.J. 273, 275 (2000) (discussing the legislation and criticizing it for treating the symptoms rather than the causes of corruption); Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379, 380 (2005) (taking issue with the grease payment exception).

15. See, e.g., Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634, 635 (2008) [hereinafter Cuervo-Cazurra, *The Effectiveness of Laws*]; Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 807, 807 (2006) [hereinafter Cuervo-Cazurra, *Who Cares*].

is deterring investment.

It is easy to assume, as many do today, that deterring investment in bribery-prone countries is the legislation's tacit purpose—that economic withdrawal from such countries is the natural and expected, if not intended, outcome of anti-bribery legislation. According to this view, we can and should assess the legislation's effectiveness by the extent to which it “induc[es] [foreign] investors . . . to reduce their investments in corrupt countries.”<sup>16</sup> This view further holds that developed nations can effectively combat overseas bribery by economically disengaging from the countries whose governments tolerate it. Because developing countries depend on foreign investment to stimulate economic development, their governments will eventually succumb to pressure and implement reforms.

There is of course a familiar, if not altogether comfortable, term for this phenomenon: economic sanctions.<sup>17</sup> The discomfort arises from a widely-shared concern that the victims of the sanctioned practice, rather than the perpetrators, will feel the brunt of the sanctions' impact. We may further suspect that despite these costs, the sanctions will fail to effect meaningful reform. Our fears are likely more pronounced where the target country is poor; they may be more pronounced yet when the country otherwise enjoys economic conditions that are highly conducive to growth.

Regrettably, anti-bribery legislation tends to sanction precisely these countries. Accordingly, although scholars and regulators have not previously applied the label of economic sanctions to the FCPA and its progeny, the data and literature suggest that we should do so now. Scholars must begin to wrestle with its implications, and to critically examine the assumption that the operation of anti-bribery legislation as *de facto* sanctions constitutes a successful implementation of the statute's underlying policies.

This Article argues firmly that it does not. Focusing in depth on the FCPA as the origin and template for international anti-bribery legislation,<sup>18</sup> this Article shows that the legislation evinces no design to function as *de facto* sanctions. Two principal sources support this argument, the first of which is well-known, though the second is not. The first is the statute's text, which plainly applies only to the suppliers

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16. Cuervo-Cazurra, *The Effectiveness of Laws*, *supra* note 15, at 635.

17. *See generally* GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & BARBARA OEGG, *ECONOMIC SANCTIONS RECONSIDERED* (3d ed. 2007) (discussing economic sanctions).

18. For a discussion of the FCPA as a predecessor to the OECD, see, for example, Brown, *supra* note 13, at 265–320; DON ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT* § 13:2 (2000).

of bribes.<sup>19</sup> The text does not provide for the punishment of the recipients or solicitors of bribes, much less the governments that tolerate them. The second source is much more illuminating on this question, though astonishingly, almost completely unknown among lawyers and scholars. That source is the statute's legislative history, which has not been analyzed at meaningful length in the academic scholarship on anti-bribery legislation.<sup>20</sup> A thorough examination of the legislative history reveals absolutely no basis for the proposition that the legislation should punish governments that tolerate bribery by withdrawing financial support in the hopes that economic hardship might incentivize reform. Businessmen, interest group leaders, congressmen, members of three presidential administrations, and indeed three U.S. Presidents, spanning both political parties and more than twenty years, provided statements on the legislative record relevant to this question, and did so in virtual unanimity.<sup>21</sup> While they specifically considered the practical effects of this legislation, they never contemplated that those effects would resemble economic sanctions.

Indeed, they believed exactly the opposite. A study of the statute's history, similar to the text, very strongly supports an altogether different mechanism for achieving the statute's goal of promoting ethical overseas business practices. Those who participated in congressional hearings on the need for the legislation prohibiting overseas bribery clearly expected the statute to encourage investment in transitional economies to promote their development and build economic and political alliances.<sup>22</sup> The legislative history portrays the FCPA as a product of two formative events: Watergate and the Cold War. While the former's influence is widely recognized, the latter has been largely forgotten.<sup>23</sup> Taken together, these events exposed a degree of corruption in U.S. business and government that, according to those who testified before Congress, tarnished the U.S. image abroad and weakened its standing in a bi-polar political struggle. To build and preserve critical alliances, the United States sought to announce to the world its intention

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19. *See infra* Part II.B.

20. For a thorough discussion of the procedural (but not thematic) legislative history of the FCPA, see GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE* 17–19 (1982).

21. *See infra* Part IV.A & Part IV.B.

22. *See infra* Part IV.A & Part IV.B.

23. For a rare, albeit brief, account of the FCPA's historical context that recognizes the importance of foreign policy considerations (and tacitly acknowledges the Cold War), see RALPH H. FOLSOM, MICHAEL W. GORDON & JOHN A. SPANOGLE, JR., *INTERNATIONAL BUSINESS TRANSACTIONS, TRADE AND ECONOMIC RELATIONS* 392 (2005) ("The FCPA is a response to real and perceived harm to U.S. foreign relations with important, developed friendly nations, and the interest of the United States to prevent U.S. persons from making payments which might embarrass the United States in conducting foreign policy.").

to implement the highest standards of business ethics. Through its continued engagement in—rather than withdrawal from—fragile transitional economies, the United States would promote ethics and economic development while advancing its foreign policy goals. This is the logic on which the FCPA was founded, and it is not the logic of sanctions.

The FCPA ultimately proves to be a large-scale study in the law of unintended consequences. Part II of this Article provides an introduction to the statute and shows that its manifest purpose is to punish those who supply bribes, and not to punish the recipients or solicitors, much less their governments or their fellow citizens. Part III demonstrates that the FCPA and related legislation, as presently enforced, constitute *de facto* economic sanctions against emerging markets. It first discusses the political science and economics literature regarding the purpose and effects of economic sanctions. It then discusses the quantitative evidence on the effects of anti-bribery enforcement, and shows that it is appropriate and useful to think of anti-bribery legislation, as currently enforced, as *de facto* economic sanctions. It further shows that the majority of the FCPA enforcement actions have occurred in economies that are today regarded as emerging markets, and that the economic sanctions therefore have their principal effect in countries that otherwise present historic opportunities for economic growth. Part IV explores for the first time in academic legal literature the legislative history of the FCPA. It introduces the colorful and animated disagreement on numerous fundamental issues surrounding the need for anti-bribery legislation, and then the striking unanimity on the statute's fundamental purpose: to promote, and not deter, investment in developing economies. Part V offers proposed reforms—including expanded membership in the OECD, the promulgation of more demand-side anti-bribery laws, and a reevaluation of the underlying theories of liability under the FCPA—that might enable the statute to achieve its manifest purpose of curbing bribery without collaterally curbing investment. Part VI concludes that sanctioning emerging markets to effect bribery-reducing reforms is an enterprise fraught with ethical, economic, and foreign policy risks that scholars and policymakers should promptly address.

## II. THE TEXT OF THE FCPA: PUNISHING THE SUPPLIER AND NOT THE RECIPIENT

This Part provides a brief historical account of the FCPA's origins and introduces the statute's core provisions. Specifically, this Part argues that scholars to date have only partially understood the historical events that precipitated the introduction and passage of anti-corruption legislation. A more complete understanding of the FCPA's context



reveals that the statute was designed as a tool of foreign policy, and not merely of business ethics. Notably it is a foreign policy tool that evinces no design to control foreign actors or to ultimately sanction foreign governments. The statute's text makes abundantly clear that the statute is designed to impact the supplier of bribes rather than the solicitors, recipients, or the governments that tolerate them. Moreover, the statute's purpose of punishing suppliers, rather than foreign governments, is further suggested by one statutory exception and one affirmative defense.

#### A. *Historical Context: Bribery as a Foreign Policy Problem*

Scholars attempting to describe the origins of the FCPA have produced several variations on the following theme.<sup>24</sup> The Watergate scandal in the early 1970s exposed illegal payments made by numerous U.S. companies to domestic political campaigns. In response to this discovery, in 1974 the SEC conducted an investigation and determined that payments were made not only to U.S. political campaigns, but to overseas campaigns and officers as well, and were typically accounted for through "slush funds." As part of the post-Watergate reforms, Congress sought to supplement existing domestic anti-bribery legislation with comparable legislation that would prohibit payments to overseas officials and require more accurate accounting.

This story thus accurately characterizes the FCPA as an outgrowth of the post-Watergate domestic crisis in confidence. Americans had lost a degree of trust in their political and business leaders, and this legislation would help to ensure the proper conduct of U.S. business. By this account, it is quite predictable and not particularly noteworthy that the ensuing legislation primarily sought to punish companies and individuals doing some substantial portion of their business in or through the United States. Watergate, after all, was a domestic problem; the solution was a matter of domestic policy, meant primarily to punish domestic actors.

This conventional story is true, but it is not the whole truth. Indeed, there was another event involving bribery that likewise alerted Congress to the need for legislation prohibiting overseas payments, and which

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24. See, e.g., Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOBAL STUD. L. REV. 1, 5 (2006); Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. SUPP. 593, 595–96 (2002); 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, 271–75 (1998); Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2902–03 (2005).

almost immediately produced congressional hearings. This event, however, occurred prior to and independently of Watergate. In 1971, Congress provided the Lockheed Corporation,<sup>25</sup> then a major manufacturer of civilian and military aircraft, with a \$250 million federal loan guarantee to prevent bankruptcy.<sup>26</sup> Soon afterwards, regulators discovered that Lockheed had, over the course of many years, paid numerous bribes to foreign governments to secure contracts.<sup>27</sup> By the time of the earliest congressional hearings concerning the need for international anti-bribery legislation, Lockheed had already disclosed to the United States government that it had paid several multi-million dollar bribes to various developed and developing countries, particularly the Netherlands, Japan, and Italy, and had caused scandals in each of those countries that were embarrassing both to those countries and to the United States.<sup>28</sup>

Because these bribes were paid to foreign governments and provoked public outcry in those countries, they were not merely a domestic policy problem; rather, they raised the issue of U.S. relations with foreign countries, and the solution would necessarily implicate foreign policy interests. As will be shown below, the ensuing legislation was in fact widely understood as an instrument of foreign policy, intended to impact relations between the United States and other nations, and not merely a component of a domestic ethics crisis. In light of the Lockheed payments, and the recognition that they constituted a foreign policy problem in need of a foreign policy solution, it is far more notable that the legislation was not designed to punish the recipients or solicitors of such bribes, let alone the governments that tolerate bribery. This foreign policy tool, both as originally passed and subsequently amended, was drafted to target and punish only the suppliers of bribes.

### B. *The FCPA's Exclusive Focus on the Supply of Bribes*

The statute's exclusive focus on the supply of bribes is evident in the persons who are subject to its prohibitions and the bases of jurisdiction over them, as well as the definition of the prohibited conduct. The anti-

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25. Lockheed Corporation merged with Martin Marietta Corporation in 1995 to form the Lockheed Martin Corporation. *Company News; Martin Marietta-Lockheed Merger Is Approved*, N.Y. TIMES, Mar. 16, 1995, at D4.

26. *Lockheed Bribery: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 94th Cong. 1 (1975) [hereinafter *1975 Senate Banking Hearing*] (statement of Sen. William Proxmire).

27. See *Lockheed's Defiance: A Right to Bribe?*, TIME, Aug. 18, 1975, available at <http://www.time.com/time/magazine/article/0,9171,917751-1,00.html>.

28. *1975 Senate Banking Hearing*, supra note 26, at 40–42 (statement of Sen. William Proxmire).

bribery provisions of the statute apply to three different classes of persons: “issuers,”<sup>29</sup> “domestic concerns,”<sup>30</sup> and “persons other than issuers or domestic concerns.”<sup>31</sup> First, the anti-bribery provisions apply to any issuer that has a class of securities registered under § 12 of the Exchange Act or which is required to file reports under § 15(d) of that act. This prohibition applies to any officer, director, employee, or agent of such an issuer, or any stockholder acting on behalf of that issuer.<sup>32</sup> The 1977 Senate Report explains that the purpose of this phrase is to make clear that it is corporate or business bribery which is being proscribed, rather than individual bribery.<sup>33</sup> Second, “domestic concern” is “any individual who is a citizen, national, or resident of the United States,”<sup>34</sup> and applies to commercial entities including “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a [U.S. state,] territory, possession, or commonwealth.”<sup>35</sup> The 1977 Senate Report elaborates that this latter section is intended to apply to entities which are “owned or controlled by individuals who are citizens or nationals of the United States” and have their principal place of business in the United States or a territory, possession, or commonwealth.<sup>36</sup> The third category of person subject to the anti-bribery sections is first identified as a “person,” other than an issuer or domestic concern, who is in the “territory” of the United States at the time of the conduct in question,<sup>37</sup> and who is not a national of the United States or a commercial entity legally organized in the United States.<sup>38</sup> This third category was established by the FCPA’s 1998 amendments to satisfy the OECD convention’s requirement that statutes

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29. 15 U.S.C. § 78dd-1 (2006).

30. *Id.* § 78dd-2 (2006).

31. *Id.* § 78dd-3 (2006).

32. *Id.* § 78dd-1(a) (2006).

33. S. REP. NO. 95-114, at 11 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

Whether an act of bribery is determined to be “by the corporation or by an individual acting on his own will depend on all the facts and circumstances, including the position of the employee, the care with which the board of directors supervises management, the care with which management supervises employees in sensitive positions and its adherence to the strict accounting standards” provided in the section. *Id.*

34. 15 U.S.C. § 78dd-2(h)(1)(A) (2006).

35. *Id.* § 78dd-2(h)(1)(B) (2006).

36. S. REP. NO. 95-114, at 17. For more recent comments by the U.S. Department of Justice, see DEP’T OF JUSTICE, LAY-PERSON’S GUIDE TO FCPA § A, *available at* <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> [hereinafter DOJ GUIDE] (“U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question.”).

37. 15 U.S.C. § 78dd-3(a) (2006).

38. *Id.* § 78dd-3(f)(1) (2006).

cover “any person.”<sup>39</sup> As a result of this amendment, foreign corporations, even if subsidiaries of a U.S. corporation, as well as the employees of such corporations, may now be independently liable under the FCPA.<sup>40</sup> However, liability continues to attach only to the supplier, rather than the recipient or solicitor of the bribe, and the supplier must have done business in or through the United States. Even after the modifications of the FCPA to conform it to the OECD convention, the legislation remains targeted exclusively at suppliers.

As originally drafted, the statute required the traditional jurisdictional hook for expansive congressional action: that the conduct occurred through “any means or instrumentality of interstate commerce.”<sup>41</sup> The 1998 amendments provided an additional basis of jurisdiction, the nationality principle of jurisdiction,<sup>42</sup> codified with the section heading “Alternative jurisdiction.”<sup>43</sup> With that amendment it became illegal for any issuer or domestic concern or an officer, director, employee, or agent thereof who is a “United States person,”<sup>44</sup> “to corruptly do any act outside the United States in furtherance of” a bribe or authorization of a bribe irrespective of whether the payor used interstate commerce.<sup>45</sup> This language implements the OECD Convention’s requirement that member nations extend coverage of their anti-bribery statutes to acts outside the United States.<sup>46</sup> Although the language limits liability to conduct taken by persons on behalf of issuers or domestic concerns, the legislative history indicates an intention that “principles of liability, including principles of vicarious liability” already applicable under the FCPA would render U.S. issuers or domestic concerns liable for the conduct of officers, directors, employees, agents, or stockholders outside of the United States regardless of their nationality.<sup>47</sup> As a result of the 1998 amendments, U.S. issuers and domestic concerns may now be liable under either territorial or nationality jurisdictional principles.<sup>48</sup> But even taken

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39. S. REP. NO. 105-277, at 2 (1998).

40. See ZARIN, *supra* note 18, at 4–9; see also Mike Koehler, *Why Compliance with the U.S. Foreign Corrupt Practices Act Matters in China*, CHINA L. & PRAC. (2008), available at <http://ssrn.com/abstract=1396267>.

41. 15 U.S.C. § 78dd-1(a) (2006).

42. ZARIN, *supra* note 18, at 4–12.

43. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (2006).

44. A “United States person,” in this context, is defined as any “national of the United States . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States” or its territory, etc. 15 U.S.C. § 78dd-1(g)(2) (2006).

45. *Id.* § 78dd-1(g)(1).

46. S. REP. NO. 105-277, at 3 (1998).

47. *Id.* at 4.

48. DOJ GUIDE, *supra* note 36, at § A. This new section does not depend on the Interstate Commerce Clause to establish jurisdiction. Rather, it falls under Congress’ constitutional

together, it remains true that the statute reaches only those corporations and individuals that have substantial ties of some kind to the United States. Its intended target remains fairly close-range.

The proscribed conduct involves three elements: the payment, the recipient, and the purpose. It defines the payment as the “furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.”<sup>49</sup> After defining the payment, it defines the persons to whom the payment must be made to violate the FCPA. First is any “foreign official,”<sup>50</sup> which is “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”<sup>51</sup> Second is any foreign political party or party official or any candidate for foreign political office.<sup>52</sup> The third group consists of third parties, such as agents, distributors, or joint venture partners,<sup>53</sup> defined in the statute as any “person,” to whom money or a thing of value is given while “knowing,”<sup>54</sup> that any portion of that money or thing of value will be “offered, given, or promised, directly or indirectly,” to any of the individuals in the first two groups above.<sup>55</sup>

For all three categories of recipients, the act must be done for one of two prohibited purposes—direct influence or indirect influence. Under direct influence,<sup>56</sup> the payee is the person whom the payor seeks to

authority to “regulate Commerce with foreign Nations’ and to ‘define and punish . . . Offenses against the Law of Nations.’” S. REP. NO. 105-277, at 3 (1998) (quoting U.S. CONST. art. 1, § 8, cls. 3 & 10).

49. 15 U.S.C. § 78dd-1(a).

50. 15 U.S.C. § 78dd-1(a)(1) (2006); *id.* § 78dd-2(a)(1); *id.* § 78dd-3(a)(1).

51. 15 U.S.C. § 78dd-1(f)(1)(A) (2006); *id.* § 78dd-2(h)(2)(A); *id.* § 78dd-3(f)(2)(A). A 1977 House Report suggests that this definition should not include an employee “whose duties are essentially ministerial or clerical.” H. REP. NO. 95-640, at 8 (1977). After the 1998 amendments, language was added to provide that a foreign official may also include an officer or employee of a “public international organization” or any person acting in an official capacity for or on behalf of such an organization. 15 U.S.C. § 78dd-1(f)(1)(A) (2006); *id.* § 78dd-2(h)(2)(A); *id.* § 78dd-3(f)(2)(A). The purpose of this language is to comply with the OECD Convention. S. REP. NO. 105-277, at 3 (1998). Nonetheless, The DOJ interprets this section to hold that the prohibition applies to payments to “any public official, regardless of rank or position,” and that it is meant to focus on the “purpose of the payment instead of the particular duties of the official receiving” the bribe. DOJ GUIDE, *supra* note 36, at § D.

