# TERRITORIAL JURISDICTION REACH OF THE FOREIGN CORRUPT PRACTICES ACT AS APPLIED TO THE ANTI-BRIBERY PROVISION

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## I. INTRODUCTION

Before the 1970s, the United States government seldom relied on criminal law to control the practices of American companies doing business overseas.[1] However, during the Watergate investigation, it was discovered that American companies were keeping overseas accounts in an effort to finance contributions to political candidates and effectively pay bribes to various foreign officials.[2] The Securities and Exchange Commission (SEC) responded by commencing a detailed inquiry calling upon American companies to conduct internal investigations and disclose the results. Essentially, the Foreign Corrupt Practices Act (FCPA) was enacted in 1977[3] after the SEC reported its findings to Congress after discovering that over 400 corporations had made questionable or illegal payments to foreign officials for a wide variety of auspicious actions on behalf of the companies.[4] In effect, the FCPA makes it unlawful to use United States mail or any other instrument of interstate commerce for the purpose of making corrupt payments to foreign government officials.[5]

During its first three decades of existence, 1977–2007, the FCPA was enforced[6] but not as often as it was during the years of 2007 and 2008. During each of those two years, the enforcement agencies for the FCPA, the SEC[7] and the Department of Justice

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1. *See* Ciara Torres-Spelliscy, *How Much is an Ambassadorship? And the Tale of How Watergate Led a Strong Foreign Corrupt Practices Act and Weak Federal Election Campaign Act,* 16 CHAP. L. REV. 71 (2012).

2. *See* Symposium, *The Foreign Corrupt Practices Act: Domestic and International Implications*, 9 SYRACUSE J. INT'L L. & COMM. 235 (1982). *See also* David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 459 (1998).

3. Pub. L. No. 95-2123, Title I, §§ 102, 103(a), 103(b), 104, 91 Stat 1495 (*enacting* 15 U.S.C. §§ 78m(b)(2)).

4. *See* United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

5. *See* Northrop Corp. v. Triad Fin. Establishment, 593 F. Supp. 928, 940 (C.D. Cal. 1984) ("In general terms, the FCPA criminalizes foreign corporate bribery.").

6. Office of the Attorney Gen., Dep't of Justice, *The Accomplishments of the U.S. Department of Justice 2001–2009* 37 (2009), http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf [http://perma.cc/S2FW-3HLC] (noting while it was already the world's leading prosecutor in foreign bribery issues, "the Department brought more FCPA prosecutions in the last five years than in all the previous 26 years dating back to the passage of the FCPA in 1977"); *see also* Gibson, Dunn & Crutcher LLP, *2008 Year-End FCPA Update* at 2, http://www.gibsondunn.com/Publications/Pages/2008Year-EndFCPAUpdate.aspx [http://perma.cc/AX7D-LBFE] (noting the combined trends of SEC and DOJ actions); *see also* Roger M. Whitten & Jay Holtmeier, *A Spiraling Caseload Under the Foreign Corrupt Practices Act,* N.Y.L.J., Feb. 23, 2009 at 1.

7. DOJ, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 2, 4 (2012) https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [http://perma.cc/7Q2T-QKWJ] (observing that the SEC investigates allegations of civil violations of the record keeping and anti-bribery provisions by issuers which may then lead to a criminal referral to the DOJ, Criminal Division).

(DOJ),[8] brought over thirty enforcement actions.[9] It is unmistakable that no company doing business overseas can afford to ignore the FCPA or the duty it imposes to establish a well-organized and functional compliance program.[10]

The FCPA consists of two provisions: the anti-bribery provision and the accounting provisions.[11] Generally, the anti-bribery provision prohibits any person or entity, subject to the FCPA, from offering or paying anything of value to any foreign official, foreign political party, or candidate for foreign political office for the purpose of obtaining, retaining, or directing business to any person.[12] On the other hand, the accounting provisions require entities to both maintain accurate and reasonably detailed records and accounts[13] and to maintain an internal system of accounting controls sufficiently capable of ensuring that transactions are properly authorized and executed.[14]