52. 15 U.S.C. § 78dd-1(a)(2) (2006); *id.* § 78dd-2(a)(2); *id.* § 78dd-3(a)(2). This term is not defined in the statute.

53. DOJ GUIDE, *supra* note 36, at “Third Party Payments.”

54. In 1988, The statute expanded the definition of knowledge to include “deliberate ignorance,” which under the statutory language is satisfied when a person is “aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. § 78dd-1(f)(2) (2006); *id.* § 78dd-2(h)(3); *id.* § 78dd-3(f)(3).

55. 15 U.S.C. § 78dd-1(a)(3) (2006); *id.* § 78dd-2(a)(3); *id.* § 78dd-3(a)(3).

56. Although, direct influence is not used in the statute in this context.

influence. It can take any of three forms: 1) “influencing” of any “act or decision” of that individual,<sup>57</sup> 2) “inducing” that individual to “do or omit to do any act in violation” of that individual’s duty,<sup>58</sup> or 3) “securing any improper advantage” with that individual.<sup>59</sup> The latter phrase, “securing any improper advantage,” was added in 1998 to mirror the language of the OECD Convention.<sup>60</sup> Under indirect influence, the payee is not the person whom the payor seeks to influence, but is instead someone with the capacity to influence the ultimate target. This category includes “inducing” that individual to “use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.”<sup>61</sup>

For both direct and indirect influence, the act must be done to assist in “obtaining or retaining business for or with, or directing business to, any person,”<sup>62</sup> commonly referred to as the business purpose test.<sup>63</sup> Moreover, the 1977 House Report makes clear that the corrupt requirement is satisfied even where the act is not “fully consummated,” or does not “succeed in producing the desired outcome.”<sup>64</sup>

Again, these provisions, on their face, are directed only toward the supplier. Even where the recipient is identified and defined in the statute, it is not done to bring the recipient within the scope of the FCPA’s punitive measures. Rather, the recipient is defined only to further clarify the conduct that is prohibited for the would-be supplier.

### C. *The “Grease Payment” Exception and the Written Law Defense: Tolerating Host-Country Bribery*

The statute’s express exception, and one of its two affirmative defenses, reflect a degree of tolerance of host-country bribery that would not be expected from a statute designed to punish foreign governments for condoning such conduct. The statutory exception is for “facilitating or expediting” payments, otherwise known as “grease payments,”<sup>65</sup> which the statute defines as payments to a foreign official,

57. 15 U.S.C. § 78dd-1(a)(3)(A)(i) (2006); *id.* § 78dd-2(a)(1)(A)(i); *id.* § 78dd-3(a)(1)(A)(i).

58. 15 U.S.C. § 78dd-1(a)(3)(A)(ii) (2006); *id.* § 78dd-2(a)(1)(A)(ii); *id.* § 78dd-3(a)(1)(A)(ii).

59. 15 U.S.C. § 78dd-1(a)(3)(A)(iii) (2006); *id.* § 78dd-2(a)(1)(A)(iii); *id.* § 78dd-3(a)(1)(A)(iii).

60. S. REP. NO. 105-277, at 3 (1998) (citing OECD Convention, *supra* note 5, at art. 1, para. 1).

61. 15 U.S.C. § 78dd-2(a)(1)(B) (2006); *id.* § 78dd-3(a)(1)(B); *see id.* § 78dd-1(a)(3)(B).

62. 15 U.S.C. § 78dd-1(a)(1) (2006); *id.* § 78dd-2(a)(1); *id.* § 78dd-3(a)(1).

63. *See* DOJ GUIDE, *supra* note 36, at § E.

64. H.R. REP. NO. 95-640, at 8 (1977).

65. S. REP. NO. 95-114, at 10 (1977).

political party, or party official intended “to expedite or to secure the performance of a routine governmental action” by that payee.<sup>66</sup> The 1977 House Report distinguishes facilitating payments from bribery by distinguishing between payments that “cause an official to exercise other than his free will in acting or deciding or influencing an act or decision” versus payments that “merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.”<sup>67</sup> An example provided in the legislative history is “a gratuity paid to a customs official to speed the processing of a customs document.”<sup>68</sup> The statute further makes clear what routine governmental action does not include: any decision by a foreign official “whether, or on what terms, to award new business to or to continue business with” a party, or any action by a foreign official “involved in the decision-making process to encourage a decision to award new business to or continue business” with a party.<sup>69</sup> The 1977 Senate Report reaffirms that this section is meant to apply to “grease payments.”<sup>70</sup>

In this context, the 1977 House Report demonstrates a degree of cultural sensitivity to differing cultural norms surrounding conduct that in the United States is considered bribery. It explains that while facilitating payments “may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.”<sup>71</sup> Far from expressing moral outrage, the report suggests that host-country bribery is to some extent inevitable, and even tolerable.

This tolerance is more powerfully apparent in the statute’s affirmative defense that the payment, gift, offer, or promise was legal under the “written laws and regulations” of the payee’s country.<sup>72</sup> The

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66. 15 U.S.C. § 78dd-1(b) (2006); *id.* § 78dd-2(b); *id.* § 78dd-3(b). The statute provides categories of sample exceptions (although the common characteristic of the items in each category is not always self-evident): “obtaining permits or licenses; processing visas or work orders; providing police protection, mail service, or scheduling inspections related to cross-country transit of goods; providing utilities service, loading or unloading cargo, or protecting perishable products from deterioration; and ‘actions of a similar nature.’” 15 U.S.C. § 78dd-1(f)(3)(A)(i) to (v) (2006); *id.* § 78dd-2(h)(4)(A)(i) to (v); *id.* § 78dd-3(f)(4)(A)(i) to (v).

67. H.R. REP. NO. 95-640, at 8 (1977).

68. *Id.*

69. 15 U.S.C. § 78dd-1(f)(3)(B) (2006); *id.* § 78dd-2(h)(4)(B); *id.* § 78dd-3(f)(4)(B).

70. S. REP. NO. 95-114, at 10 (1977). The statute provides the additional example of placing a transatlantic telephone call. *Id.*

71. H.R. REP. NO. 95-640, at 8 (1977).

72. 15 U.S.C. § 78dd-1(c)(1) (2006); *id.* § 78dd-2(c)(1); *id.* § 78dd-3(c)(1). The statute provides another affirmative defense that is less relevant to the present analysis—that the payment, gift, offer, or promise was for a “reasonable and bona fide expenditure” that is by or for the payor and was directly related to either: 1) the “promotion, demonstration, or explanation of products or services,” or 2) “the execution or performance of a contract with a foreign

adjective “written” was added in 1988 to “make clear that the absence of written laws in a foreign official’s country would not by itself be sufficient to satisfy this defense.”<sup>73</sup> The absence of a prohibition against bribery would not, then, be a defense, but the presence of a written law expressly permitting such payments would be a defense. If host-country reforms were the express object of the legislation, it is hard to imagine that the FCPA would permit this defense.

Admittedly, neither the grease payment exception nor the written law defense constitutes overwhelming evidence that reforming countries perceived to have a greater tolerance for bribery is beyond the statute’s purpose. But taken in conjunction with the core provisions, the message becomes clear: The payor, and not the payee, is the party held responsible under the statute. There is absolutely no part of the statute suggesting that the solicitor, recipient, or its government should be held responsible or punished for the bribe. The statute is thus “supply-side;” the “demand-side” is well beyond its purview.

### III. THE FCPA AS ENFORCED: DE FACTO SANCTIONS AGAINST EMERGING MARKETS

Despite the plain meaning of the text (and, as will be shown in Part IV, the legislative history) the enforcement of the statute has produced a different result altogether. This part demonstrates that the FCPA, as enforced, operates as de facto economic sanctions against countries where substantial foreign direct investment is occurring and yet which have substantial levels of corruption. Generally speaking, these will be the emerging markets. While economists have for years been using empirical data and quantitative methodologies to explore the collateral effects of anti-bribery legislation, legal scholars have yet to recognize the importance of their work and explore its implications. This section seeks to repair that disconnect.

Part III.A draws on economic sanctions literature in economics and political science to provide a framework for understanding the impact of anti-bribery enforcement as sanctions. Part III.B discusses the quantitative research showing that enforcement of anti-corruption legislation has resulted not just in a reduction in bribery, but in a reduction in investment in countries where bribery is perceived to be more common—that is, the legislation effectively functions as economic sanctions against such countries. Part III.C shows that a majority of the FCPA prosecutions have occurred with respect to

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government or agency thereof.” 15 U.S.C. § 78dd-1(c)(2)(A) to (B) (2006); *id.* § 78dd-2(c)(2)(A) to (B); *id.* § 78dd-3(c)(2)(A) to (B). Examples provided in the statute include travel and lodging expenses. 15 U.S.C. § 78dd-1(c)(2) (2006); *id.* § 78dd-2(c)(2); *id.* § 78dd-3(c)(2).

73. H.R. REP. NO. 100-576, at 922 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.A.N. 1547, 1954.



emerging markets. Part III.D thus arrives at the counterintuitive and alarming conclusion that anti-bribery enforcement amounts to de facto economic sanctions against emerging markets.

A. *Defining Economic Sanctions: Drawing Upon Political Science and Economics*

The most comprehensive treatment of the definition, history, and effectiveness of economic sanctions is the collaborative work of Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, and Barbara Oegg (HSEO), *Economic Sanctions Reconsidered*.<sup>74</sup> Originally published in 1985 and updated in 1990 and then again in 2007, they analyze 174 examples of economic sanctions, and draw upon the literature in political science and economics to understand their purpose and effect. Theirs and related work provide valuable groundwork for evaluating the extent to which anti-bribery legislation may be regarded as sanctions, and the extent to which it is likely to prove effective.

HSEO define sanctions as the “deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations.”<sup>75</sup> To a lawyer, this definition has four elements: the 1) deliberate; 2) government-inspired; 3) withdrawal or threat of withdrawal; 4) of customary trade or financial relations.<sup>76</sup> In sanctions jargon, the country applying the sanctions is often called the “sender” and the sanctioned country is the “target.” With respect to the senders, sanctions can be unilateral or multilateral, although the latter usually involve major powers persuading their smaller allies to join.<sup>77</sup> Sanctions rarely turn out in practice to be a complete blockade, either because of problems of enforcement, the so-called “black knights” that move in to supply the prohibited goods, or in the case of multilateral sanctions, the limited extent of international cooperation.<sup>78</sup> Episodes thus vary greatly

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74. HUFBAUER ET AL., *supra* note 17.

75. HUFBAUER ET AL., *supra* note 17, at 3.

76. An alternative definition of sanctions suggests that any conduct that intentionally deprives a people of its “means to an effective economic life” should be considered sanctions. GEOFF SIMONS, IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL? 11 (1999). This definition would even treat military conduct that adversely impacted a target’s economy as sanctions, and is thus significantly broader than any generally accepted usage. Another, more often used definition of sanctions is “coercive economic measures taken against one or more countries to force a change in politics, or at least to demonstrate a country’s opinion about the other’s policies.” DIANNE E. RENNACK & ROBERT D. SHUEY, ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW 2 (1998), *cited in* HOSSEIN G. ASKARI, JOHN FORRER, HILDY TEEGEN & JIAWEN YANG, ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY 14 (2003). Because this definition disregards the possibility that sanctions may be intended as expressive tools, and may or may not be designed to “bring about a change in behavior or policies,” it is not used here.

77. HUFBAUER ET AL., *supra* note 17, at 5.

78. HUFBAUER ET AL., *supra* note 17, at 57–58.

in the degree of sanctioning that actually occurs. Sanctions can involve any or all of three types of customary trade or financial relations: limitations on imports, limitations on exports, and restricting the flow of finance.<sup>79</sup> The target country need not be the adversary of the sender, and indeed, many of the most successful documented instances of sanctions have involved a friendly target who promptly acquiesced to the sender's demands.<sup>80</sup>

The nature and function of sanctions have evolved historically; the sanctions that are commonly used, and which the FCPA resembles in important ways, are comparatively new. While the history of sanctions can be traced as far back as Pericles' Megarian Decree of 432 B.C., sanctions generally became a regular and integral instrument of foreign policy, as a substitute for or at least a precursor to military action, after World War I. Sanctions became much more prevalent after World War II with the onset of the Cold War, as both the United States and the Soviet Union sought to effect dramatic reform or even the all-out collapse of various regimes within their respective spheres. The sanctions they imposed were typically comprehensive, meaning that they sought to produce a complete blockade of all relations with the target country.

After the end of the Cold War, the scholarly and regulatory community recognized that these comprehensive sanctions were perhaps too blunt an instrument. They frequently resulted in undue damage to the very people who were already victimized by an oppressive government, or to neighboring countries. This collateral damage would often occur despite the complete failure of the sanctions to reform the target regime. Indeed, the multilateral sanctions against Iraq that the UN imposed in 1990, and the colossal harm that resulted to the Iraqi people, were perhaps the most dramatic example. In order to continue to use sanctions to achieve foreign goals as an alternative to military intervention while avoiding this collateral damage, countries began to develop "targeted sanctions."<sup>81</sup> These sanctions involve more specific, tailored methods to punish governing elites and disrupt their activities while protecting the population.<sup>82</sup> Examples have included arms embargoes, travel bans (either general travel into or out of the country, or travel restrictions on specific individuals or organizations) or, commodity bans such as oil or diamonds (or, as in the case of North Korea, banning the importation of luxury goods to deny its leader, Kim

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79. HUFBAUER ET AL., *supra* note 17, at 44–45.

80. *See* HUFBAUER ET AL., *supra* note 17, at 60.

81. *See, e.g.,* David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 1, 2 (David Cortright & George A. Lopez eds., 2002).

82. *See id.*

Jong-Il, some of his favorite habits). Most recently, the United States has imposed various targeted sanctions to combat terrorism, such as freezing the assets of designated foreign terrorist organizations or prohibiting all transactions with specially designated terrorists.

Notably, these targeted sanctions are quite frequently administered against an open-ended category of nations defined by their behavior, rather than one or a few named nations. Examples have included the prohibition on certain forms of assistance to former Soviet-bloc countries for engaging in gross human rights violations (amendments to the Foreign Assistance Act of 1961), the decision by the United States to vote against the granting of loans by international financial institutions to countries condoning female genital mutilation (part of the Omnibus Appropriations Act for 1997) or the imposition of sanctions against countries engaged in a pattern of religious persecution (the International Religious Freedom Act).

Sanctions may serve either of two purposes, both of which are relevant to the FCPA. While the most obvious purpose of economic sanctions would be to “coerc[e] target governments into particular avenues of response,”<sup>83</sup> economists and political scientists have explained that economic sanctions might also be designed to accomplish an entirely different, non-instrumental goal. Under this alternative theory, sanctions are not necessarily designed to effect reforms in the target countries, and their success thus should not necessarily be measured by the extent of any resulting reforms. William H. Kaempfer and Anton D. Lowenberg have contrasted the “instrumental” theory of sanctions with the “expressive” purpose.<sup>84</sup> According to this theory, the value of sanctions lies in “taking a moral stance against some other nation’s objectionable behavior.”<sup>85</sup> Where a target country offends the sender state, but the sender’s leaders may deem more severe intervention such as military action inappropriate, the sender’s leaders may nonetheless feel compelled to “do something.”<sup>86</sup> While the costs of military action may be too high, the political costs of doing nothing may be considerable to the extent that it projects weakness.<sup>87</sup> Such domestic political pressure can “persuade the government in the sanctioning nation to respond by imposing sanctions to meet goals other than target

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83. HUFBAUER ET AL., *supra* note 17, at 5.

84. William H. Kaempfer & Anton D. Lowenberg, *The Theory of International Economic Sanctions: A Public Choice Approach*, 78 AM. ECON. REV. 786, 786 (1988).

85. *Id.*; see also PER LUNDBORG, *THE ECONOMICS OF EXPORT EMBARGOES: THE CASE OF THE US-SOVIET GRAIN SUSPENSION* (1987).

86. Ivan Eland, *Economic Sanctions as Tools of Foreign Policy*, in *ECONOMIC SANCTIONS: PANACEA OR PEACEBUILDING IN A POST-COLD WAR WORLD?* 29 (David Cortright & George Lopez eds., 1995).

87. See generally DANIEL W. DREZNER, *THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS* (1999) (discussing political costs).

compliance.”<sup>88</sup> Indeed, the expressive purpose of sanctions sometimes occurs despite its instrumental ineffectiveness, but often the sanctions are “designed deliberately to be ineffectual.”<sup>89</sup>

Unlike expressive sanctions, measuring the effectiveness of instrumental sanctions is a tricky and contested matter. HSEO have developed a comprehensive rubric for evaluating the instrumental success of sanctions, and have undertaken to identify the variables that might explain those results. They recognize that the instrumental goals of sanctions might lie anywhere on a spectrum that ranges from targeted policy changes (such as curbing religious persecution or drug trafficking), more dramatic policy changes (such as changing the alliances of a smaller nation), impairing military capacity, disrupting a military action, or ultimately, to completely changing the target country’s regime.<sup>90</sup> They have found that whether sanctions achieve their intended result depends on quite a number of economic and political variables. Among the political goals that bear the most relevance to anti-corruption legislation include the extent of international cooperation in enforcing the sanctions; whether both the senders and targets are members of the international organization that is coordinating the administration of the sanctions; the “warmth” of prior relations between senders and targets; and the political system of the target nations, ranging between autocratic and democratic.<sup>91</sup> Economic variables include the costs imposed on the target countries; the costs to the sender countries; prior commercial relations between senders and targets; the relative economic size of the targets and senders; and the economic health and political stability of the targets.

Generally, targeted sanctions have thus far proven to be much less successful than comprehensive sanctions in achieving their instrumental goals. David Cortright and George Lopez, who have done the most extensive work in the field of targeted sanctions, concluded that “comprehensive, rigorously enforced sanctions are more likely to be successful than limited, unenforced measures”<sup>92</sup> while Kimberly Ann Elliott has declared the collective experience of targeted sanctions “disappointing.”<sup>93</sup> Still, they remain an integral part of foreign policy,

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88. Eland, *supra* note 86, at 29.

89. *Id.* Scholars have further debated the role of an expressive function in law more generally. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2035 (1996).

90. HUFBAUER ET AL., *supra* note 17, at 52–53.

91. *Id.* at 55.

92. Cortright & Lopez, *supra* note 81, at 8.

93. Kimberly Ann Elliott, *Analyzing the Effects of Targeted Sanctions*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT, *supra* note 81, at 171; see also DAVID CORTRIGHT & GEORGE A. LOPEZ WITH RICHARD W. CONROY, JALEH DASHTI-GIBSON & JULIA WAGLER, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S*, at 209–12

have numerous advantages over comprehensive sanctions, and, perhaps with time, policymakers may learn how to utilize them more effectively.