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only with the territorial jurisdiction of the United States.'"[15] The 1998 amendments to the FCPA expanded the jurisdictional reach of the anti-bribery provisions. The amendments include bribery committed outside of the United States by issuers and any United States person[16] who is an officer, agent or employee of those issuers acting on the issuers' behalf. This is the case "irrespective of whether such issuer or agent

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8. *See generally id.*, at 4 (finding that the investigations of FCPA violations are completed by the Federal Bureau of Investigation under the supervision of the Fraud Section of the DOJ Criminal Division). *See also* DOJ, *United States Attorneys' Manual*, 9-47.110 (June 2013), https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977 [http://perma.cc/X9C9-JFD2] (requiring that the Criminal Division must first authorize all investigations before coordinating with the SEC).

9. *See* 2008 Year-End FCPA Report, *supra* note 6, at 2 (noting that in 2007 there were twenty SEC and eighteen DOJ actions, while in 2008 there were fourteen SEC and twenty DOJ actions); Whitten & Holtmeier, *supra* note 6, at 1 (noting that the number of enforcement actions has "ballooned" to more than thirty in both 2007 and 2008).

10. Dionne Searcey, *U.S. Cracks Down on Corporate Bribes,* WALL ST. J., May 26, 2009, at A1 (noting that in response to enforcement by the DOJ on FCPA issues, "companies across the U.S. are working to figure out if they are at risk. In some instances, companies have called the Department of Justice to come clean, in hopes of obtaining leniency").

11. *See* 15 U.S.C. § 78dd–1(a)(1–3) (West 1998).

12. *See* 15 U.S.C. § 78dd–1–3.

13. *See* 15 U.S.C. § 78m(b)(2)(A).

14. *See* 15 U.S.C. § 78m(b)(2)(B).

15. *See* EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

16. *See* U.S.C. 78dd–2(i)(2) (1998) (explaining that a "'United States Person' means a United States national within the meaning of the United States (as defined in § 1101 of Title 8), or corporation, partnership, association, joint stock company, business trust unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United Sates, or any political subdivision thereof").

makes use of the mails or any means or instrumentality of interstate commerce in furtherance of' the corrupt payment.[17] These provisions expand the ability of United States regulators to enforce the FCPA's anti-bribery provision against foreign companies and their agents. This principle of application represents a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate.[18] The presumption relies on the reading that Congress ordinarily legislates with respect to domestic, not foreign matters.[19] Therefore, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions."[20]

Part II of this article outlines a theoretical framework required for a better understanding of the structural impediments that corporate bribery regulation must overcome. This section develops a model to analyze the effect of domestic anti-corruption laws on the incentives of domestic and foreign companies with regard to bribery. The model predicts that although domestic prohibitions on international bribery may decrease bribery payoffs to a sufficient extent, the unilateral action by one country against its own corporations may prove to be disadvantageous. Ultimately, unilateral enforcement of anti-bribery laws could steer international business to foreign competitors and therefore make international cooperation exceedingly more difficult. This theory suggests that in order to pursue an effective international corruption regulation, not only must the payoffs be reduced from all relevant corporations, not just a subset of them, but also the regulatory actions must be extended to reach all foreign countries.

Part III presents the standard account of the United States' international anti-corruption law, the Foreign Corrupt Practices Act of 1977, which prohibits companies from making payments to foreign officials in return for business. It includes the anti-bribery provisions of the FCPA as well as the parties the provisions apply to, how the provisions are enforced and related civil litigations proposed by the FCPA, and the nexus required with interstate commerce.

Part IV argues that the standard account for international corporate bribery fundamentally misunderstands the nature and effect of the FCPA on international business transactions. While the FCPA does place significant restraints and restrictions on the way United States companies are able to do business abroad, it

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17. 15 U.S.C. § 78dd–1(g) (1998); *see also* 15 U.S.C. 78dd–2(i)(1) (1998).
18. *See* Blackmer v. United States, 284 U.S. 421, 437 (1932).
19. *See* Smith v. United States, 507 U.S. 197, 204 (1993).
20. *Arabian American Oil Co.*, 499 U.S. at 248 (internal quotation marks omitted).

also places significant restrictions on foreign competitors. The jurisdictional provisions of the FCPA are ambitiously extraterritorial, and the United States has increasingly used these jurisdictional provisions to prosecute foreign corporations for international bribery, even when the bribery has little to no effect in the United States.[21]

This section also addresses the extraterritorial reach of the FCPA, including the bases of jurisdiction under international law, and the statutory basis for extraterritoriality under the FCPA along with the enforcement practices used in the United States.

This theory of the FCPA's effect on the level of occurrences of international bribery thus differs from conventional wisdom. By imposing United States law on foreign corporations, this Article argues, the FCPA has materially reduced the payoffs from bribery for the majority of large, multinational corporations.

Part V concludes by describing the implications of the model for multilateral regulation of corruption in the future and discussing some potential positive aspects of continued aggressive extraterritorial enforcement of United States law.

## II. A THEORETICAL FRAMEWORK OF INTERNATIONAL CORRUPTION

Corruption has been described as a "global bad"[22] due to related costs not being limited to the nations in which the corruption occurs.[23] It distorts international commerce; firms that do not pay bribes are at a competitive disadvantage for government procurement contracts.[24] However, despite the universal condemnation of international corruption, deep structural issues stand in the way of effective regulation at an international level. Without domestic regulation, corporations have strong motivations to pay off foreign officials in exchange for their business. Global collaboration has a strong likelihood of mitigating the obstacles, however, the reticent and non-transparent nature of international corruption prevents real monitoring of international arrangements and contracts.

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21. *See* Brandon L. Garrett, *Globalized Corporate Prosecutions,* 97 VA. L. REV. 1775, 1776-84 (2011) (describing the increase in United States prosecutions of foreign firms and arguing that such prosecutions deserve more scrutiny).

22. *See* Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 304 (2010).

23. *See* Patrick Glynn et al., *The Globalization of Corruption, in Corruption and the Global Economy* 6, 10–17 (1997), https://piie.com/publications/chapters_preview/12/1iie2334.pdf [http://perma.cc/P5WR-T3SF].

24. *See* Wayne Sandholtz & Mark M. Gray, *International Integration and National Corruption*, 57 INT'L ORG. 761, 769 (2003).

Consequently, international corruption and bribery may demand additional ideas and resolutions to reduce the payoffs from bribery to all relevant players.

This analysis will be limited to the paradigmatic example of political corruption: quid pro quo bribery. Quid pro quo bribery occurs when an actor explicitly agrees to make payments to government officials in return for special privileges, such as government contracts or lower tax rates.[25] It is this type of corruption that people most readily identify as bribery, and is also the kind of corruption that most anti-bribery laws strive to prevent.[26]

International corruption, as opposed to domestic corruption, transpires when an official or one country bribes a government official of another country.[27] A reasonable argument can be made that the case for regulating international corruption is much stronger than the case for regulating domestic corruption. To the extent that we suppose government procedures and guidelines should reflect, or at a minimum adopt and refine, domestic preferences, international corruption is considered more challenging than its domestic counterpart.[28] Looking at the situation from a domestic viewpoint, local citizens may not believe or want the interests of foreign corporations to play any role in government institutions and decisions. In the past, the principle that government policies ought to be formed by domestic players has been shared by deliberative and competitive models of democracy.[29] However, this does not imply that all cases of the actions of domestic entities are preferred over those of foreign individuals. Rather, the proposition is, with all else equal, there

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25. Buckley v. Valeo, 424 U.S. 1 (1976) (recognizing a government interest in preventing quid pro quo corruption, as well as the appearance of it, in the electoral process); *see also* Jacob Eisler, *The Unspoken Institutional Battle Over Anti-corruption: Citizens United, Honest Services, and the Legislative-Judicial Divide,* 9 FIRST AMEND. L. REV. 363, 395–96 (2011) (arguing that the Supreme Court has adopted a view of democracy that leads to a definition of corruption that tends towards the quid pro quo side of the spectrum).