Economic sanctions, then, can take any of several forms, and promote any or all of various possible policy objectives. As will be shown below, the present enforcement regime of anti-bribery legislation in the United States and elsewhere demonstrates that this legislation can, and should, be understood as de facto sanctions.

*B. The Effect of Anti-Bribery Enforcement: Economic  
Withdrawal from Countries Where Bribery is Perceived  
to be More Prevalent*

In 1995, not quite twenty years after enactment of the FCPA and three years prior to the OECD treaty ratification, James Hines of the John F. Kennedy School of Government offered the first major contribution to the theory that anti-bribery legislation deterred investment in countries where bribery is perceived to be relatively prevalent.<sup>94</sup> Hines analyzed the impact of the FCPA on U.S. investment by looking at four indicators of U.S. business activity. First was foreign direct investment.<sup>95</sup> Because the threatened penalties of the FCPA raise the costs of doing business in higher risk countries, Hines reasoned that one possible impact of the FCPA would be a reduction in such business.<sup>96</sup> The second factor that Hines examined was capital—to—labor ratios, which could be reduced as a result of the FCPA if firms conclude that an equally effective alternative to bribing local politicians would be to hire larger numbers of their constituents.<sup>97</sup> Third, Hines looked at levels of joint-venture activity post-1977.<sup>98</sup> The 1981 Comptroller General's Report to Congress had documented the concerns raised by the U.S. business community that they could become liable for the bribes paid by their joint venture partners, and that some companies had withdrawn from such ventures as a result of the FCPA.<sup>99</sup> Hines reasoned that evidence that firms “systematically avoided participation in joint ventures in corrupt countries after 1977” would constitute further evidence of the FCPA's impact.<sup>100</sup> Finally, the 1981 Comptroller General report indicated that the airline industry was most

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(2000).

94. James R. Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977* (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995), available at <http://www.nber.org/papers/w5266.pdf>.

95. *Id.* at 6. Hines used data from Business International, which has since become part of the Economist Intelligence Unit.

96. *Id.*

97. *Id.* at 11.

98. *Id.* at 14.

99. *Id.*

100. *Id.*

likely to be impacted negatively by the FCPA because of the unique prevalence of bribes.<sup>101</sup> Thus, Hines concluded that a drop in U.S. aircraft exports after 1977, when controlling for other variables, was likely due to the FCPA.<sup>102</sup> Although prior studies had suggested that the FCPA had no measurable impact on foreign investment,<sup>103</sup> Hines moved beyond prior scholarship by distinguishing the impact of the FCPA from other unrelated factors.<sup>104</sup>

He found that by each of these measures, U.S. business activity in corrupt countries showed “unusual declines” after 1977.<sup>105</sup> Foreign direct investment (FDI) grew substantially more rapidly after 1977 in less-corrupt countries than in more corrupt countries, after controlling for GDP growth and total FDI.<sup>106</sup> Similarly, the median capital-to-labor ratio for corrupt high-growth countries fell slightly in the years after the FCPA, whereas it rose in less-corrupt countries.<sup>107</sup> With respect to aircraft exports, while the U.S. share of the world’s exports declined in the years following the FCPA, it declined much more significantly, almost four times as much, in corrupt countries relative to less-corrupt countries.<sup>108</sup>

Hines noted that while U.S. commercial engagement in corrupt countries dropped significantly as a result of the FCPA, no evidence exists to suggest that total foreign business activity in such countries dropped; rather, other firms that were not constrained by anti-bribery legislation apparently took the place once occupied by U.S. companies.<sup>109</sup> He noted that the principal effect of the statute was to divert U.S. investments to less-corrupt countries, and in more-corrupt countries to effectively “encourag[e] ownership substitution between [U.S.] and foreign investors.”<sup>110</sup>

Hines’ analysis of the impact of anti-bribery legislation on investor countries was limited to the United States for the obvious reason that it was the only country with such legislation at the time of his study. Once

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101. *Id.* at 19 n.22. Indeed, the report’s survey of 250 firms in the Fortune 1000 noted that 30% of respondents reported a reduction in overseas business as a consequence of the FCPA, and in the airline and construction industries the figure is more than 50%. *Id.*

102. *Id.* at 16–18.

103. *See, e.g.*, Paul J. Beck, Michael W. Maher & Adrian E. Tschoegl, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 *MANAGERIAL & DECISION ECON.* 295, 301 (1991); John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 *J. INT’L BUS. STUD.* 107–11 (1984). For Hines’ critique of the previous methodologies, see Hines, *supra* note 94, at 19 n.23.

104. Hines, *supra* note 94, at 2.

105. Hines, *supra* note 94, at 1.

106. Hines, *supra* note 94, at 10.

107. Hines, *supra* note 94, at 12.

108. Hines, *supra* note 94, at 17.

109. Hines, *supra* note 94, at 19–20.

110. Hines, *supra* note 94, at 20.

that changed with ratification of the OECD convention, a new data set became available, and this data was analyzed for similar trends by Alvaro Cuervo-Cazurra, an M.I.T.-trained economist at the Darla Moore School of Business at the University of South Carolina. In his first article on the subject, Cuervo-Cazurra essentially confirmed and expanded upon Hines' thesis.<sup>111</sup> Cuervo-Cazurra's study was narrower than Hines' in that he focused exclusively on FDI, but broader in that Cuervo-Cazurra used data on bilateral FDI inflows from 183 home economies to 106 host economies with varying quantified corruption levels.<sup>112</sup>

Cuervo-Cazurra found that the phenomenon of businesses from countries with anti-bribery legislation investing less in highly corrupt countries was not limited to the United States. Rather, high levels of corruption in a host country generally resulted in less FDI from signatories to the OECD convention.<sup>113</sup> The same phenomenon that Hines identified with respect to the United States thus became more widespread as a result of the OECD convention. The underside of the phenomenon that Hines first identified—countries that are not bound by anti-bribery legislation continue to invest in corrupt countries—was likewise confirmed by Cuervo-Cazurra. Post-OECD, as signatory countries invested less in corrupt countries, countries with higher levels of corruption received relatively more FDI from countries with similarly higher corruption levels.<sup>114</sup> The result of these trends is that as anti-bribery legislation became more widespread, corrupt countries received less of their FDI from less-corrupt countries and more of their FDI from more-corrupt countries.<sup>115</sup>

Cuervo-Cazurra further expanded this analysis in a follow-up article published in 2008,<sup>116</sup> which had two major conclusions concerning the impact of anti-bribery legislation on levels of FDI in relatively corrupt markets. First, he was able to verify and restate the conclusion of his previous article—that countries that implemented the OECD convention had become “more sensitive” to corruption and had reduced their FDI in more-corrupt countries.<sup>117</sup> Second, he proposed a modification of

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111. Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 814. Cuervo-Cazurra further noted that Hines' study had become subject to various methodological disputes, as noted in Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 *REV. ECON. & STAT.* 1 (2000). Cuervo-Cazurra believed that he had improved upon Hines' methodology and yet confirmed the results. See Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 808–09. Again, evaluating these methodologies is not the purpose of this Article.

112. Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 811.

113. Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 807–08.

114. Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 808.

115. Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 808.

116. Cuervo-Cazurra, *The Effectiveness of Laws*, *supra* note 15.

117. Cuervo-Cazurra, *The Effectiveness of Laws*, *supra* note 15, at 644.

Hines' original thesis. He concluded that prior to the OECD convention, U.S. investors were not in fact investing less in corrupt countries, but that they began investing less after the ratification of the OECD.<sup>118</sup> In other words, the FCPA standing alone did not induce U.S. investors to invest less in corrupt countries, but rather the OECD induced both U.S. and other OECD signatories to invest less.

Whether Cuervo-Cazurra's methodology is more reliable than Hines' in evaluating the impact of the FCPA prior to the OECD convention is a question beyond the scope of this Article. The relevant conclusion from these studies is that the latest empirical studies suggest that anti-bribery legislation has a deterrent effect on investment in countries where bribery is perceived to be more prevalent. Moreover, countries that are more tolerant of corruption fill the FDI void. As the following section will show, the patterns of FCPA enforcement to date suggest that emerging markets are the countries where investment will be most deterred as a result of continued enforcement.

### C. *The FCPA Enforcement Focus on Emerging Markets*

To identify the impact of the FCPA on emerging and frontier markets, I compiled a list of countries in which alleged acts of bribery formed the basis of either a finding of liability in a civil action, a conviction in a criminal action, or a settlement of either. Because these actions are frequently resolved through pleas, deferred prosecution agreements, or civil settlements,<sup>119</sup> one cannot claim that these instances of alleged bribery are proven. Because the defendant will sometimes settle without admitting guilt, they cannot even be called admitted violations.<sup>120</sup> Rather, they are allegations of bribery that ultimately formed the basis of the resolution of a legal action that is unfavorable to the defendant. For purposes of this analysis, they will be referred to as "alleged violations."

Each country in which an alleged violation occurred over this thirty-year period has been placed in one of the three categories suggested by the Standard & Poor's (S&P) typology: 1) developed markets (those more developed than the emerging markets); 2) emerging markets; and 3) markets that have not yet become sufficiently attractive investment

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118. Cuervo-Cazurra, *The Effectiveness of Laws*, *supra* note 15, at 645.

119. See STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 6 (2005); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1-3 (2006).

120. See FCPA DIGEST, *supra* note 8, at 11-201, for a breakdown of bribery-related FCPA cases by criminal action, civil action brought by the DOJ, and civil action brought by the SEC. Bribery-related charges might ultimately be settled either under the bribery provisions or the books and records provisions of the FCPA. See *id.*



destinations to the international business and finance community to have made the S&P list of emerging markets (hereinafter “less developed markets”).<sup>121</sup> In total, there were 125 alleged violations—that is, 125 separate instances in which a defendant (or group of related defendants) became liable for one or more illicit payments in a particular country related to a single commercial transaction or a set of closely related transactions.

Of these 125 instances, it is perhaps predictable that only nine, or 7% of the total, occurred in developed countries. Of those nine, only five have occurred since ratification of the OECD convention. Accordingly, very little FCPA enforcement activity occurs in developed countries. Outliers on the other end of the spectrum are those violations that occurred in countries that are not yet far enough along in their development to be included among the emerging markets. These amounted to thirty-one, or 25% of the total. Of the thirty-one, nine occurred in Iraq as part of the United Nations’ oil-for-food program. The remaining twenty-two instances occurred in eighteen different countries—in over thirty years of FCPA enforcement, only four such countries have been host to more than one FCPA violation. Accordingly, these enforcement actions are predictably diffuse and sporadic. Combining this group with the few alleged violations that have occurred in developed countries results in a total of 32%—just less than one-third of all enforcement actions have occurred in nations either too developed, or not developed enough, to create a significant deterrent to investment. However, over two-thirds of all alleged violations—eighty-five instances, or 68% of the total—have occurred in emerging markets, as defined today by S&P.

Arguably, the patterns of enforcement in the first and third categories of markets—developed markets, and less developed markets—do not raise substantial public policy concerns. Developed countries, while unquestionably wrestling with public corruption problems of their own, generally have relatively lower levels of tolerance of public corruption. The most commonly cited gauge of public corruption is the Corruption Perception Index (CPI), which the non-profit organization Transparency International sponsors. Based on surveys of various practitioners, the CPI assigns a ranking to 180 countries.<sup>122</sup> Using the 2008 rankings,<sup>123</sup> the developed countries in

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121. The categorizations of various countries, and the number of alleged violations that occurred in each, are provided in the APPENDIX.

122. For a discussion of the CPI methodology, see Transparency International: The Global Coalition Against Corruption, TI Corruption Perceptions Index, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi](http://www.transparency.org/policy_research/surveys_indices/cpi).

123. Transparency International: The Global Coalition Against Corruption, TI Corruption Perceptions Index 2008, *available at* [http://www.transparency.org/policy\\_research/surveys\\_ind](http://www.transparency.org/policy_research/surveys_ind)

which FCPA violations have occurred have a mean CPI ranking of approximately 29 out of 180—they are among the least corrupt countries in the world. Given the low levels of corruption and of FCPA violations in these countries, any deterrent effect on future investment is likely to be minimal.

At the other end of the spectrum are the countries whose levels of market development remain quite low. These less-developed markets are countries where there is a sufficiently high degree of volatility and a low degree of economic development, such that the finance community does not generally recommend investment. Unsurprisingly, the countries in this category that have been host to FCPA violations have a mean CPI ranking of 127 out of 180—among the most corrupt countries in the world. In contrast to the developed countries, here there is little investment and much corruption. In sum, these are countries with limited current prospects for economic growth, with very high levels of corruption, and with only sporadic foreign investment. Because these countries have not yet been able to create the conditions for larger-scale foreign investment, the aggregate economic impact of FCPA enforcement actions is far less problematic.

However, the frequency of alleged violations in emerging markets, and the deterrent effect on these countries that will likely result, raises a major public policy red flag. These are markets where opportunities for exceptional economic development exist, where the prospects of overcoming poverty are historically high, and where the developed world is already investing in substantial and systematic ways. Many of these countries are in critical stages in their political development, and moreover, are likely instrumental in the stabilization of their geographic regions. China, Russia, India, Pakistan, and Venezuela are a few examples of the countries in Standard & Poor's list of emerging markets where FCPA violations have already occurred and which have significant foreign policy implications. Finally, the mean CPI ranking of these countries is almost exactly the mean of all countries: 89 out of 180. Corruption levels in these countries, while undeniably a cause for concern, are only average.

In sum, both economically and politically, public policy would seem to strongly favor the building of economic ties in emerging markets. Yet these are the very countries in which most alleged violations occur.

#### D. *Putting the Pieces Together: Anti-Bribery Enforcement as De Facto Sanctions Against Emerging Markets*

To what extent does this pattern of enforcement constitute economic sanctions? Although HSEO do not count the FCPA or the OECD

convention as sanctions, and lawyers, political scientists, and economists have not generally treated them as sanctions, the legislation exhibits almost all of the characteristics of sanctions. They might rightly be counted as targeted sanctions—sanctions which target business that is obtained through the bribery of overseas officials. The list of targeted nations is open-ended, as they often are for targeted sanctions. We have seen that the markets that are most likely to fall into that open-ended category, and that raise the most formidable policy questions, are emerging markets.

More specifically, consider the four elements of HSEO's definition—the “deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations”<sup>124</sup>—in reverse order. Foreign direct investment certainly constitutes trade and financial relations. The levels of FDI that would exist absent the anti-corruption legislation are the “customary levels” that are withdrawn as a result of the legislation. Moreover, the threat of heightened FCPA enforcement, and the anticipation of more aggressive enforcement by OECD signatories, should now, after the work of Hines and Cuervo-Cazurra, constitute at least a tacit threat of further withdrawal. Because this withdrawal results from an act of government, it is “government-inspired.” They began as unilateral sanctions, but as often occurs, over time they became multilateral with the ratification of the OECD convention. These sanctions are not universally enforced, but then again, sanctions rarely are.

Despite these parallels, it will be shown below that the FCPA fails quite conspicuously to meet the first of HSEO's elements: the sanctions that result from the FCPA are not deliberate. That is, the United States did not intend to punish target countries by withdrawing customary trade and financial relations, either when it passed the FCPA or later when amending it. The FCPA thus resembles sanctions in every respect except, arguably, the most important one: no politically accountable governmental body ever decided to impose them. Part I of this Article explained that the statute, on its face, punishes suppliers of bribes only. The following exploration of the legislative history shows that this was precisely the purpose of the statute. It demonstrates that the FCPA was not to any meaningful degree an expression of disapproval of the governments that tolerate bribery. More to the point, the congressional testimony, like the statute, does not reflect an intent to punish those governments by withdrawing customary trade and financial relations. In this respect, and perhaps only in this respect, the consequences of FCPA enforcement are materially different from the targeted sanctions that have become so common in the post-Cold War era.

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124. HUFBAUER ET AL., *supra* note 17, at 3.

#### IV. THE LEGISLATIVE HISTORY: BUILDING ALLIANCES THROUGH ETHICAL INVESTMENT

Given the FCPA's straight-forward moral appeal and the context of the infamous Watergate scandal, the statute can lend itself to fairly simple assumptions about the values that motivated its passage. Relying on a general knowledge of the times and the structure and operation of the statute today, one can arrive at a number of incorrect conclusions about the zeitgeist of the time: that everyone believed in a universal ethical norm by which bribery was offensive; that immediate legislation was appropriate; that the legislation would ideally be multilateral, but if impossible, unilateral legislation was nonetheless called for; that the legislation should criminalize bribery; and that any negative impact to U.S. competitiveness would be easily outweighed by the moral and economic benefits of reducing bribery.

The prevalence of this way of thinking is due in part to the failure of legal scholars thus far to more deeply mine the legislative history. This history reveals that among businessmen, financiers, academics, congressmen, presidential appointees, and U.S. Presidents, there was substantial disagreement on numerous fundamental issues, including: whether bribery was common overseas; whether bribery was necessary to conduct business there; whether companies from countries other than the United States engaged in bribery; whether the United States should work toward an international consensus and a multilateral treaty prohibiting bribery, or instead pass unilateral legislation; if the latter, whether it would impose a competitive disadvantage on U.S. businesses, have no impact, or actually improve their competitiveness; and whether any such legislation should criminalize bribery or merely impose civil penalties. The debate was surprisingly heated and contentious, peppered with dramatic rhetorical flourishes and poignant metaphors.

The context of this debate creates a colorful backdrop, against which the underlying unanimity becomes all the more striking. On the more fundamental question of the legislation's purpose and its intended effects, every individual who testified clearly believed that the FCPA should encourage investment in higher risk countries to build economic and political alliances. The legislation would be an alliance-building tool. No one ever suggested, either in 1977 or in 1998, that the FCPA should punish countries that tolerate bribery by withdrawing economic support. Indeed, it should do precisely the opposite. Part IV.A paints the backdrop by sampling the more divided testimony. Against that backdrop, Part IV.B shows the breath of the consensus on the fundamental purpose of the legislation. Part IV.C further shows that in ratifying the OECD Convention and amending the FCPA in 1998, the United States continued to believe that the legislation should promote,

rather than deter, investment in countries that have historically presented higher bribery risks.

A. *The Early Disputes Over The Scope of the Problem and the Appropriate Remedy*

The earliest and most fundamental issue before Congress obviously was the magnitude of the overseas bribery problem—just how prevalent is bribery overseas, and how widely are U.S. businesses participating in it? This proved to be a topic of considerable disagreement. Many witnesses and documents admitted into the record suggested that the practice was nearly universal. In the course of the earliest hearings on the need for international anti-bribery legislation, Lockheed represented that bribes to overseas officials for business purposes had been made in “some countries . . . for centuries—and was a practice we believe was engaged in by a great many companies, both American and foreign, including Lockheed.”<sup>125</sup> Its testimony went on to mention numerous other indicators that overseas bribery was widely practiced by businesses from many countries, and that it was known to exist by U.S. officials in both business and government.<sup>126</sup>

At least some of the media painted a similar picture. The prevalence of such payments was captured in a survey of *Washington Post* foreign correspondents published on June 22, 1975. Admitted into the congressional testimony, the survey reported that such payments “are ubiquitous and a way of life in many countries” and are “part of a deeply rooted system of doing business.”<sup>127</sup> Similarly, an interview by the *Financial Times* of the chairman of the U.S. Council of the International Chamber of Commerce suggested there are countries where, no matter the company’s size, “you could not do business without greasing someone’s palm.”<sup>128</sup>

Two U.S. Senators, in the course of the congressional hearings, powerfully voiced a similar perception of the prevalence of bribery in international business. Senator Abraham Ribicoff, a Democrat from Connecticut, stated:

What disturbed me as I traveled around the world was the realization that American business was being internationally blamed for activities which are very obvious to me were a very common practice throughout the entire world. Not only the countries of the West—Western Europe, Japan, and the United States—but certainly

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125. 1975 Senate Banking Hearing, *supra* note 26, at 26.

126. 1975 Senate Banking Hearing, *supra* note 26, at 27.

127. 1975 Senate Banking Hearing, *supra* note 26, at 26, 57–60.

128. 1975 Senate Banking Hearing, *supra* note 26, at 50–51.

through Africa, the Middle East, and Asia.<sup>129</sup>

Similarly, Senator Frank Church, a Democrat from Idaho, concluded: "There is no doubt that these practices are common, and that they are used by foreign and American firms alike."<sup>130</sup> This perception was further articulated by members of the administration of President Gerald Ford. Robert S. Ingersoll, Deputy Secretary of State, noted: "We are told that businessmen from other countries take the view that what we call improper payments are a basic requirement of the societies in which they operate, and represent centuries old practices which no amount of indignation or legislation can change."<sup>131</sup>

This view of the role of bribery in international business was expressed perhaps most poignantly in a September 21, 1976, article in *Foreign Affairs*, which had been admitted into the record, in which the author tellingly explained: "The legend persists that the Harvard Business School student who questioned the ethics of this practice was directed by his professor to enroll in the Harvard Divinity School."<sup>132</sup>

A very different perspective was articulated once President Jimmy Carter took office. The most forceful voice was that of George Ball, then of Lehman Bros., but formerly Undersecretary of State under Presidents Kennedy and Johnson. Ball, who had become most famous for his opposition to the escalation of the Vietnam War, struck a far more moralistic tone. In response to American businessmen suggesting that bribery is pervasive and necessary, he said, "[s]uch self-righteous answers cannot stand analysis. That American business firms are compelled to engage in bribery is disproved by the example of a number of our most successful enterprises that rigorously reject such practices yet still do enormous business all over the world."<sup>133</sup>

According to this worldview, the problem is not the absence of appropriate ethical standards abroad, but rather, of low standards in the United States. Dr. Gordon Adams, Director of the Military Research Council on Economic Priorities, a public interest research organization,

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129. *Protecting the Ability of the United States to Trade Abroad: Hearing Before the Subcomm. on International Trade of the S. Comm. on Finance*, 94th Cong. 1 (1975) [hereinafter *1975 Senate Hearing*] (statement of Sen. Abraham Ribicoff).

130. *Id.* at 8 (statement of Sen. Frank Church).

131. *Abuses of Corporate Power: Hearing Before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm.*, 94th Cong. 153 (1976) [hereinafter *1976 Joint Priorities Hearing*].

132. *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 126 (1976) [hereinafter *1976 House Consumer Protection Subcommittee Hearing*].

133. *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 94th Cong. 39 (1976) [hereinafter *1976 Senate Banking Hearings*] (statement of George Ball, Lehman Bros).

observed that “the problem may not be one of lower standards abroad, but of low standards in general for U.S. corporate behavior.”<sup>134</sup> In a sharper retort to the previous testimony, he stated, “If anyone thinks that these standards are vastly different in other countries than they are in the United States, then that person must indeed be naïve.”<sup>135</sup>

Relatedly, there was substantial disagreement on whether the United States should act unilaterally in prohibiting overseas bribery, or instead, seek to build an international agreement that would result in multilateral legislation. For example, Treasury Secretary Simon favored an international agreement with the United Nations (UN), International Monetary Fund (IMF), and OECD,<sup>136</sup> and was concerned that unilateral action by the United States might “undercut the vital principle that cooperative action by the whole international community of nations is needed in order to deal effectively with this problem.”<sup>137</sup> Likewise, Ian MacGregor, Chairman of the U.S. Council of the International Chamber of Commerce, testified that given the prevalence of bribery, “an international agreement on the legal definition for bribery and corruption might be needed before any general law and penalties could be drawn up to stop the practices,” and urged the committee to delay unilateral legislation until the problem could be further studied and a more effective and fair remedy supplied.<sup>138</sup>

By contrast, Representative Stephen J. Solarz, a Democrat from New York and a member of the House International Relations Committee, believed that “any truly effective international agreement which provided enforcement procedures and sanctions would be a long time coming—if ever . . . . To wait until bribery is solved on a multilateral basis may well be to wait forever.”<sup>139</sup>

The concern about unilateral action was based largely on the feared impact of such action on the competitiveness of U.S. businesses. Robert S. Ingersoll, Deputy Secretary of State, stated, “It is tempting to try to deal with the situation unilaterally, but there are serious risks for the United States in such an approach. There is widespread recognition in

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134. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 35 (statement of Dr. Gordon Adams, Director of the Military Research Council on Economic Priorities).

135. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 35 (quoting Conference Board, an independent research organization, from *The New York Times*, Feb. 13, 1976).

136. *1976 Senate Banking Hearings*, *supra* note 133, at 86 (statement of William E. Simon, Secretary of the U.S. Department of the Treasury).

137. *1976 Senate Banking Hearings*, *supra* note 133, at 88.

138. *1976 Senate Banking Hearings*, *supra* note 133, at 51–52 (statement of Ian MacGregor, Chairman of the U.S. Council of the International Chamber of Commerce).

139. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 142 (statement of Rep. Stephen J. Solarz).

the Congress that such unilateral action would put U.S. companies at a serious disadvantage in the export trade.”<sup>140</sup> This fear was shared by the International Chamber of Commerce, which testified that unless prohibitions on overseas bribery were internationalized, it “could, and in some cases would, mitigate severely against U.S. business and prevent it from being able to compete effectively in quite substantial markets of the world.”<sup>141</sup> Senator Ribicoff predicted that under unilateral legislation, “the American companies, who should be making payoffs then would be barred from making payoffs, the business that they should be getting would be going to foreign competitors who were undertaking the same practices.”<sup>142</sup>

Then-Senator Joe Biden, a Democrat from Delaware, also agreed that frequently in international business, not just in the Lockheed instance but in many others, U.S. firms are competing only against fellow U.S. firms.<sup>143</sup> W. Michael Blumenthal, Treasury Secretary under President Carter, testified that paying bribes, “apart from being morally repugnant and illegal in most countries—is simply not necessary for the successful conduct of business here or overseas. I believe that the responsible elements of the business community agree.”<sup>144</sup> George Ball concurred, testifying that frequently, as in the case of Lockheed, the U.S. company is only competing against other U.S. companies.<sup>145</sup> He concluded:

The only action that could materially reduce the practice—and mitigate its consequences—is for the U.S. Government to utilize its powers as the domiciliary state of most of the largest multinational companies by enacting and enforcing comprehensive laws imposing on American corporations a standard of conduct in their overseas dealings fully as strict as that required at home. Only when that is done will our Government be able to speak with authority in shaping an international set of rules and sanctions. Having put our own house in order, we will be entitled to insist that foreign

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140. *1976 Joint Priorities Hearing*, *supra* note 131, at 154 (statement of Hon. Robert S. Ingersoll, Deputy Secretary of State).

141. *1976 Senate Banking Hearings*, *supra* note 133, at 49 (statement of Ian MacGregor, Chairman of the U.S. Council of the International Chamber of Commerce).

142. *1975 Senate Hearing*, *supra* note 129, at 1 (statement of Sen. Abraham Ribicoff).

143. *1976 Senate Banking Hearings*, *supra* note 133, at 44–45 (statement of Sen. Joseph R. Biden, Junior).

144. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 67 (1977) [hereinafter *1977 Senate Banking Hearing*] (statement of W. Michael Blumenthal, Secretary of the U.S. Department of the Treasury).

145. *1976 Senate Banking Hearings*, *supra* note 133, at 39 (statement of George Ball, Lehman Bros.).



governments do likewise—and, in time, this procedure should gradually bring some solid results.<sup>146</sup>

Some, even of the business community, testified that anti-bribery legislation would actually improve the ability of U.S. companies to conduct business overseas. The Chairman of Gulf Oil Corporation urged Congress,

[Y]ou can help us, and many other multinational corporations which are confronted by this problem by enacting legislation which would outlaw any foreign contribution by an American company. Such a statute on our books would make it easier to resist the very intense pressures which are placed upon us from time to time.<sup>147</sup>

Ultimately, both the House and Senate committee reports echoed this opinion.<sup>148</sup> Similarly, the SEC interpreted its data to suggest that the cessation of such foreign payments “will not seriously affect the ability of American business to compete in world markets.”<sup>149</sup>

As with the question of whether bribery is prevalent internationally, there was some doubt as to whether any U.S. law should go so far as to criminalize such bribery, which the FCPA of course ultimately did. The Ford Administration was concerned that criminalization was both too severe and too difficult to implement. In President Ford’s August 3, 1976 Message from the President of the United States Urging Enactment of Proposed Legislation to Require the Disclosure of Payments to Foreign Officials, he urged passage of a bill that required reporting but did not criminalize payments, due to problems of “definition and proof.”<sup>150</sup>

These competing worldviews, and the tensions among different witnesses and administrations, were illustrated in the following exchange. Frustrated by what he regarded as a tentative approach when

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146. 1976 Senate Banking Hearings, *supra* note 133, at 40–41.

147. 1976 House Consumer Protection Subcommittee Hearing, *supra* note 132, at 141–42 (statement of Rep. Stephen J. Solarz) (quoting Bob R. Dorsey, Chairman of Gulf Oil Corp.).

148. See S. REP. NO. 95-114, at 4 (1977) (“Many U.S. firms have taken a strong stand against paying foreign bribes and are still able to compete in international trade.”); H.R. REP. NO. 95-640, at 5 (1977) (citing the testimony of SEC Chairman Roderick Hills that bribery is “unnecessary”).

149. STAFF OF S. COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 42–43 (Comm. Print 1976).

150. FOREIGN PAYMENT DISCLOSURE, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES URGING ENACTMENT OF PROPOSED LEGISLATION TO REQUIRE THE DISCLOSURE OF PAYMENTS TO FOREIGN OFFICIALS, H.R. DOC. NO. 94-572, at 1 (1976) [hereinafter 1976 PRESIDENTIAL STATEMENT URGING ENACTMENT].

he felt that an immediate and fairly strong response was needed, Senator Proxmire said,

I recall the story of an agency in the bureaucracy that was short on bureaucrats. They hired a talking parrot. And they made him a GS-15. They taught him to say only one phrase: 'Very complex, very complex.' Sometimes I get the feeling that that parrot, that very complex parrot, is in charge of the Federal Government's groping, grasping, policy on bribery.<sup>151</sup>

Elliot L. Richardson, President Ford's Secretary of Commerce, responded that the Ford Administration was developing numerous non-criminalizing solutions, including information-sharing agreements, disclosure requirements, a code of conduct, and developing an international approach through the OECD and the UN.<sup>152</sup> Expressing reservations about criminalization, Richardson said, "Even a parrot must occasionally be right."<sup>153</sup> Following Richardson, Ford's Treasury Secretary William E. Simon began his testimony, "The Treasury Department actually hired a second parrot, Mr. Chairman and he says, 'I agree, let's study it.'"<sup>154</sup>

#### B. *The Early Consensus: Anti-Bribery Legislation as an Alliance-Building Instrument*

There was one issue which no one apparently believed needed to be studied. Despite these contrasting viewpoints on crucial issues related to the nature of the problem and the appropriate remedy, an absolute consensus existed on the question of the purpose and intended effects of the proposed legislation. Bribery is a foreign policy problem because it jeopardizes our relations with countries whose alliances we very much value. Specifically, exposing the bribing of overseas officials undermines U.S. credibility and creates the conditions in which hostile governments can spread. Moreover, all agreed that these alliances must be maintained through the continued building of economic and political ties with vulnerable countries, and that the resulting legislation was therefore designed to promote investment in countries where bribery was occurring, rather than to withdraw investments as punishment. The legislative history reveals that this view was shared by the business

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151. 1976 Senate Banking Hearings, *supra* note 133, at 76 (statement of Sen. William Proxmire).

152. 1976 Senate Banking Hearings, *supra* note 133, at 79 (statement of Elliot Richardson, Secretary of the U.S. Department of Commerce).

153. 1976 Senate Banking Hearings, *supra* note 133, at 80.

154. 1976 Senate Banking Hearings, *supra* note 133, at 84 (statement of William E. Simon, Secretary of the U.S. Department of the Treasury).

community as well as by every member of Congress who spoke. The bipartisan nature of this consensus is further apparent in the comments made by members of the Republican Ford Administration and the Democratic Carter Administration, whose comments were indistinguishable both in substance and tone.

The most fulsome explanation of the foreign policy implications of international bribery was provided by Congressman Solarz. He began his testimony: “It is important to look at the problem of overseas payments in broader terms than simply a matter of economics or even morality.”<sup>155</sup> In doing so, Solarz articulated a view that would prove to be universal among witnesses that there existed another dimension to the problem of overseas bribery, and he used the example of Lockheed to illustrate this view. Solarz described that the Lockheed scandal, which involved payments to Japanese officials, put “[t]he democratic system in Japan [] in grave danger.”<sup>156</sup> Japanese opponents of the close ties between the United States and Japan were

handed a terribly effective weapon to drive a wedge between two close allies. At a time of uncertainty due to the shifting balances of power in Asia, our strongest and most stable ally in the region [was] undergoing unnecessary turbulence, and [a] relationship which is at the very heart of our foreign policy [was] potentially jeopardized.<sup>157</sup>

Lockheed’s payments had also occurred in the Netherlands, where Prince Bernhard reportedly received \$1.1 million in bribes from Lockheed and was forced to resign. But, Solarz explained, “[p]erhaps most serious” was the “delicate situation” with Italy, which was “one of the keys to the southern flank of NATO.”<sup>158</sup> He explained that the power struggle between Italy’s more democratic party—the Christian Democrats—and the Communist Party was at that time quite pronounced, and the balance was precarious. He noted that “[a]llegations of payments by Lockheed served to advance the Communist cause in Italy where the Communist bloc was strengthened by the sight of corrupt capitalism.”<sup>159</sup> His ultimate fear was that the

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155. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 140 (statement of Rep. Stephen S. Solarz).

156. *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 172 (1977) [hereinafter *1977 Protection Hearings*] (statement of Rep. Stephen S. Solarz) (quoting “a very senior politician close to former [Japanese] Prime Minister Takeo Mike”).

157. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 141 (statement of Rep. Stephen S. Solarz).

158. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 141.

159. *1977 Protection Hearings*, *supra* note 156, at 173 (statement of Rep. Stephen S.

Communist Party would gain a majority in the Italian parliament and the country would be lost to the enemy.<sup>160</sup>

He concluded that the foreign policy implications for the United States were “staggering and in some cases, perhaps irreversible.”<sup>161</sup> U.S. foreign policy objectives are “seriously impaired” when “foreign government is weakened by corruption because popular support erodes thus jeopardizing common interests shared with our friends overseas.”<sup>162</sup> The example of Italy demonstrated that “[c]ommunist and other anti-U.S. forces are quick to take advantage of any evidence of immorality or corruption associated with pro-Western governments. Both fear and resentment are generated among foreign officials who become increasingly hostile as the United States continues to expose traditional corrupt practices abroad.”<sup>163</sup> He continued, “The resulting economic and political instability is certainly detrimental to American foreign policy especially when it results in a backlash against American ideals and interests.”<sup>164</sup> Ultimately, he observed, “[W]hat is at stake is much more than the individual interests of corporations which are competing for a share of foreign markets. What is in fact at stake is the foreign policy and national interest of the Untied [sic] States.”<sup>165</sup>

This view would be powerfully expressed by members of both the Ford and Carter Administrations. Mark B. Feldman, Deputy Legal Adviser in the Department of State under President Ford, testified that

[c]orruption weakens the fabric of government, erodes popular support, and jeopardizes the important interests we share with our friends abroad. The free enterprise system is a vital factor in world economic growth upon which social progress, economic justice, and perhaps, ultimately, world peace depends. . . . Corruption of friendly foreign governments can undermine the most important objectives of our foreign policy.<sup>166</sup>

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Solarz).

160. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 141 (statement of Rep. Stephen S. Solarz).

161. *1976 House Consumer Protection Subcommittee Hearing*, *supra* note 132, at 2 (statement of John M. Murphy, Chairman).

162. *1977 Protection Hearings*, *supra* note 156, at 173 (statement of Rep. Stephen S. Solarz).

163. *1977 Protection Hearings*, *supra* note 156, at 173.

164. *1977 Protection Hearings*, *supra* note 156, at 173.

165. *1977 Protection Hearings*, *supra* note 156, at 173.

166. *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the H. Comm. on International Relations*, 94th Cong. 23–24 (1975) (statement of Mark B. Feldman, Deputy Legal Adviser, U.S. Department of State).

Similarly, Ford's Deputy Secretary of State, Robert S. Ingersoll, stated:

I wish to state for the record that grievous damage has been done to the foreign relations of the United States by recent disclosures . . . . [I]t is a fact that public discussion in this country of the alleged misdeeds of officials of foreign governments cannot fail to damage our relations with these governments.<sup>167</sup>

Treasury Secretary William E. Simon further stated that it “erodes the general reputation of the American business community, may adversely affect our relations with foreign governments and can contribute to a general deterioration in the climate for fair and open international trade and investment.”<sup>168</sup> It is notable that this concern was voiced by members of both parties. Indeed, it was voiced by both presidential administrations. Ford's Commerce Secretary, Elliot L. Richardson, further articulated: “Bribery corrodes the confidence that must exist between buyer and seller if domestic and international commerce is to flourish. It threatens to poison relationships between the United States and nations with which we have long had mutually beneficial political and commercial ties.”<sup>169</sup>

In urging passage of legislation, President Ford stated that reports of bribery “have resulted in an erosion of confidence in the responsibility of many of our important business enterprises. In a more general way, these disclosures tend to destroy confidence in our free enterprise institutions.”<sup>170</sup> He repeated the theme that bribery is first and foremost a problem of image and creates a crisis of confidence, rather than a problem of substantive ethics or economic efficiency and growth.<sup>171</sup> The legislation would “contribute in an important way to the restoration of confidence in America's vital business institutions.”<sup>172</sup>

Unlike their arguments on other issues, which marked a sharp departure from the prior administration, the comments coming from the Carter Administration were indistinguishable from those of its predecessor. Carter's Treasury Secretary, W. Michael Blumenthal, stated, “The Carter Administration believes that it is damaging both to our country and to a healthy world economic system for American

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167. 1976 *Joint Priorities Hearing*, *supra* note 131, at 154 (statement of Hon. Robert S. Ingersoll, Deputy Secretary of the U.S. Department of State).