26. *See* William Magnuson, *International Corporate Bribery and Unilateral Enforcement,* 51 COLUM. J. TRANSNAT'L L. 360, 369 (2013).

27. *See* Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 418–19 (2007).

28. *See* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605–10 (2011) (laying out the reasons why the Supreme Court is not likely to expand its holding in *Citizens United* to allow spending by foreign nationals to influence candidate elections).

29. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy, in Deliberative Democracy: Essays on Reason and Politics* 72 (James Bohman & William Rehg eds., 1997) (arguing "the notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens")(emphasis added).

are arguments why foreign corruption should be considered more problematic.

Assuming international corruption is a "global bad,"[30] we may presume that international anti-corruption legislation would be extensive. However, until recent years, international anti-corruption laws were disjointed and restricted.[31] Why, then, have the attempts to fight international corruption been so unsuccessful? The answer is in the nature of international cooperation with the robust corrupt practices acts that are currently in place.

## III. THE FOREIGN CORRUPT PRACTICES ACT

The FCPA was enacted in 1977[32] in response to the revelation of widespread bribery of foreign government officials by United States companies doing business overseas. Consequently, investigations conducted by the Watergate Special Prosecutor and the SEC disclosed the existence of overseas "slush funds" that were used to finance illegal contributions to the Nixon re-election campaign and other domestic political campaigns in addition to funding bribes that were used to pay foreign officials.[33] The SEC brought enforcement proceedings against several major public corporations.[34] In addition, the SEC instituted a voluntary disclosure program under which companies were able to self-report violations of United States securities laws in the hope of

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30. *See* Brewster, *supra* note 22, at 29.

31. *See* Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance,* 42 INT'L LAW. 1259, 1260–1 (2008) (tracing the history of efforts to combat transactional bribery); *see also* Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 28 (2011) (pointing out that in 2010, the United Kingdom enacted its Bribery Act, which some commentators have argued imposes even greater restrictions on companies than the FCPA does).

32. *See Foreign* Corrupt Practices Act of 1977, Pub. L. No. 95–213, § 102-04, 91 Stat. 1494 (1977); *see also*, 13 Weekly Compilation Pres. Doc. 1909 (Dec. 20, 1977) (President Carter signed the FCPA into law on December 19, 1977).

33. *See Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities & Economy in Gov't of the Joint Econ. Comm.,* 94th Cong. 91 at 96 (1976) (discussing Congress was aware of the investigation by the Watergate Special Prosecutor concerning illegal campaign contributions by U.S. companies, often financed through off-shore entities and accounts, which had resulted in criminal prosecutions of twenty-two corporations and twenty-one individuals); *see also George* C. Greanias & Duane Windsor, *The Foreign Corrupt Practices Act: Anatomy of Statute* 17–19 (1982); *see also* Charles R. McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215 (1976).

34. *See* Mary Jane Dundas & Barbara Crutchfield George, *Historical Analysis of the Accounting Standards of the Foreign Corrupt Practices Act*, 10 MEMPHIS ST. U. L. REV. 499–500 (1980); *see also* SEC v. Boeing Co., [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) PP 95, 442, 99, 233 (D.D.C. 1976); *see also* SEC v. Lockheed Aircraft Co., 404 F. Supp. 651 (D.D.C. 1975).

avoiding SEC enforcement action.[35] The SEC's voluntary disclosure program resulted in more than 400 United States companies disclosing overseas payments in excess of $300 million.[36]