168. 1976 *Senate Banking Hearings*, *supra* note 133, at 85 (statement of William E. Simon, Secretary of the U.S. Department of the Treasury).

169. 1976 *Senate Banking Hearings*, *supra* note 133, at 76.

170. 1976 PRESIDENTIAL STATEMENT URGING ENACTMENT, *supra* note 150, at 1.

171. 1976 PRESIDENTIAL STATEMENT URGING ENACTMENT, *supra* note 150, at 3.

172. 1976 PRESIDENTIAL STATEMENT URGING ENACTMENT, *supra* note 150, at 3.

corporations to bribe foreign officials.”<sup>173</sup> President Carter ultimately explained in his signing statement that

[d]uring my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. [The FCPA] provides that necessary sanction. I share Congress belief 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. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.<sup>174</sup>

Again, this view was expressed most forcefully and eloquently by the Democrat George Ball:

The vast volume of speeches, pamphlets, and advertising copy and propaganda leaflets extolling the virtues of free enterprise are cancelled every night when managements demonstrate by their conduct that a sector of multinational business activity is not free; it is bought and paid for. This is a problem that, like so many others, has relevance in the struggle of antagonistic ideologies; for, when our enterprises stoop to bribery and kickbacks, they give substance to the communist myth—already widely believed in Third World countries—that capitalism is fundamentally corrupt.<sup>175</sup>

Thus, even most liberal, reform-minded advocates recognized the urgent foreign policy implications.

The congressional reports captured this important basis for the legislation. The Senate Report stated that as “[t]he image of American democracy abroad has been tarnished . . . [c]onfidence in the financial integrity of our corporations has been impaired.”<sup>176</sup> Governments that otherwise had friendly relations with the United States, such as Japan, Italy, and the Netherlands, came under “intense pressure from their own people.”<sup>177</sup> The idea gained its most fulsome expression in the House

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173. 1977 *Senate Banking Hearing*, *supra* note 144, at 67 (statement of W. Michael Blumenthal, Secretary of the U.S. Department of the Treasury).

174. Foreign Corrupt Practices and Investment Disclosure Bill: Statement on Signing S. 305 into Law, 13 WEEKLY COMP. PRES. DOC. 1909, 1909 (Dec. 20, 1977).

175. 1976 *Senate Banking Hearings*, *supra* note 133, at 41–42 (statement of George Ball, Lehman Bros.).

176. S. REP. NO. 95-114, at 3 (1977).

177. *Id.*

Report, which discussed the ethical component of the bribery problem,<sup>178</sup> and that bribery is not only unethical, but is “bad business as well.”<sup>179</sup> It mentioned that bribery “short-circuits the marketplace” by channeling business to companies that are “too inefficient” or “too lazy” to compete fairly.<sup>180</sup> Bribery “rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards.”<sup>181</sup> Despite these themes of ethics and efficiency, the overriding concern expressed in the House Report was with America’s international image— “It erodes public confidence in the integrity of the free market system.”<sup>182</sup> And the corrupt practices of some U.S. companies “casts a shadow on all U.S. companies.”<sup>183</sup> It also noted that “the exposure of such activity can damage a company’s image,” while secondarily mentioning that it can cause direct financial damage.<sup>184</sup>

The House Report further sounded the theme of the foreign policy implications of overseas bribery. Bribery creates “severe foreign policy problems” for the United States.<sup>185</sup> The Lockheed scandal, for instance, “shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations.”<sup>186</sup> Similarly, when it was revealed that multiple large oil companies bribed Italian officials, it “eroded public support for that Government and jeopardized U.S. foreign policy” with Italy, the broader Mediterranean area, and “with respect to the entire NATO alliance.”<sup>187</sup> Ultimately, bribery can “embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.”<sup>188</sup> These comments, again, assume that bribery is incongruent with the cultural norms of the payee’s country, and that its exposure sparks public outrage.

The foreign policy implications of bribery were perhaps stated most graphically, and somewhat comically, in the following exchange. The executive of a company that was known to have bribed overseas officials in a European country testified, somewhat incredibly, that

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178. H. REP. NO. 95-640, at 4 (1977).

179. *Id.*

180. *Id.*

181. *Id.* at 4–5.

182. *Id.* at 4.

183. *Id.* at 5.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

although his company had in fact paid bribes to leaders of Eastern European countries, the purpose of its work was to promote liberal free enterprise and stave off communism, which required bribing political parties.<sup>189</sup> Then-Senator Joe Biden, sitting on the committee, facetiously asked, “How much did you contribute to the Communist Party?” Perhaps not appreciating the Senator’s tone, the attorney turned to the president of the corporation, conferred for a moment, and replied, “Well, \$88,000.”<sup>190</sup>

The foreign policy implications of bribery were unmistakable. But also unmistakable was the precise design of the intended remedy: continued investment, albeit subject to higher ethical standards. In the ensuing twenty years, the United States would realize that the FCPA was in fact restricting such investment by U.S. companies, and that this constituted a serious shortfall of the legislation. In 1998, Congress would undertake to correct that problem and create the conditions under which U.S. businesses would again be free to invest liberally in transitional economies.

### *C. Affirming the Consensus in Amending the FCPA Twenty Years Later*

As explained in Part II, although the FCPA was amended in 1988 in several respects, this occurred as part of an omnibus bill, with minimal congressional testimony on the nature and purpose of anti-bribery legislation. Despite the legislative vehicle for these amendments, the 1988 Amendments would prove most significant in their requirement that the President pursue the negotiation of an international agreement with the member countries of the OECD to govern acts prohibited by the FCPA.<sup>191</sup>

This requirement was ultimately satisfied on December 17, 1997, with the OECD Member States’ adoption of the Convention on Combating Bribery.<sup>192</sup> The convention required each state to adopt its own legislation to enact its provisions into law and provide for its enforcement,<sup>193</sup> and the United States did so on December 8, 1998. While the convention does not require absolute identity among the statutes passed by the various states, it does require functional

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189. 1976 *Senate Banking Hearings*, *supra* note 133, at 45 (statement of Sen. Joseph R. Biden, Junior).

190. *Id.*

191. H.R. REP. NO. 100-576, 924 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1957.

192. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

193. *Id.*



equivalence,<sup>194</sup> and this in turn required amendments to the FCPA.

The U.S. ratification of the convention began with the May 4, 1998 message from President Clinton transmitting the OECD convention. The message referenced only a single policy behind ratifying the treaty:

Since the enactment . . . of [the FCPA], the United States has been alone in specifically criminalizing the business-related bribery of foreign public officials. United States corporations have contended that this has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws.<sup>195</sup>

The President advocated ratification of the treaty because it would facilitate U.S. investment in countries where the FCPA had previously put U.S. businesses at a disadvantage.

The theme would prove fundamental in the ensuing congressional testimony, and was frequently captured with the same ubiquitous metaphor. In the hearings before the House Commerce Committee's Subcommittee on Finance and Hazardous Materials, Congressman Michael Oxley, a Republican from Ohio, stated that the convention would "go a long way to leveling the playing field."<sup>196</sup> Congressman Bliley reiterated the theme of fighting bribery by "level[ing] the playing field,"<sup>197</sup> as would Associate Director of Enforcement for the S.E.C. Paul V. Gerlach.<sup>198</sup> The metaphor eventually made its way into the presidential signing statement, wherein President Clinton explained that "U.S. companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at \$30 billion per year."<sup>199</sup>

The overwhelming concern among congressional leaders and witnesses, as well as the President, in ratifying the OECD treaty was enabling U.S. businesses to compete with companies from countries that had not previously ratified or enforced anti-bribery legislation. The predictions of some in the original hearings that the FCPA would not adversely affect U.S. competitiveness had, by all accounts, proven

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194. See ZARIN, *supra* note 18, at § 13:3.

195. S. TREATY DOC. NO. 105-43, at III (1998).

196. *The International Anti-Bribery and Fair Competition Act of 1998: Hearing Before the Subcomm. on Finance and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 1 (1998) [hereinafter *1998 House Finance Hearing*] (statement of Rep. Michael G. Oxley).

197. *Id.* at 4 (statement of Rep. Tom Bliley).

198. *Id.* at 11 (statement of Paul V. Gerlach, Associate Director of Enforcement of the U.S. Securities and Exchange Commission).

199. Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290, 2290 (Nov. 10, 1998), *reprinted in* 1998 U.S.C.C.A.N. 771, 771 [hereinafter *1998 Presidential Signing Statement*].

wrong, and the inability of U.S. companies to continue investing in historically higher risk countries had become a major public policy concern. This theme proved so dominant that many of the other issues that had appeared in the testimony in the 1970s had, by 1998, disappeared. Among the vanished themes was the damage that bribery did to U.S. foreign policy interests. This disappearance was likely due largely to two factors: the collapse of the Soviet Union, which brought an end to bi-polar international politics, and the success of the FCPA in curbing bribery, which at least in part brought an end to the major overseas bribery scandals such as Lockheed's.

But despite the absence of overt foreign policy themes in the 1998 testimony, from the concept of leveling the playing field there generally emerged three more subtle, but unmistakably present, themes that bear on the question of the FCPA's intended effect on international relations. Each is consistent with the 1977 view of the FCPA.

First and perhaps most obviously, it remained true that the legislation would, and should, target only the suppliers of the bribes, and not the solicitors, recipients, or the governments that tolerate them. Congressman Edward J. Markey, a Democrat from Massachusetts, submitted a prepared opening statement which explained that in originally passing the FCPA, "it was hoped that by taking the lead to curb bribery by our corporations, America would put pressure on the other developed industrialized nations to adopt similar laws."<sup>200</sup> Congressman Oxley testified that the problem which the OECD convention was designed to remedy "is that our competitors have much looser rules and enforcement mechanisms against bribery."<sup>201</sup> Congressman Thomas Manton, Democrat from New York, expressed the problem was not merely with the absence of fear of penalty, as certain trading partners, such as Germany, apparently "appear to actually encourage [bribery] through their tax codes."<sup>202</sup> The House Report ultimately noted that since 1977, U.S. businesses have "operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty."<sup>203</sup> The report stated that the OECD treaty will, in relation to the FCPA, achieve "comparable prohibitions in other developed countries."<sup>204</sup> The object of the legislation, then as before, was to punish the supply of bribes, and not the demand. The

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200. 1998 House Finance Hearing, *supra* note 196, at 5 (statement of Rep. Edward J. Markey).

201. 1998 House Finance Hearing, *supra* note 196, at 1 (statement of Rep. Michael G. Oxley).

202. 1998 House Finance Hearing, *supra* note 196, at 3 (statement of Rep. Thomas J. Manton).

203. H.R. REP. NO. 105-802, at 10 (1998).

204. *Id.*

convention was going after bribery suppliers in developed markets, and not solicitors, recipients, or the governments of emerging markets.

Second, and nearly as obvious, in “leveling the playing field,” the objective was to encourage U.S. investment in those markets where the FCPA had served to inhibit it. Undersecretary of State Stuart Eisenstat testified that lost business to the United States, as a result of the FCPA, was approximately \$30 billion per year,<sup>205</sup> and that the OECD would have covered about 70% of those deals.<sup>206</sup> His concern was that the United States was being denied investment opportunities because of this legislation. Congressman Oxley explained that the OECD would again enable that investment:

American business and American workers, the most productive in the world, are prime beneficiaries of free and open markets overseas. But to take advantage of the benefits of free trade, the business victory has to go to the best competitor. . . . Transparency and openness are keys to free competition. The more fair the competitive environment, the better our companies will do.<sup>207</sup>

The inability of U.S. businesses to invest in historically higher risk countries was precisely the problem which the 1988 amendments had directed the President to remedy, and which were in fact remedied by the adoption of the convention.

Third, the theme of how to effectively bring about host-country reforms appears in the testimony in ways that, albeit still faint, are unmistakably present. The few who hinted at the mechanism by which the OECD would effect these reforms suggested, although admittedly not overwhelmingly, that it should be heightened investment, not withdrawal. Two congressmen alluded to the possibilities of reform. Congressman Manton explained that bribery’s “detrimental effect on economies and societies is evident. Corruption distorts the allocation of resources, undermines fair competition in the marketplace, hurts economic development, erodes confidence in political systems and fosters organized crime.”<sup>208</sup> Drawing on recent economic events, Congressman Oxley explained that U.S. investment in developing countries is

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205. H.R. REP. NO. 43, at 45 (1998) (statement of Stuart E. Eizenstat, Undersecretary of the U.S. Department of State for Economic, Business, and Agricultural Affairs).

206. *Id.* at 61.

207. 1998 *House Finance Hearing*, *supra* note 196, at 1–2 (statement of Rep. Michael G. Oxley).

208. 1998 *House Finance Hearing*, *supra* note 196, at 3 (statement of Rep. Thomas J. Manton).

better for the countries involved. Recent events in Asia show us that a lack of transparency can lead to market distortions and inefficiencies with negative results for national economies and individual citizens. This Convention will not end bribery worldwide, and I think we all understand that, but it is an important step forward in America's effort to lead the world to a more open, market-based system.<sup>209</sup>

Congressman Oxley thus suggested, albeit in passing, that reforms in higher risk countries were perhaps one eventual result of the legislation, and that such reforms would occur as a result of investment rather than withdrawal. Similarly, the House Commerce Committee Report stated that the goal of the United States in ratifying the OECD was to promote "stronger, more reliable, and transparent foreign legal regimes that, in turn, make for more reliable and attractive investment climates."<sup>210</sup> The House Report characterizes the harm that comes to payee countries in terms of economic efficiency, rather than ethics, and as two-fold. First, the quality of the products and services to be provided by the payor diminishes, in that countries that receive bribes may grant contracts to businesses "offering an inferior deal."<sup>211</sup> Second, it suggests that the perception that bribery is necessary in a country to do business in effect deters investment, in that "countries that have the most corruption have trouble attracting foreign investment because the need to bribe acts as a substantial added tax on the investor."<sup>212</sup> While none of these comments expressly reference the intended mechanism of effecting reforms—whether it should be investment or withdrawal—both Congressmen Oxley and Manton, as well as the House Report, had already amply expressed their intention that the statute should promote investment.

The theme would become slightly more apparent in the testimony of the General Counsel of the Department of Commerce, Andrew Pincus. He testified that

Implementation of this treaty around the world is absolutely vital to the promotion of our democratic ideals. Corruption is completely inconsistent with free trade and fair government, and implementation of this treaty is also vital to the ability of American companies to compete in the global economy. The unfortunate reality is that last year we estimate \$30 billion in international contracts were alleged

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209. *1998 House Finance Hearing*, *supra* note 196, at 2 (statement of Rep. Michael G. Oxley).

210. H.R. REP. NO. 105-802, at 10 (1998).

211. *Id.*

212. *Id.*

to involve bribery by foreign firms.<sup>213</sup>

Pincus did not seem to imagine that further losses to investors of the developed world would be the impetus to reform. Rather, in remedying the problem of lost U.S. business opportunities, both the United States and the OECD signatories would take advantage of those opportunities through continued investment, and that reforms would occur as a result.

Similarly, President Clinton's signing statement provided, "The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development."<sup>214</sup> Although communism was no longer the enemy, it was nonetheless envisioned that liberal reforms could, over time, occur if the developed world prohibited bribery and yet continued to actively invest in countries that were historically higher-risk. Thus, host-country reform was clearly secondary in importance in 1998, subsumed under the imperative of promoting U.S. investment. But to the extent that it was addressed, all parties suggested that greater transparency, productivity, and efficiency could be obtained by encouraging investment in countries where the U.S. businesses had been hamstrung by the FCPA in relation to companies from other countries. No one suggested that withdrawal was intended, foreseeable, or effective. Therefore, the purpose of leveling the playing field, then, was to get the United States back in the game.

And the game, it might be said, was to actively and competitively invest in those countries that presented substantial economic opportunities, but where bribery remained enough of a problem that countries not previously bound by anti-bribery legislation had competed with an advantage over U.S. companies. Generally speaking, these would be the emerging markets. The goal of the 1998 amendments was thus to enable U.S. investment in such markets.

If economic withdrawal were the objective, anti-competitiveness would not be a concern—policymakers would expressly intend that U.S. businesses continue to not invest in higher risk countries, regardless of what other developed-country competitors might be doing. But this was never suggested. The unmistakable intention was to promote continued investment in countries where bribery occurred. Neither was it ever suggested that countries that tolerate bribery should be held responsible for the prevalence of bribery and punished through economic withdrawal. To the contrary, the general view was that reforms might

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213. 1998 House Finance Hearing, *supra* note 196, at 6 (statement of Andrew J. Pincus, General Counsel to the U.S. Department of Commerce).

214. 1998 Presidential Signing Statement, *supra* note 199, at 2290.

incrementally occur through continued investment by companies from less corrupt countries. No one, not a single witness, suggested that it would be appropriate, let alone effective, to withdraw economic support from countries that neglected to crack down on bribery. The concept is simply not present in the legislative history, just as it is not manifest in the statutory text. Rather, the purpose was to underscore that anti-bribery legislation resembles economic sanctions in every respect except arguably the most important one, as there is no congressional testimony showing that anyone ever intended it to function this way. The FCPA, and its progeny, thus constitute a unique kind of economic sanction: they sanction host countries despite the intentions of anyone who ever testified on the matter.

## V. THE CONUNDRUM OF UNWITTING SANCTIONS

Given this legislative history, the FCPA is disqualified from one of the two recognized purposes of sanctions. It cannot be thought of, even with a caveat, as expressive sanctions, for the obvious reason that the United States never expressed a desire to impose them. They are, then, unwitting sanctions; *de facto*, and not *de jure*. To the extent that the withdrawal of these customary trade and financial relations has any value at all, it must be of instrumental value—the capacity to effect reforms in target countries. However, thinking of anti-bribery legislation as unwitting instrumental sanctions against emerging markets proves deeply problematic. Specifically, it presents two distinct sets of problems: the first concerns the actual effects of the legislation's enforcement, and the second concerns whether those effects are justifiable as a matter of public policy.