The anti-bribery provisions of the FCPA prohibit United States issuers and domestic concerns from making or promising to make payments, directly or indirectly, of money or anything of value to a foreign official, party or party official or candidate, with corrupt intent, in order to obtain or retain business.[37] An "issuer" is defined as a company that has registered securities or that is required to file reports with the SEC.[38] A "domestic concern" is defined as a "citizen, national, or resident of the United States" and "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 State of the United States or a territory, possession, or commonwealth of the United States."[39] In 1998, the FCPA was amended to extend its application to any person, including foreign persons, as long as an act in furtherance of the violation is committed in the United States.[40]

The Act further exempts "grease payments," or payments exclusively intended to "expedite or secure the performance of a routine governmental action," from the bribery prohibition.[41] It also includes two affirmative defenses. The first defense applies if the payment was lawful under the laws of the foreign official's country.[42] The second defense applies if the payment was a "reasonable bona fide expenditure" directly related either to the promotion and demonstration of products and services or to the execution and performance of a contract with a foreign government.[43]

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35. *See* Buckley v. Valeo, 424 U.S. 1, 16–18 (1976) (testimony of Roderick M. Hills, Chairman of the SEC); *see also* Greanis & Windsor, *supra* note 33, at 75–78.

36. Committee on Interstate and Foreign Commerce, Unlawful Corporate Payments Act of 1977, H.R. Rep. No 95–640, at 4 (1977).

37. 15 U.S.C. § 78dd–1(a) (explaining the FCPA notably does not prohibit the acceptance of bribes by foreign officials, instead only dealings with the supply-side of bribes, not the demand-side); *see also* United States v. Castle, 925 F.2d 831, 835 (5th Cir. 1991) (concluding that the government could not "refute the overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes, especially since Congress knew it had the power to reach foreign officials in many cases, and still declined to exercise that power").

38. 15 U.S.C. § 78m(a).

39. 15 U.S.C. § 78dd–2(h)(1)(A)–(B).

40. 15 U.S.C. § 78dd–1(a).

41. 15 U.S.C. § 78dd–1(b).

42. 15 U.S.C. § 78dd–1(c)(1).

43. 15 U.S.C. § 78dd–1(c)(2).

## IV. THE FCPA AS A UNILATERAL ENFORCEMENT DEVICE

The well-established model of the FCPA as unilateral disarmament by the United States has a single fault: it misinterprets the international anti-corruption fixture as it fails to encompass the extraterritorial elements of the FCPA. The FCPA's aspiringly extraterritorial jurisdictional provisions extend the prohibitions to any corporation that issues stock on a United States stock exchange, has American depository receipts trading in the United States, engages in any part of the bribery transaction in the United States or utilizes United States banks to facilitate any bribery transaction.[44] Accordingly, the FCPA's jurisdictional reach is not only wide, but ascribes to many foreign corporations. Equally important, the United States has progressively used these wide-ranging jurisdictional provisions to assertively prosecute foreign corporations for bribery, even when the bribery has little or no ties to the United States.[45]

The United States' aptitude to control global corporate bribery depends critically on the extraterritorial application of the law. If corporations could simply escape United States laws by moving conduct offshore, the FCPA would have a limited influence on bribery rates. To avoid this dynamic, United States regulators have tried to extend the FCPA's prohibitions to corporations functioning overseas. However, extraterritorial enforcement of the FCPA against foreign companies is limited by the constraints imposed under both international and domestic law. By exploring the extraterritorial application of the FCPA, this section will demonstrate the long reach of United States law and the consequent restraints faced by foreign corporations.

Under traditional international law, states may implicate legislative jurisdiction under either territoriality-based or

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44. *See* 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, 349–351 (2001) (explaining the prosecutions of foreign corporations under the FCPA are not "extraterritorial" because they are based on the presence of the corporation in the United States. However, they involve actions that occur primarily abroad and actors that are located primarily abroad, and thus their effects are extraterritorial); *see also* Minodora D. Vancea, *Exporting U.S. Corporate Governance Standards Through the Sarbanes-Oxley Act: Unilateralism or Cooperation?* 53 DUKE L.J. 833, 833 (2003) (defining extraterritorial jurisdiction as the regulation of activities "where (1) the conduct at issue occurs within the U.S., but its effects take place abroad; (2) the conduct occurs abroad, but its effects take place in the U.S.; or (3) both the conduct and its effects occur abroad"); Chris Brummer, *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 U. CIN. L. REV. 499, 504-506 (2010) (explaining that these kinds of assertions of jurisdiction have, thus, been referred to as "extraterritorial territoriality").