### A. *The Likely Effects of the Present Enforcement Regime*

If current enforcement trends continue, any of three aggregate outcomes might result, none of which is satisfactory. The first is that targeted countries will respond to the economic withdrawal by implementing domestic reforms. While this might be the most desirable outcome, it is certainly not the most likely. Indeed, economic sanctions literature casts substantial doubt on whether this can ever be a realistic foreign policy goal: it is at best uncertain whether these sanctions can succeed in effecting reforms in emerging markets. As explained above, economists and political scientists have demonstrated that whether sanctions are likely to prove effective is a complex analysis. Among the political goals that bear the most relevance to anti-corruption legislation include the extent of international cooperation in enforcing the sanctions; whether both the senders and targets are members of the international organization that is coordinating the administration of the sanctions; the “warmth” of prior relations between senders and targets;

and the political system of the target nations, ranging between autocratic and democratic.<sup>215</sup> Economic variables include the costs imposed on the target countries; the costs to the sender countries; prior commercial relations between senders and targets; the relative economic size of the targets and senders; and the economic health and political stability of the targets.<sup>216</sup> Effectiveness thus depends on myriad political and economic factors, the combination of which is specific to each country. However, the FCPA has been enforced, and will continue to be enforced, against a very broad and open-ended swath of countries, with widely-varying political and economic conditions. Determining which of these countries are most likely to respond to enforcement by cracking down on bribery would be a very detailed and time-consuming analysis, even if the DOJ and SEC were inclined to conduct it.

The second scenario, while perhaps less hopeful, is certainly more realistic, as the empirical evidence demonstrates that it has already begun to occur.<sup>217</sup> As investment opportunities continue to develop in higher-risk countries, at least some capital-rich countries may neglect, or even refuse, to ratify and enforce anti-bribery legislation. In sanctions terminology, these “black knights” will move in to fill the void created by the economic withdrawal of countries that are enforcing the OECD convention. Companies from countries that either have not ratified the OECD convention or do not enforce it, such as China or Russia, may not hesitate to invest in these countries. Cuervo-Cazurro in 2006 found this precise dynamic to be occurring, observing that “[c]orruption in the host country results in relatively less FDI from countries that have signed the OECD Convention, but [results] in relatively more FDI from countries with high levels of corruption.”<sup>218</sup> More recently, China’s systematic investment in emerging economies in Africa, Central Asia, and Latin America, where CPI corruption levels remain relatively high, provides further evidence in support of these findings.<sup>219</sup> If this dynamic continues, companies from those countries that actively enforce anti-

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215. HUFBAUER ET AL., *supra* note 17, at 55.

216. HUFBAUER ET AL., *supra* note 17, at 55.

217. Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 809; Hines, *supra* note 94, at 19–20 (finding that the FCPA encouraged “ownership substitution” between U.S. investors, who were at that time the only investors subject to anti-bribery legislation, and foreign investors).

218. Cuervo-Cazurra, *Who Cares*, *supra* note 15, at 808.

219. For recent academic commentary on China’s ascendancy in Africa, see, for example, Hany Besada, *The Implications of China’s Ascendancy for Africa* 1–37 (The Ctr. for Int’l Governance Innovation, Working Paper No. 40, 2008), available at <http://ssrn.com/abstract=1289787>; Gernot Pehnelt, *The Political Economy of China’s Aid Policy in Africa* (Jena Economic Research Paper No. 2007-051, Aug. 22, 2007), available at <http://ssrn.com/abstract=1022868>; Jian-Ye Wang, *What Drives China’s Growing Role in Africa?* 1–30 (Int’l Monetary Fund, Working Paper No. 07/211, 2007), available at <http://ssrn.com/abstract=1012994>.

bribery legislation will tend to seek out safer investment destinations, which will typically exist in more developed markets. The nations of the developed world will begin to invest in each other, while the less-developed economies with less-developed anti-bribery regimes will do the same. The world economy could slowly begin to bifurcate into two economies: one in which bribery is tolerated and one in which it is not. To see this scenario play out, even if only partially, would raise innumerable problems in the ethical, economic, and foreign policy spheres alike.

It is a regrettable irony that this may not even be the least desirable result of the present anti-bribery enforcement regime. The third conceivable outcome is that the developed nations will continue to incrementally withdraw from emerging markets, but the black knights will not substantially fill the void. In this scenario, the emerging markets' historic opportunities for growth, with its concomitant economic and social benefits, will be missed. Even if bribery is deterred, the OECD-enforcing nations will have prolonged the suffering of poorer but otherwise promising nations. This result, while consistent with a firm ethical commitment to reducing bribery, is ultimately nonetheless tragic.<sup>220</sup>

#### *B. Policy Problems Inherent in the Present Enforcement Regime*

Even if these de facto sanctions were likely to succeed in effecting reforms, it is by no means self-evident that continuing to implement them would be a desirable course of action. That is, it is not at all clear that the benefits would outweigh the costs. The preliminary data suggests the possibility of substantial collateral damage that virtually no one intended or foresaw: economic growth may be stunted in countries that otherwise enjoy historically rare opportunities to reduce poverty, and foreign policy alliances may be made or broken in critical and volatile areas of the world.<sup>221</sup>

Reflecting on these potential effects exposes a fundamental, and quite difficult, policy trade-off: if forced to choose between reducing poverty and reducing corruption, which should we prefer? To the extent that enforcing anti-bribery legislation stymies economic development, and thus reducing poverty and reducing corruption are to some degree

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220. For discussions of the importance of foreign direct investment to economic development, see, for example, THEODORE MORAN, EDWARD M. GRAHAM & MAGNUS BLOMSTROM EDS., *DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT?* (2005); THEODORE H. MORAN, *FOREIGN DIRECT INVESTMENT AND DEVELOPMENT: THE NEW POLICY AGENDA FOR DEVELOPING COUNTRIES AND ECONOMIES IN TRANSITION 19–25* (1998).

221. On the relation between foreign direct investment and U.S. Foreign Policy, see, for example, EDWARD M. GRAHAM & DAVID M. MARCHICK, *U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 95–121* (2006).



competing goals, which should be the higher, or more immediate, priority?

The available data on the impact of anti-bribery enforcement supplies a preliminary answer to this question. In our enforcement of anti-bribery legislation, we have prioritized the reduction of bribery above the reduction of poverty. The work of Hines and Cuervo-Cazurra, combined with the data compiled in this Article about the market types where enforcement actions usually occur, lead inexorably to this conclusion: those nations that are actively participating in the enforcement of anti-bribery legislation are sacrificing, in significant part, the opportunity to reduce poverty in the name of combating bribery.

We should take notice of this result. While there are at least two possible ways to justify it, neither is compelling. First, it might be said that combating bribery actually furthers economic development, thereby reducing poverty. By this line of reasoning, bribery and other forms of corruption are a detriment to economic efficiency, and reducing bribery will therefore promote efficiency and in turn promote economic development.<sup>222</sup> This theory, as applied, proves problematic. For starters, emerging markets are by definition uniquely positioned at present to experience historic economic development. The conditions that make this growth possible have not existed forever, and it should not be assumed that they will remain indefinitely. Meanwhile, a significant lag time would necessarily occur before any instrumental value, in the form of host-country legal reforms, could be realized—the withdrawal of financial support would need to become more pronounced, governments would need to acknowledge the withdrawal as a consequence of the tolerance of bribery, they would need to enact legislation in response, and then enforce it effectively. The conditions that make emerging markets unique may or may not last long enough for these reforms to occur, and the opportunity for extraordinary development would be lost. If these market conditions did remain, the years that had passed in the interim would nonetheless mark a lost opportunity for growth. That is, even if the sanctions ultimately worked

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222. See, e.g., M. Shahid Alam, *Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment*, 48 AM. J. ECON. & SOC'Y 441, 448–53 (1989); Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983); Parthaprati Chanda, *The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal Obstacles and Uncertainties*, 32 DENV. J. INT'L L. & POL'Y 315, 345–47 (2004); Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 390–91 (1987); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 705 (1995); Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 309 (1997); Ibrahim F.I. Shihata, *Corruption—A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 460–61 (1997).

in promoting economic growth, people would still suffer.

The second problem with the economic justification is that incremental reductions in bribery will not necessarily improve economic growth. At a theoretical level, bribery impedes efficiency, and the absolute elimination of bribery would of course improve efficiency. But because sanctions could not completely eliminate bribery, the question becomes whether the reduction in bribery will lead to an increase in efficiency, and that answer is regrettably complex. Political scientists such as Samuel Huntington<sup>223</sup> and Mancur Olson<sup>224</sup> have famously observed that in transitional economies, where bureaucratic processes are particularly inefficient, bribery may actually allow a bypass of the inefficiency. By this ironic reasoning, in countries with inefficient bureaucracies bribery is necessary to the efficient conduct of business. While counterintuitive and just barely palatable, this theory must remain on the table in discussing the impact of anti-bribery enforcement on the economic development of emerging markets.

Alternatively, we might prefer to rely on a deontological justification—one that is ethical rather than economic. The deontological theory holds that bribery is absolutely wrong, and therefore should be sanctioned regardless of its economic impact.<sup>225</sup> By this thinking, no amount of economic development could justify the tolerance of, or participation in, the unethical practice of bribing overseas government officials. If one begins from the premise that bribery is an absolute wrong, the only appropriate response is to work towards reducing it. The problem with this justification, however, is even more fundamental: there is simply no evidence that Congress, or any other deliberative body for that matter, has ever adopted this policy. As the legislative history shows, whether bribery is an absolute and universal moral wrong, which government should seek to immediately eradicate regardless of the economic implications, was heavily disputed in Congress. Unless and until politically accountable bodies adopt this principle, it should not be used to justify the enforcement of a statute where fines have exceeded \$1 billion for a single company.<sup>226</sup>

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223. SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 68–69 (1968).

224. MANCUR OLSON, JR., *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* 106–07 (2000).

225. The deontological approach to law has recently appeared in various legal debates. See, e.g., Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate Governance Standards: A Fiduciary Duty of Care Without a Remedy*, 57 CATH. U.L. REV. 701 (2008) (discussing corporate governance); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2004) (discussing capital punishment); Robert Weisberg, *The Utilitarian and Deontological Entanglement of Debating Guns, Crime, and Punishment in America*, 71 U. CHI. L. REV. 333 (2004) (discussing gun control).

226. The total fines levied against Siemens A.G. by the United States and German

### C. Proposed Reforms: Detering Bribery Without Detering Investment

This discussion of the uncertain justification for the present enforcement regime is obviously meant to sound a note of caution. Still, it must be emphasized that concern for tempering the sanction-like effects of anti-bribery legislation does not, by any means, imply an abandonment of the commitment to combating bribery. The purpose of any changes in the drafting or enforcement of anti-bribery legislation should have a very specific and limited purpose: the legislation should create a disincentive to bribe but not a disincentive to invest. Put another way, while it is good to deter bribery, it is far better to deter bribery that occurs in the course of ongoing business activity. Promoting ethical business in emerging markets is precisely the purpose of the FCPA.<sup>227</sup>

There are numerous reforms to the text and enforcement of anti-bribery legislation that would advance the policy of reducing bribery without scaring companies away from emerging markets. The first and most obvious is to bring the remainder of the capital-rich countries into the OECD Convention. The black knight effect occurs because capital-rich countries with substantial FDI capacity, but that are not subject to anti-bribery legislation, still exist, just as they did prior to enactment of the OECD Convention. The playing field remains uneven. Most notably, of the four largest emerging markets—Brazil, Russia, India, and China (the BRICs)<sup>228</sup>—Brazil is the only one to have adopted the Convention.<sup>229</sup> The OECD is presently engaged in negotiations with the

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authorities exceeded this amount. For the DOJ press release, see Press Release, Department 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), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html> [hereinafter DOJ Press Release].

227. For further commentary on the role of private investment in curbing bribery, see, for example, Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 *FORDHAM INT'L L.J.* 45, 47–48 (2006); Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, *LAW & CONTEMP. PROBS.*, Autumn 2007, at 109, 136–38; Roger C. Cramton, *Counseling Organizational Clients "Within the Bounds of the Law,"* 34 *HOFSTRA L. REV.* 1043, 1058 (2006); José Armando Fanjul, Comment, *Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics, and the Foreign Corrupt Practices Act*, 26 *PENN ST. INT'L L. REV.* 735, 758 (2008).

228. Goldman Sachs first coined the acronym "BRIC" in 2001 to describe the four emerging markets that, by 2050, could replace most of the current G6 members in terms of GDP. See Goldman Sachs, <http://www2.goldmansachs.com/ideas/brics/index.html> (last visited Oct. 7, 2009).

229. OECD Convention, *supra* note 5. For the list of countries that have adopted the Convention, see Organization for Economic Co-operation and Development, [http://www.oecd.org/document/44/0,3343,en\\_2649\\_34859\\_36433004\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/44/0,3343,en_2649_34859_36433004_1_1_1_1,00.html) (last

remaining three, finding varying degrees of success. Mere adoption of the Convention, of course, is not enough, and the countries must meaningfully enforce it. While the day when China, Russia, and India demonstrate a resolve to eradicating bribery that is commensurate to the more developed nations may not be imminent, it is clearly the first and most important piece of a long-term anti-bribery agenda.

A complementary piece to pursue concurrently is the broad implementation and enforcement of demand-side anti-bribery laws. Several conventions currently exist, at least on paper, that go beyond the supply-side legislation of the FCPA and OECD and prohibit the solicitation or receipt of bribes. Some have been ratified by the member nations of important emerging market governmental organizations, including the Organization of American States' Inter-American Convention Against Corruption,<sup>230</sup> and the African Union's Convention on Preventing and Combating Corruption.<sup>231</sup> More generally, in 2004 the United Nations passed the Convention Against Corruption,<sup>232</sup> which requires each member state to adopt legislation criminalizing not only the offer of a bribe but also its solicitation or acceptance. Similarly, international financial institutions such as the World Bank<sup>233</sup> and the IMF<sup>234</sup> have adopted guidelines that deny funding to governments whose officials have solicited or accepted bribes. Less formally, the International Chamber of Commerce has adopted rules addressing the demand of bribes, and has urged businesses around the world to implement them.<sup>235</sup> To the extent that these conventions and guidelines are adopted and enforced, companies will be less fearful of doing

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visited Oct. 7, 2009).

230. Inter-American Convention Against Corruption, art. VI(1)(a), Mar. 29, 1996, 35 I.L.M. 724, 729 (1996); see Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 244–45 (1998).

231. African Union Convention on Preventing and Combating Corruption, arts. 4(1)(b), 11(3), <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>.

232. Convention Against Corruption, G.A. Res. 58/4, arts. 15–16, U.N. Doc. A/58/4 (Oct. 31, 2003), *reprinted in* 43 I.L.M. 37 (2004). For a more thorough discussion of the convention's history and substance, see Weiss, *supra* note 3, at 480–81.

233. See POVERTY REDUCTION AND ECONOMIC MANAGEMENT, THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 23–27 (1997), [www.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf](http://www.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf).

234. News Brief No. 97/15, International Monetary Fund, IMF Adopts Guidelines Regarding Governance Issues ¶ 16 (Aug. 4, 1997), *available at* [www.imf.org/external/np/sec/nb/1997/nb9715.htm](http://www.imf.org/external/np/sec/nb/1997/nb9715.htm).

235. INTERNATIONAL CHAMBER OF COMMERCE, COMBATING EXTORTION AND BRIBERY, ICC RULES OF CONDUCT AND RECOMMENDATIONS 5 (2005), [http://www.iccwbo.org/uploadedFiles/ICC/C/policy/anticorruption/statements/ICC\\_Rules\\_of\\_Conduct\\_and\\_Recommendations%20\\_2005%20Revision.pdf](http://www.iccwbo.org/uploadedFiles/ICC/C/policy/anticorruption/statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf).

business in the previously higher-risk emerging markets.

The demonstrated sanctions-like effect of the FCPA further suggests that the calculation of corporate criminal penalties bears reexamination. The FCPA provides that a corporation may be fined the greater of twice the gross gain or loss that resulted from the bribery,<sup>236</sup> and in recent cases, this formula has resulted in staggering penalties.<sup>237</sup> Factoring the sanctions-like impact of these penalties into the equation might yield figures that still punish companies for wrongdoing but do not scare them away from foreign emerging markets that badly need their capital.<sup>238</sup>

More fundamentally, we should reevaluate the underlying theories of liability by which the government holds corporations accountable for FCPA violations. Indeed, one commentator has observed that “nothing magnifies the impact of the Foreign Corrupt Practices Act on corporations more than *respondeat superior*,” the common law doctrine by which employers are held liable for the conduct of their employees.<sup>239</sup> As the U.S. Sentencing Commission explained,

Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees’ illegal actions.<sup>240</sup>

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236. 15 U.S.C. § 78ff(c)(2)(A)-(B) (2006); *id.* § 78dd-2(g)(2)(A)-(B). Subject to this maximum, the amount of the fine is governed by the Federal Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2B4.1 (2008); *see* ZARIN, *supra* note 18, at 8–4. Additionally, engaging in an act of bribery can result in the suspension or debarment of a contractor or subcontractor from continuing to do business with the U.S. Government pursuant to the Federal Acquisition Regulations, 48 C.F.R. Ch. 1 (2008), and an indictment or conviction under the FCPA can adversely impact an application for a license to export defense-related articles or services pursuant to the Arms Export Control Act, 22 U.S.C. § 2778 (Supp. 2006). *Id.*

237. *See* DOJ Press Release, *supra* note 226; Press Release, Department of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), *available at* [http://www.usdoj.gov/criminal/pr/press\\_releases/2009/02/02-11-09kellogg-guilty.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2009/02/02-11-09kellogg-guilty.pdf).

238. For commentary on the impact of the FCPA on international business, *see*, for example, H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government’s Campaign Against International Bribery*, 22 HASTINGS INT’L & COMP. L. REV. 407, 430 (1999); Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 330 (1997); Ashe, *supra* note 24, at 2904.

239. The FCPA Blog: News and Views about the United States Foreign Corrupt Practices Act, In the Master’s Defense <http://www.fcablog.com/blog/2008/11/24/in-the-masters-defense.html> (Nov. 24, 2008, 08:22 EST).

240. PAOLA DESIO, U.S. SENTENCING COMMISSION, AN OVERVIEW OF THE ORGANIZATIONAL

It is easy to imagine the impact of this doctrine in the FCPA context. Defendants are often large publicly-traded companies with ventures in various countries and various cultures. In some of these countries, bribery has long been regarded as a customary, acceptable, and even necessary way of doing business with a government that is likely perceived as egregiously inefficient and inherently corrupt. Recognizing the risk, a company might implement a broad compliance program that includes rigorous anti-bribery training for its employees. Nonetheless, if a lower-level employee eager to close a deal pays a bribe, the company is criminally liable. Penalizing companies for such acts, despite their best preventative efforts, perverts the purposes of the FCPA. By penalizing bribery, it creates a risk that large international companies feel they cannot afford to take. They financially withdraw from higher-risk markets, rather than building alliances with those nations in the way that those who testified before Congress anticipated. Rather than lending financial and political support to emerging markets, the statute may punish the countries in which these companies would otherwise invest.