45. *See* Garrett, *supra* note 21, at 1800. *Contra* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).

nationality-based grounds.[46] It is customary that a state, under territorial jurisdiction, may regulate persons or activities in its own territory.[47] The extent of territorial jurisdiction, including the question of whether a state may legally regulate acts taking place outside its territory by causing effects inside its territory, is debated, but the rudimentary elements of territory are well-established and serve as the chief basis for jurisdiction in international law.[48] Nationality-based jurisdiction, however, gives a state the power to control the activity of its own citizens abroad.[49] If a prohibited action occurs in the bounds of another state's territory, that state has the authority to forbid the action if it was committed by a citizen.[50]

In recent years, the United States has improved its extraterritorial implementation of the FCPA against foreign corporations.[51] In what seems to be a deliberate decision by the DOJ and the SEC in an effort to rein in non-United States companies, the United States has brought numerous high-profile cases against large foreign corporations. The extraterritorial enforcement of the FCPA goes hand-in-hand with the broader trend of global corporate prosecutions by United States authorities.[52]

The wide-ranging jurisdictional reach of the FCPA and its extraterritorial application by the SEC and the DOJ may necessitate various changes in the way that we understand international anti-corruption cooperation. The passage of the FCPA was, in a sense, a cooperative change by the United States, demonstrating to other countries that it would prohibit its corporations from engaging in bribery. Unfortunately, this cooperative move was not reciprocated by other countries who do business with the United States, as they cheated and continued to allow their corporations to bribe foreign officials. Because of this, the FCPA disadvantaged American corporations with respect to

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46. *See* John H. Knox, *A Presumption Against Extrajurisdictionality,* 104 AM. J. INT'L L. 351, 355–61 (2010).

47. *See* INT'L BAR ASS'N, *Report of the Task Force on Extraterritorial Jurisdiction* 1, 11(2009), http://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E [http://perma.cc/5HFE-VL7K].

48. *See* PEARSON EDUCATION LIMITED, OPPENHEIM'S INTERNATIONAL LAW § 143, at 485 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

49. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

50. *Id.*

51. *See* Roger M. Witten et al., *Anti-Corruption Enforcement Developments: 2010 Year in Review and 2011 Preview, in* THE FOREIGN CORRUPT PRACTICES ACT 2011 63, 65 (PLI CORP. L. & PRAC., Course Handbook Series No. B–1883, 2011) (explaining how the SEC created a specialized FCPA unit in order to increase its ability to initiate and conduct FCPA investigations, and increasing resources devoted to the unit).

52. *See Brown, supra* note 44, at 350.

their foreign counterparts. In effect, the FCPA fashioned a unilateral disarmament game. One in which foreign corporations and governments had strong incentives to engage in or tacitly allow bribery.[53]

The United States' capability to control international corporate bribery through unilateral deeds depends, to a great extent, on its ability to enforce costs on foreign companies. Ultimately, if prosecutors cannot proclaim jurisdiction over a foreign company or the actions it takes, they will find it nearly impossible to change the payoff structure for those companies. The United States does possess a distinct capacity to control the actions of international companies. Various international companies have significant ties to the United States financial markets, either through the listing of stock or American depository receipts on the New York Stock Exchange, or by using United States financial institutions for payment services.[54] Few countries have such all-inclusive market control.[55] The United States can therefore prohibit other countries and their corporations from cheating by conditioning market access on compliance with the FCPA. Thus, the FCPA essentially serves as a type of international enforcement instrument, but one that is enforced unilaterally without the requirement of global collaboration.[56]