The outer limits of the doctrine were recently challenged in a Second Circuit case.<sup>241</sup> Though it concerned environmental rather than anti-bribery laws, it involved arguments that are at least as applicable to the FCPA context. An amicus brief co-authored by the former Enron prosecutor, Andrew Weissmann, echoed the admonition of the U.S. Sentencing Commission and described the dangers of an overly broad application of respondeat superior:

A criminal indictment can be a life-or-death matter for a company. Yet, the vast sweep of the district court's standard for the imposition of vicarious criminal liability makes corporations accountable for almost all criminal acts of any low level employees—even those acting

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GUIDELINES 1 (2004), available at <http://www.ussc.gov/corp/ORGOVERVIEW.pdf>.

241. *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2009). The defendant-appellant was a company incorporated in Liberia with its principal place of business in Greece, and was convicted of violating the Act to Prevent Pollution on Ships for failing to maintain appropriate records of its petroleum deliveries while in U.S. waters. *Id.* at 305. The defendant, as well as an amicus, argued that a company should not be held liable under respondeat superior unless it “lacked effective policies and procedures to deter and detect criminal actions by its employees.” *Id.* at 310. The Second Circuit held that the absence of such policies and procedures is not “a separate element,” and thus irrelevant to liability under respondeat superior. *Id.* The *Wall Street Journal* reported that Judge Calabresi, former Dean of the Yale Law School, found amicus’ argument in particular “interesting” and that it “appealed” to him as an “academic[,]” but further stated, “[w]hether we should do something about this as judges is a different matter.” Posting of Amir Efrati to WALL ST. J. LAW BLOG, <http://blogs.wsj.com/law/2008/11/21/former-enron-prosecutor-criminal-charges-shouldnt-be-so-easy/> (Nov. 21, 2008, 15:11 EST).

against explicit instructions and in the face of the most robust corporate compliance program.<sup>242</sup>

The same brief compellingly explained that the doctrine forces companies to settle criminal charges and forego the opportunity to prove their innocence at trial:

[Respondeat superior] has caused a tremendous imbalance between the power of a prosecutor and a corporate defendant. Given the hair-trigger for corporate liability even for the most responsible corporate citizen, many corporations forego any defenses in order to resolve threatened prosecution. . . . The potential for inappropriate prosecutorial pressure is particularly heightened in the area of corporate criminal investigations that end in Draconian non-prosecution and deferred prosecution agreements, where *no* court has oversight authority. There, the prosecutor effectively serves as both judge and jury. Because of the disastrous consequences of a corporate indictment and the ease with which corporations may be liable under the doctrine of *respondeat superior*, corporations are under immense pressure to agree to almost any terms. The vast majority of these negotiations go on behind closed doors, with little public scrutiny and no judicial review.<sup>243</sup>

This precise dynamic can be observed with powerful effect in the FCPA context, where companies routinely settle their charges through deferred prosecution and nonprosecution agreements to avoid the damaging publicity of a criminal trial.<sup>244</sup>

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242. Brief for The Association of Corporate Counsel, et al. as Amici Curiae In Support of Appellant Urging Reversal at 20, United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009) (No. 07-5801-CR).

243. *Id.* at 20, 22.

244. For a thorough discussion of the role of respondeat superior in FCPA enforcement, see the series of entries at The FCPA Blog: News and Views about the United States Foreign Corrupt Practices Act, <http://www.fcablog.com/blog/tag/respondeat-superior>. Dick Cassin, the blog author, argues,

[R]espondeat superior does more harm than good. Sure, it produces a 100% corporate ‘conviction’ rate in FCPA cases, which must go down well at the Justice Department. But, it probably doesn’t deter illegal behavior or encourage better compliance programs. And it puts overwhelming pressure on organizations to resolve threatened criminal cases. Because of the catastrophic effects of any potential conviction, companies have to settle with the government. So they rush into agreements that may require them to waive the attorney–client privilege, hand over employees’ private documents and data,

Although the Second Circuit in *United States v. Ionia Management S.A.* affirmed the lower court's judgment against the defendant,<sup>245</sup> the case further exposes ever-increasing cracks in the respondeat superior dam. Scholars have generated a substantial body of research calling for a more deliberate application of the doctrine, one that more effectively advances the underlying policies of punishment and deterrence.<sup>246</sup> One remedy, proposed by Professor Ellen Podgor, is to recognize a good faith defense for corporations where the violation occurred despite the defendant company's best preventative efforts.<sup>247</sup> Indeed, such a defense would substantially mitigate the sanctioning effect of FCPA enforcement, as the risk of doing business in foreign markets would significantly decrease.

## VI. CONCLUSION: DESTINED TO REPEAT HISTORY?

In concluding their comprehensive analysis of the history of economic sanctions, HSEO issued a striking admonition, which now

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cut off support for their legal defense, and fire those who don't cooperate with government investigations.

The FCPA Blog: News and Views about the United States Foreign Corrupt Practices Act, <http://www.fcablog.com/blog/2009/1/22/naked-corporate-defendants.html> (Jan. 22, 2009, 08:28 EST), <http://fcablog.blogspot.com/2009/01/naked-corporate-defendants.html>. He concludes that "[i]t is time to fix *respondeat superior*—either in court or in Congress." *Id.* at In the Master's Defense (Nov. 24, 2008), <http://fcablog.blogspot.com/2008/11/in-masters-defense.html>.

245. *Ionia Mgmt. S.A.*, 555 F.3d at 311.

246. See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 866–67 (1994); Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 113 (2007); Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 630–32 (1988); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 327–28 (1995); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1182–83 (1991); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 246 (1991); John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 459 (1981); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 412–14 (1999); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1532–34 (1996); Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1543 (2007); George J. Terwilliger III, *Under-Breaded Shrimp and Other High-Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417, 1434 (2007); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 689 (1995); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 451 (2007); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1367–75 (1979).

247. Podgor, *supra* note 238, at 1538.



applies with equal force to members of the international law enforcement community who are poised to greatly increase the enforcement of anti-bribery legislation:

Sender governments should think through their means and objectives *before* taking a final decision to deploy sanctions. Leaders in the sender country should be confident that their goals are within their reach, that they can impose sufficient economic pain to command the attention of the target country . . . that their efforts will not prompt offsetting policies by other powers, and that the sanctions chosen will not impose insupportable costs on their domestic constituents and foreign allies. These propitious conditions arise less often than the leaders of major powers seem to imagine.<sup>248</sup>

In relation to the FCPA and the OECD convention, there is absolutely no indication that sender governments have adequately thought through their means. A public debate about whether to withdraw investment from emerging markets in the name of combating bribery has simply never occurred. As the above analysis is intended to show, overwhelming evidence now exists that such a debate should occur, and promptly. This article has proposed several possible reforms—expanding the signatories to the OECD convention, promoting demand-side legislation, tempering the use of *respondeat superior*—that might effectively implement international anti-bribery norms without stymieing economic development. Further public discussion on the purpose and effect of anti-bribery legislation would likely elicit many others.

While the goal of reducing bribery is no longer controversial, the question of how to do so has thus proven quite complex. Indeed, it has become more complex, not less, since 1977. In sum, Senator Proxmire's original introduction to the congressional inquiry into the need for anti-bribery legislation is even more appropriate today than it was then: "Virtually every [one] . . . thinks bribery is a dreadful thing. There is no dispute about that. The question . . . is the remedy."<sup>249</sup>

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248. HUFBAUER ET AL., *supra* note 17, at 178.

249. 1976 *Senate Banking Hearings*, *supra* note 133, at 75 (statement of Sen. William Proxmire).

## VII. APPENDIX: CATEGORIZING ENFORCEMENT ACTIONS BY MARKET TYPE

This appendix briefly defines the several market types used in this study, and explains how the countries in which FCPA violations have occurred are categorized into those types. A spreadsheet follows that shows, for each FCPA enforcement action, the country or countries in which the violation occurred, the Transparency International Corruption Perception Index ranking of each country, and its market type as defined by S&P.

There is almost no legal scholarship identifying the distinctive legal features of emerging markets. Despite the term's wide usage today and the general recognition that law and politics figure prominently in the development of emerging markets, legal scholars lag well behind the community of legal and financial practitioners in understanding this phenomenon. A useful general characterization of emerging markets—and to this author's knowledge, the only available definition in the law review literature, though written by a World Bank economist rather than a lawyer—explains that emerging markets are principally distinguished by two characteristics: volatility and transition.<sup>250</sup> They are volatile in several related respects: the value of financial assets and volume of financial output vary dramatically; they are subject to price shocks; domestic policy is comparatively unstable; government regulation and intervention tends to be “pro-cyclical,” meaning that it tends to exacerbate both booms and recessions; and investors often perceive policymaking as arbitrary.<sup>251</sup> Emerging markets tend to be transitional in the sense that they have recently moved to a market economy from a planned economy; both their economic and political institutions are changing dramatically; there is a relatively short history of foreign investment; they are witnessing a rapid increase in the market's participation in the international economy; and they generally are experiencing dramatic changes in such demographic factors as fertility rates, life expectancy, and educational status.<sup>252</sup>

Frontier markets, by comparison, might be thought of as nascent emerging markets (a nearly redundant phrase, but still illustrative). They exhibit the same characteristics as emerging markets, but to a different degree: they are not quite as far along in their transition, and are somewhat more volatile. Owing to the relative newness of the term, legal academic definitions are, perhaps fittingly, less developed than the

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250. Ashoka Mody, *What is an Emerging Market?*, 35 GEO. J. INT'L L. 641, 643 (2004).

251. *Id.* at 641–45.

252. *Id.* at 642, 645. For a more technical description of the financial characteristics of emerging markets, see Wei Li & Richard Hoyer-Ellefsen, *Characteristics of Emerging Markets* (Oct. 21, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909890](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909890).

term emerging markets, and this author could locate none. One investment company provides a very simple and useful definition: frontier markets “demonstrate a relative openness and accessibility for foreign investors” and are not “undergoing a period of extreme economic and political instability.”<sup>253</sup> Emerging markets and frontier markets, then, are different in degree but similar in kind. For this reason, they are combined into a single category of emerging markets for purpose of this Article, although the following spreadsheet preserves the distinction.

While various investment firms have provided slightly differing lists of emerging markets,<sup>254</sup> this Article will rely on the categories created by S&P. A combination of its indices of emerging markets and frontier markets yields the following list: Argentina, Bahrain, Bangladesh, Botswana, Brazil, Bulgaria, Cambodia, Chile, China, Colombia, Cote d’Ivoire, Croatia, Cyprus, Czech Republic, Ecuador, Egypt, Estonia, Georgia, Ghana, Hungary, India, Indonesia, Israel, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Latvia, Lebanon, Lithuania, Malaysia, Mauritius, Mexico, Morocco, Namibia, Nigeria, Oman, Pakistan, Panama, Peru, Philippines, Poland, Qatar, Romania, Russia, Saudi Arabia, Slovakia, Slovenia, South Africa, Korea, Sri Lanka, Taiwan, Thailand, Trinidad & Tobago, Tunisia, Turkey, Ukraine, the United Arab Emirates, Venezuela, and Zimbabwe.<sup>255</sup> Countries that are more developed than the above are here referred to as “developed” in the spreadsheet and countries that are less developed are called “less developed.”

Calculating the number of alleged violations that have occurred in these countries, for the specific purpose of identifying the patterns among various types of markets, requires a number of methodological

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253. Product Insights, MSCI Barra, MSCI Frontier Market Indices 2 (Dec. 18, 2007), available at [http://www.msclubarra.com/products/indices/fm/MSCI\\_Frontier\\_Markets.pdf](http://www.msclubarra.com/products/indices/fm/MSCI_Frontier_Markets.pdf).

254. See, e.g., FTSE, FTSE Global Equity Index Series Country Classification 2 (2009), [http://ftse.com/Indices/Country\\_Classification/Downloads/FTSE\\_Country\\_Classification\\_Sept\\_09\\_update.pdf](http://ftse.com/Indices/Country_Classification/Downloads/FTSE_Country_Classification_Sept_09_update.pdf); MSCI Barra, MSCI Global Investable Market Indices Methodology 57 (2009), [http://www.msclubarra.com/eqb/methodology/meth\\_docs/MSCI\\_Aug09\\_GIMIMethod.pdf](http://www.msclubarra.com/eqb/methodology/meth_docs/MSCI_Aug09_GIMIMethod.pdf).

255. See Standard & Poor’s, The S&P Emerging Markets Database Brochure, available at [http://www2.standardandpoors.com/spf/pdf/index/brochure\\_EMDB.pdf](http://www2.standardandpoors.com/spf/pdf/index/brochure_EMDB.pdf). (Standard & Poor’s, S&P/IFCG Extended Frontier 150, available at [http://www2.standardandpoors.com/spf/pdf/index/SP\\_IFCG\\_Extended\\_Frontier\\_150\\_Factsheet.pdf](http://www2.standardandpoors.com/spf/pdf/index/SP_IFCG_Extended_Frontier_150_Factsheet.pdf). The purpose of this analysis is to anticipate the effect of FCPA enforcement patterns on contemporary investment decisions. Accordingly, countries in which FCPA violations have historically occurred are categorized based on S&P’s contemporary market definitions—for instance, a country in which a violation occurred in 1985 may be categorized, for purposes of this analysis, as an emerging market based on its 2008 market conditions, rather than its 1985 conditions. A decision to invest in a particular country will of course be based on contemporary market conditions, but the impact of FCPA enforcement patterns on that decision will be based, at least in part, on where the violations have historically occurred.

decisions. Where a single case involved bribery in multiple countries, each country is counted once. If there were multiple cases concerning the same set of transactions—for instance, separate criminal actions against multiple defendants or overlapping DOJ and SEC cases—each country in which bribery occurred is counted only once. Where two unrelated cases involved bribery in the same country, that country is counted twice. This list does not include countries in which transactions were suspected to have occurred but which were not part of the underlying facts of the conviction or settlement. Finally, two older cases that involved an extraordinarily high number of countries<sup>256</sup> were not included in the tally because they would disproportionately influence the numbers. Otherwise, this index includes every alleged violation that resulted in a finding of liability, a conviction, or a settlement, between the original passage of the FCPA and October of 2008.

The totals, as indicated in the spreadsheet below, are as follows. There have been 125 “violations” of the FCPA from its ratification to October of 2008. Of those, thirty-three occurred in less developed markets, six occurred in frontier markets, seventy-seven occurred in emerging markets, and nine occurred in developed markets. The Article combines frontier and emerging markets, to produce a total of eighty-three violations in that market type.

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256. SEC v. Int'l Sys. & Controls Corp., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,922 (D.D.C. 1979); SEC v. Tesoro Petroleum Corp., [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,699 (D.D.C. 1980).

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2008	United States v. Albert Jackson Stanley, 08-CR-597 (S.D. Tex. 2008)	Nigeria	Emerging	121
2008	United States v. Faro Technologies Inc. (2008)	China	Emerging	72
2008	United States v. AGA Med. Corp., 08-CR-00172-1 (D. Minn. 2008)	China	Emerging	72
2008	United States v. Willbros Group, Inc. 08-CR-0287 (S.D. Tex. 2008); United States v. Steph, 4:07-CR-00307 (S.D. Tex. 2007); SEC v. Brown, 4:06-CV-02919 (S.D. Tex. 2006); United States v. Brown, 4:06-CR-00316 (2006)	Nigeria	Emerging	121
2008	United States v. Willbros Group, Inc., 08-CR-0287 (S.D. Tex. 2008); United States v. Steph, 4:07-CR-00307 (S.D. Tex. 2007); SEC v. Brown, 4:06-CV-02919 (S.D. Tex. 2006); United States v. Brown, 4:06-CR-00316 (2006)	Ecuador	Frontier	151
2008	United States v. Willbros Group, Inc., 08-CR-0287 (S.D. Tex. 2008); United States v. Steph, 4:07-CR-00307 (S.D. Tex. 2007); SEC v. Brown, 4:06-CV-02919 (S.D. Tex. 2006); United States v. Brown, 4:06-CR-00316 (2006)	Bolivia	Less Developed	102
2008	United States v. Self, 8:08-CR-00110 (S.D. Cal. 2008)	UK	Developed	16

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2008	United States v. AB Volvo (2008); United States v. Volvo Constr. Equip. AB, 1:08-CR-00069 (D.D.C. 2008); United States v. Renault Trucks SAS, 1:08-CR-00069 (D.D.C. 2008)	Iraq	Less Developed	178
2008	United States v. Flowserve Corp. (2008); United States v. Flowserve Pompes SAS, 1:08-CR-00035 (D.D.C. 2008)	Iraq	Less Developed	178
2008	United States v. Westinghouse Air Brake Tech. Corp. (2008)	India	Emerging	85
2008	SEC v. Con-Way Inc., 1:08-CV-01478 (D.D.C. 2008)	Philippines	Emerging	141
2007	United States v. Smith, 8:07-CR-00069 (C.D. Cal. 2007)	UK	Developed	16
2007	United States v. Akzo Nobel, N.V. (2007); SEC v. Azko Nobel, N.V., No. 07-CV-02293 (D.D.C. 2007)	Iraq	Less Developed	178
2007	United States v. Chevron Corp. (S.D.N.Y. 2007); SEC v. Chevron Corp., No. 07-CIV 10299 (S.D.N.Y. 2007)	Iraq	Less Developed	178
2007	United States v. Lucent Tech. (2007); SEC v. Lucent Technologies Inc., No. 07-CV-02301 (D.D.C. 2007)	China	Emerging	72

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2007	United States v. Ingersoll-Rand Co. (2007); United States v. Ingersoll-Rand Italiana SpA, 1:07-CR-00294 (D.D.C. 2007); United States v. Thermo King Ireland Ltd., 1:07-CR-00296 (D.D.C. 2007); SEC v. Ingersoll-Rand Co., No. 07-CV-1955 (D.D.C. 2007)	Iraq	Less Developed	178
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	Iraq	Less Developed	178
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	Bahrain	Emerging	43
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	Egypt	Emerging	115
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	India	Emerging	85
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	China	Emerging	72
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	Nigeria	Emerging	121
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	Turkey	Emerging	58

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2007	United States v. York Int'l Corp. (2007); SEC v. York Int'l Corp., No. 07-CV-1750 (D.D.C. 2007)	UAE	Emerging	35
2007	United States v. Paradigm B.V. (2007)	China	Emerging	72
2007	United States v. Paradigm B.V. (2007)	Indonesia	Emerging	126
2007	United States v. Paradigm B.V. (2007)	Kazakhstan	Emerging	145
2007	United States v. Paradigm B.V. (2007)	Mexico	Emerging	72
2007	United States v. Paradigm B.V. (2007)	Nigeria	Emerging	121
2007	United States v. Textron, Inc. (2007); SEC v. Textron, Inc., No. 07-CV-01505 (D.D.C. 2007)	Iraq	Less Developed	178
2007	United States v. Textron, Inc. (2007); SEC v. Textron, Inc., No. 07-CV-01505 (D.D.C. 2007)	UAE	Emerging	35
2007	United States v. Textron, Inc. (2007); SEC v. Textron, Inc., No. 07-CV-01505 (D.D.C. 2007)	Bangladesh	Frontier	147
2007	United States v. Textron, Inc. (2007); SEC v. Textron, Inc., No. 07-CV-01505 (D.D.C. 2007)	Indonesia	Emerging	126
2007	United States v. Textron, Inc. (2007); SEC v. Textron, Inc., No. 07-CV-01505 (D.D.C. 2007)	Egypt	Emerging	115
2007	United States v. Textron, Inc. (2007); SEC v. Textron, Inc., No. 07-CV-01505 (D.D.C. 2007)	India	Emerging	85