This understanding of the FCPA as a unilateral international enforcement instrument helps clarify some of the mysteries that modern corporation theory has struggled with in recent years. Primarily, it aids in the explanation of why economists who have previously considered the problem have not consistently found a

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

54. *See The Competitive Position of the U.S. Public Equity* Market, COMM. ON CAPITAL MKTS. REGULATION (Dec. 4, 2007), http://capmktsreg.org/wp-content/uploads/2014/12/The_Competitive_Position_of_the_US_Public_Equity_Market.pdf [http://perma.cc/A63K-86L6] (providing that in 2001, the domestic market capitalization of the New York Stock Exchange and NASDAQ constituted more than half of the capitalization of the entire World Federation of Exchanges, and the United States share of the value of global stock trading was 58%); *see also* Craig Doidge, G. Andrew Karolyi & Rene M. Stulz, *Has New York Become Less Competitive Than London in Global Markets? Evaluating Foreign Listing Choices Over Time*, 91 J. FIN. ECON. 253, 253–77 (2009) (explaining that in 2005, there were 2,087 foreign firms with cross-listings in the United States, and foreign listings on the three major exchanges in New York accounted for 30% of total global foreign listings).

55. *See The Competitiveness Position of the U.S. Public Equity Market,* COMM. ON CAPITAL MKTS. REGULATION (2007), http://www.capmktsreg.org/2007/12/04/the-competitiveness-position-of-the-u-s-public-equity-market/ [http://perma.cc/8J2F-84GL].

56. *See* Lawrence S. Makow, *Current Perspectives and Recommendations Regarding Governance, Compliance and Ethics in a Time of Change—The Role and Responsibility of Counsel, in* A GUIDE TO FINANCIAL INSTITUTIONS 2011: NAVIGATING THE NEW LANDSCAPE 1067, 1126–27 (PLI CORP. L. & PRAC., Course Handbook Series No. 28327, 2011).

strong negative impact of the FCPA on United States business.[57] Second, the extraterritorial enforcement of the FCPA aids in the explanation for the reason we have not seen a decline in United States prosecutions as a response to careless anti-bribery enforcement by foreign governments. Numerous scholars have noted that other countries have failed to fully implement or enforce their anti-bribery laws even after the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention's conclusion,[58] but few have explained the United States' response to this non-enforcement by other signatories.[59] The United States has drastically increased its enforcement of the FCPA, at the same time that its counterparts remain stubbornly non-compliant with, or at least not similarly committed to, the Anti-Bribery Convention. Assertive actions of foreign corporations are especially important when other countries are failing to examine their own companies. One of the identified purposes of the OECD Anti-Bribery Convention was to "ensure that companies face substantially similar rules and penalties for international bribery, no matter what their own country of origin, and that network of laws forged by the combined effort will permit effective enforcement and mutual legal assistance."[60] To fulfill these purposes, the treaty explicitly encouraged countries to assert extensive jurisdictional powers over foreign bribes.[61] The United States has intensified FCPA prosecutions by increasing prosecutions of foreign corporations, and this enforcement may well be a response to the lack of enforcement by other countries.[62]

Extraterritorial implementation of the FCPA alleviates one of the central concerns of scholars and legislators: that the FCPA places United States corporations at a competitive disadvantage

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57. *See* John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. INT'L BUS. STUD. 107 (1984) (finding no evidence that the U.S. share of exports to bribery-prone countries had declined after the FCPA was enacted).

58. *See* Brewster, *supra* note 22, at 309.

59. Ernst & Young LLP, *European Fraud Survey 2011: Recovery, Regulation and Integrity* 3, http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation—-Dispute-Services/European-fraud-survey-2011—recovery—regulation-and-integrity [http://perma.cc/2UND-22CM] (surveying employees of European companies and finding that 68% of respondents believed that their regulators were either unwilling to pursue convictions for bribery and corruption offenses, or were ineffective in doing so).