<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2007	United States v. Ott, 07-CR-608 (D.N.J. 2007); United States v. Young, 07-CR-609 (D.N.J. 2007); United States v. Amoako, 3:05-01122 (D.N.J. 2005); SEC v. Amoako, 3:05-MJ-01122 (D.N.J. 2005); SEC v. Ott, 3:06-CV-04195 (D.N.J. 2006)	Nigeria	Emerging	121
2007	United States v. Ott, 07-CR-608 (D.N.J. 2007); United States v. Young, 07-CR-609 (D.N.J. 2007); United States v. Amoako, 3:05-01122 (D.N.J. 2005); SEC v. Amoako, 3:05-MJ-01122 (D.N.J. 2005); SEC v. Ott, 3:06-CV-04195 (D.N.J. 2006)	Rwanda	Less Developed	102
2007	United States v. Ott, 07-CR-608 (D.N.J. 2007); United States v. Young, 07-CR-609 (D.N.J. 2007); United States v. Amoako, 3:05-01122 (D.N.J. 2005); SEC v. Amoako, 3:05-MJ-01122 (D.N.J. 2005); SEC v. Ott, 3:06-CV-04195 (D.N.J. 2006)	Senegal	Less Developed	85

Year	Matter(s)	Violation Location	S&P Market Type	TI CPI Rating (2008)
2007	United States v. Wooh, 07-CR-244 (D. Or. 2007); SEC v. Wooh, 07-CV-957 (D. Or. 2007); United States v. SSI Int'l Far East, Ltd., CR 06-398 (D. Or. 2006); United States v. Schnitzer Steel Indus. (Ind. 2006); <i>In re</i> Schnitzer Steel Indus., Inc., SEC Admin Proc. File No. 3-12456 (2006)	China	Emerging	72
2007	United States v. Wooh, 07-CR-244 (D. Or. 2007); SEC v. Wooh, 07-CV-957 (D. Or. 2007); United States v. SSI Int'l Far East, Ltd., CR 06-398 (D. Or. 2006); United States v. Schnitzer Steel Indus. (Ind. 2006); <i>In re</i> Schnitzer Steel Indus., Inc., SEC Admin Proc. File No. 3-12456 (2006)	South Korea	Emerging	40
2007	United States v. Baker Hughes Servs. Int'l, Inc., H-07-129 (S.D. Tex. 2007); United States v. Baker Hughes, Inc., (2007); SEC v. Baker Hughes, Inc., H-07-1408 (S.D. Tex. 2007)	Kazakhstan	Emerging	145

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2007	United States v. Baker Hughes Servs. Int'l, Inc., H-07-129 (S.D. Tex. 2007); United States v. Baker Hughes, Inc., (2007); SEC v. Baker Hughes, Inc., H-07-1408 (S.D. Tex. 2007)	Angola	Less Developed	158
2007	United States v. Baker Hughes Servs. Int'l, Inc. H-07-129 (S.D. Tex. 2007); United States v. Baker Hughes, Inc., (2007); SEC v. Baker Hughes, Inc., H-07-1408 (S.D. Tex. 2007)	Nigeria	Emerging	121
2007	United States v. Baker Hughes Servs. Int'l, Inc. H-07-129 (S.D. Tex. 2007); United States v. Baker Hughes, Inc., (2007); SEC v. Baker Hughes, Inc., H-07-1408 (S.D. Tex. 2007)	Indonesia	Emerging	126
2007	United States v. Baker Hughes Servs. Int'l, Inc. H-07-129 (S.D. Tex. 2007); United States v. Baker Hughes, Inc., (2007); SEC v. Baker Hughes, Inc., H-07-1408 (S.D. Tex. 2007)	Russia	Emerging	147

Year	Matter(s)	Violation Location	S&P Market Type	TI CPI Rating (2008)
2007	United States v. Baker Hughes Servs. Int'l, Inc. H-07-129 (S.D. Tex. 2007); United States v. Baker Hughes, Inc., (2007); SEC v. Baker Hughes, Inc., H-07-1408 (S.D. Tex. 2007)	Uzbekistan	Less Developed	166
2007	United States v. Vetco Gray Controls Ltd., 4:07-CR-00004 (S.D. Tex. 2007); United States v. Aibel Group Ltd., 4:07-CR-00005 (S.D. Tex. 2007); SEC v. John Samson, 1:06-CV-01217 (D.D.C. 2006)	Nigeria	Emerging	121
2007	SEC v. Fu, No. 07-CV-01735 (D.D.C. 2007)	Taiwan	Emerging	39
2007	<i>In re</i> Bristow Group Inc., SEC Admin. Proceeding (File No. 3-12833)	Nigeria	Emerging	121
2007	SEC v. Srinivasan, 07-CV-1699 (D.D.C. 2007); <i>In re</i> Electronic Data Sys. Corp., SEC Admin. Proceeding File No. 3-12825 (Sept. 25, 2007) (EDS/Kearney)	India	Emerging	85
2007	SEC v. Delta & Pine Land Co., 07-CV-1352 (D.D.C. 2007); <i>In re</i> Delta & Pine Land Co., SEC Admin Proceeding File No. 3-12712 (2007)	Turkey	Emerging	58
2007	SEC v. Dow Chem. Co., 07-CV-00336 (D.D.C. 2007)	India	Emerging	85

Year	Matter(s)	Violation Location	S&P Market Type	TI CPI Rating (2008)
2007	SEC v. El Paso Corp, 07-CV-00899 (S.D.N.Y. 2007)	Iraq	Less Developed	178
2006	SEC v. Tyco Int'l Ltd., 06-CV-2942 (S.D.N.Y. 2006)	Brazil	Emerging	80
2006	SEC v. Tyco Int'l Ltd., 06-CV-2942 (S.D.N.Y. 2006)	South Korea	Emerging	40
2006	<i>In re</i> Oil States Int'l, SEC Admin. Proc. File No. 3-12280 (2006)	Venezuela	Emerging	158
2006	United States v. Sapsizian, 1:06-CR-20797 (S.D. Fla. 2006)	Costa Rica	Less Developed	47
2006	United States v. SSI Int'l Far East, Ltd., CR 06-398 (D. Or. 2006); United States v. Schnitzer Steel Indus. (Ind. 2006); <i>In re</i> Schnitzer Steel Indus., Inc., SEC Admin Proc. File No. 3-12456 (2006)	South Korea	Emerging	40
2006	United States v. Statoil ASA, 06-CR-00960 (S.D.N.Y. 2006); <i>In re</i> Statoil ASA, SEC Admin. Proc. File No. 3-12453 (2006)	Iran	Less Developed	141
2006	United States v. Head, 06-CR-01380 (S.D. Cal. 2006)	Benin	Less Developed	96
2006	United States v. Novak, 05-180-3 (E.D. Wash. 2006)	Liberia	Less Developed	138
2006	United States v. Salam, 06-CR-00157 (D.D.C. 2006)	Iraq	Less Developed	178

Year	Matter(s)	Violation Location	S&P Market Type	TI CPI Rating (2008)
2005	United States v. Kozeny, CR 05-518 (S.D.N.Y. 2005); United States v. Bodmer, CR-03-947 (S.D.N.Y. 2003); United States v. Omega Advisors, Inc. (2007); United States v. Lewis, CR-03-930 (S.D.N.Y. 2003); United States v. Farrell, CR-03-290 (S.D.N.Y. 2003)	Azerbaijan	Less Developed	158
2005	United States v. DPC (Tianjin) Co. Ltd., CR 05-482 (C.D. Cal. 2005); <i>In re</i> Diagnostic Prods. Corp. SEC Admin. Proc. File No. 3-11933 (2005)	China	Emerging	72
2005	United States v. Monsanto Co. (2005); SEC v. Monsanto Co., 05-CV-14 (D.D.C. 2005); United States v. Martin, 07-CV-00434 (D.D.C. 2007)	Indonesia	Emerging	126
2005	United States v. InVision Tech., Inc. (2005); SEC v. GE InVision, Inc., 3:05-CV-00660 (N.D. Cal. (2005); SEC v. Pillor, 1:06-C-4906 (N.D. Cal. 2006)	Thailand	Emerging	80
2005	United States v. InVision Tech., Inc. (2005); SEC v. GE InVision, Inc., 3:05-CV-00660 (N.D. Cal. (2005); SEC v. Pillor, 1:06-C-4906 (N.D. Cal. 2006)	China	Emerging	72

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2005	United States v. InVision Tech., Inc. (2005); SEC v. GE InVision, Inc., 3:05-CV-00660 (N.D. Cal. (2005); SEC v. Pillor, 1:06-C-4906 (N.D. Cal. 2006)	Philippines	Emerging	141
2005	United States v. Micrus Corp. (2005)	France	Developed	23
2005	United States v. Micrus Corp. (2005)	Turkey	Emerging	58
2005	United States v. Micrus Corp. (2005)	Spain	Developed	28
2005	United States v. Micrus Corp. (2005)	Germany	Developed	14
2005	United States v. Titan Corp., CR 05-314 (S.D. Cal. 2005); SEC v. Titan Corp., 05-CV-0411 (D.D.C. 2005)	Benin	Less Developed	96
2005	United States v. Thompson & Reilly, 2:04-CR-00240 (N.D. Al. 2005)	Saudi Arabia	Emerging	80
2004	SEC v. Schering-Plough Corp. (D.D.C. 2004)	Poland	Emerging	58
2004	<i>In re</i> BJ Servs. Co., SEC Admin. Proc. File No. 3-11427 (2004)	Argentina	Emerging	109
2004	SEC v. ABB, Ltd. (D.D.C. 2004)	Nigeria	Emerging	121
2004	United States v. ABB Vetco Gray Inc. (S.D. Tex. 2004)	Angola	Less Developed	158
2004	United States v. ABB Vetco Gray Inc. (S.D. Tex. 2004)	Kazakhstan	Emerging	145

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
2003	United States v. Giffen, 03-663 (S.D.N.Y. 2003); United States v. Williams, 03-CR-406 (S.D.N.Y. 2003)	Kazakhstan	Emerging	145
2002	SEC v. BellSouth Corp. (N.D. Ga. 2002)	Venezuela	Emerging	158
2002	SEC v. BellSouth Corp. (N.D. Ga. 2002)	Nicaragua	Less Developed	158
2002	United States v. Pitchford, CR 1:02-00365 (S.D.N.Y. 2002)	Turkmenistan	Less Developed	166
2002	United States v. Syncor Taiwan, Inc., CR-02-1244 (C.D. Cal. 2002); SEC v. Syncor Int'l Corp., 02-2421 (D.D.C. 2002)	Taiwan	Emerging	39
2002	United States v. Sengupta, CR-02-40 (D.D.C. 2002); United States v. Basu, CR-02-475 (D.D.C. 2002)	Kenya	Frontier	147
2002	United States v. Kay, CR-4-01-914 (S.D. Tex. 2001); United States v. Kay, CR-4-01-914 (S.D. Tex. 2002); SEC v. Murphy, H-02-2908 (S.D. Tex. 2002)	Haiti	Less Developed	177
2001	<i>In re</i> Baker Hughes Inc., SEC Admin Proc. File No. 3-10572 (2001); SEC v. KPMG-SSH, 01-3105 (S.D. Tex. 2001); SEC v. Mattson, 01-3106 (S.D. Tex. 2001)	Indonesia	Emerging	126



Year	Matter(s)	Violation Location	S&P Market Type	TI CPI Rating (2008)
2001	<i>In re</i> Chiquita Brands Int'l, Inc., SEC Admin Proc File NO. 3-10613 (2001); SEC v. Chiquita Brands Int'l, Inc., 1:01-CV-02079 (D.D.C. 2001)	Colombia	Emerging	70
2001	United States v. Halford, et al, 01-CR-221 (W.D. Mo. 2001); United States v. Reitz, CR-01-222 (W.D. Mo. 2001); United States v. King, CR-01-190 (W.D. Mo. 2001)	Costa Rica	Less Developed	47
2001	United States v. Rothrock, CR-343 (W.D. Tex. 2001)	Russia	Emerging	147
2001	United States v. Cantor, CR-01-687 (S.D.N.Y. 2001); <i>In re</i> Am. Bank Note Holographics, Inc., SEC Admin Proc File No. 3-01532 (2001); SEC v. Am. Bank Note Holographics, Inc., 01-CV-6453 (S.D.N.Y. 2001); SEC v. Cantor, 03-CV-2488 (S.D.N.Y. 2003)	Saudi Arabia	Emerging	80
2000	SEC v. Int'l Bus. Machs. Corp., 00-CV-3040 (D.D.C. 2000)	Argentina	Emerging	109
1999	United States v. Metcalf & Eddy (99-CV-12566) (D. Mass. 1999)	Egypt	Emerging	115
1999	United States v. Int'l Material Solutions, CR-3-99-008 (S.D. Ohio 1999); United States v. Control Sys. Specialist, CR-3-98-073 (S.D. Ohio 1998)	Brazil	Emerging	80

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
1998	United States v. Tannenbaum, CR-98-784 (S.D.N.Y. 1998)	Argentina	Emerging	109
1998	United States v. Saybolt N. Amer. Inc., CR-98-10266 (D. Mass. 1998); United States v. Mead, CR-98-240-01, D.N.J. 1998)	Panama	Emerging	85
1997	SEC v. Triton Energy Corp., 1:97-CV-00401 (D.D.C. 1997)	Indonesia	Emerging	126
1996	SEC v. Montedison, S.P.A., 1:96-CV-02631 (D.D.C. 1996)	Italy	Developed	55
1994	United States v. Lockheed Corp., CR-1-94-22-016 (N.D. Ga. (1994); United States v. Love (N.D. Ga. 1994); United States v. Nassar (N.D. Ga. 1994)	Egypt	Emerging	115
1994	United States v. Vitusa Corp., CR-94-253 (D.N.J. 1994); United States v. Herzberg, CR-94-254 (1994)	Dominican Republic	Less Developed	102
1994	United States v. Steindler, et al, CR-1-94-29 (S.D. Ohio 1994)	Israel	Emerging	33
1993	United States v. Am. Totalisator Co. (D. Md. 1993)	Greece	Developed	57
1990	United States v. Dornier GmbH (D. Minn. 1990)	Niger	Less Developed	115
1990	United States v. Harris Corp., CR-90-0456 (N.D. Cal. 1990)	Colombia	Emerging	70

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
1990	United States v. FG Mason Eng'g, Inc., B-90-29 (D. Conn. 1990)	Germany	Developed	14
1991	United States v. Eagle Bus Mfg., B-91-171 (S.D. Tex. 1991); United States v. Morton, CR-3-90-061 (N.D. Tex. 1990); United States v. Blondek, 3-90-62 (N.D. Tex. 1990); United States v. Castle (N.D. Tex. 1990)	Canada	Developed	9
1994	United States v. Young & Rubicam, Inc., CR-N-89-68 (D. Conn. 1990); Abrahams v. Young & Rubicam, Inc. (D. Conn. 1994)	Jamaica	Frontier	96
1989	United States v. Pou (S.D. Fla. 1989)	Dominican Republic	Less Developed	102
1989	United States v. Goodyear, CR-89-0156 (D.D.C. 1989)	Iraq	Less Developed	178
1991	United States v. Napco Int'l, Inc. CR-4-89-65 (D. Minn. 1989); United States v. Liebo, CR-4-89-76 (D. Minn. 1989)	Niger (	Less Developed	115
1986	SEC v. Ashland Oil, Inc., 86-CV-1904 (D.D.C. 1986); Howes v. Atkins, 83-CV-279 (E.D. Ky. (1987); Williams v. Hall, 84-CV-149 (E.D. Ky. 1988)	Oman	Emerging	41
1985	United States v. Silicon Contractors, CR-85-251 (E.D. La. 1985)	Mexico	Emerging	72

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
1985	United States v. Carpenter & Kirkpatrick, CR-85-353 (D.N.J. 1985); United States v. Carpenter (D.N.J. 1985)	Nigeria	Emerging	121
1983	United States v. Applied Process Prods. Overseas, CR-83-00004 (D.D.C. 1983); United States v. Batan, CR-83-00005 (D.D.C. 1983)	Mexico	Emerging	72
1983	SEC v. Sam P. Wallace Co., , 81-CV-1915 (D.D.C. 1981); United States v. Sam P. Wallace Co., No. 83-0034 (D.P.R. 1983); United States v. Rodriguez, 83-0044 (D.P.R. 1983)	Trinidad & Tobago	Frontier	72
1983	United States v. Int'l Harvester, 82-CR-244 (S.D. Tex. 1982); United States v. Crawford Enters., CR-82-224 (S.D. Tex. 1982); United States v. Ruston Gas Turbines, CR-82-207 (S.D. Tex. 1982); United States v. C.E. Miller Corp., CR-82-788 (C.D. Cal. 1982); United States v. Marquis King, CR-83-00020 (D.D.C. 1983)	Mexico	Emerging	72
1979	United States v. Kenny Int'l Corp., CR-79-3 (D.D.C. 1979)	Cook Islands	Less Developed	n/a
1979	United States v. Carver, (S.D. Fla. 1979)	Qatar	Emerging	28

<b>Year</b>	<b>Matter(s)</b>	<b>Violation Location</b>	<b>S&amp;P Market Type</b>	<b>TI CPI Rating (2008)</b>
1978	SEC v. Katy Indus., 78-CV-3476 (N.D. Ill. 1978)	Indonesia	Emerging	126
1978	SEC v. Page Airways, Inc., 78-CV-0645 (D.D.C. 1978)	Gabon	Less Developed	96
1978	SEC v. Page Airways, Inc., 78-CV-0645 (D.D.C. 1978)	Malaysia	Emerging	47
1978	SEC v. Page Airways, Inc., 78-CV-0645 (D.D.C. 1978)	Ivory Coast	Frontier	151
1978	SEC v. Page Airways, Inc., 78-CV-0645 (D.D.C. 1978)	Morocco	Emerging	80
1978	SEC v. Page Airways, Inc., 78-CV-0645 (D.D.C. 1978)	Saudi Arabia	Emerging	80
1978	SEC v. Page Airways, Inc., 78-CV-0645 (D.D.C. 1978)	Uganda	Less Developed	126