60. *See* Brown, *supra* note 44, at 266–67 (reviewing the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalization of Bribery of Foreign Officials, OECD Committee on International Investment and Multinational Enterprises (CIME) to the OECD Council at the Ministerial Level, § IIIA (May 26, 1997)).

61. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 18, 1997, S. Treaty Doc. No. 105–43, 37 I.L.M. 1 (1998) (entered into force Feb. 13, 1999) [hereinafter OECD Anti-Bribery Convention].

62. *See Developments in the Law – Extraterritoriality*, 124 HARV. L. REV. 1226, 1285-89 (2011).

with respect to foreign corporations.[63] Several scholars have claimed that the FCPA misrepresents international competition by imposing competitive constraints on United States companies that it does not similarly impose on foreign companies.[64] The argument relies on the flawed idea that the FCPA's provisions apply only to United States corporations, and not foreign ones. Not only has the FCPA granted extensive extraterritorial jurisdiction to the SEC and the DOJ in order to prosecute foreign companies for bribery, the SEC and the DOJ have in fact used this jurisdiction to impose substantial monetary fines on foreign corporations.

The FCPA has guided the United States to implement significant changes in the way that foreign corporations do business. Foreign corporations have devoted growing sums of resources and attention to becoming compliant with the FCPA, and many international companies have thus adopted anti-corruption compliance programs.[65] As a result of FCPA settlements, numerous large foreign corporations have retained independent compliance monitors who continuously evaluate and oversee internal ethics and compliance programs.[66] Various foreign companies are now supportive of more anti-corruption supervision by governments.[67] Foreign corporations have been required to pay hefty fines to the United States government, and United States investigations of foreign companies have instigated local prosecutions as well.[68]

Extraterritorial enforcement of the FCPA, then, should help to do away with the criticism of the Act as being anti-American.[69]

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63. *See generally* Branislav Hock, *Competitive "(Dis)Advantage" and Extraterritoriality of Anti-Bribery Laws* (Jun. 3, 2013), FCPA COMPLIANCE & ETHICS, http://fcpacompliancereport.com/2013/06/competitive-disadvantage-and-extraterritoriality-of-anti-bribery-laws/ [http://perma.cc/6U7K-LRH6].

64. *See* Brewster, *supra* note 22, at 307; *see also* Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 667 (2004).

65. *See* Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and Effects of International Standards, in* THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 716 (PLI CORP. L. & PRAC., Course Handbook Series No. 13908, 2008). For an example of a multinational corporation's anti-corruption compliance program, *see generally* Statoil, Anti-Corruption Compliance Program, available at http://www.statoil.com/no/About/EthicsValues/Downloads/Anti-corruption%20compliance%20program.pdf [http://perma.cc/48L9-JRWV].

66. *See* Witten et al., *supra* note 51, at 78–79; F. Joseph Wain, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 PENN. J. BUS. L. 321, 322 (2011).

67. *See* Ernst & Young LLP, *supra* note 59.

68. *See* Witten et al., *supra* note 51.

69. *See* Daniel Kaufmann & Shang-Jin Wei, *Does "Grease Money" Speed Up the Wheels of Commerce?* (Nat'l Bureau Econ. Res., Working Paper No. 7093, 1999),

Through the application of the FCPA's disciplines on foreign companies in such a rigorous way, the United States has reduced the competitive shortcoming that national companies might otherwise have faced under domestic regulation prohibiting international bribery. The FCPA increases the price of bribery to both United States and foreign corporations, and consequently imposes similar competitive limitations on both groups.

The FCPA only influences foreign corporations that either have equity securities trading on a United States exchange or commit acts in furtherance of a bribe within the United States. In exercise, this has meant the FCPA's grasp is limited to large corporations with multinational operations.[70] While true that the FCPA is principally imposed on foreign companies that are large and have international operations, the FCPA is also enforced against domestic operations that are large and have multinational operations.[71] Further, these domestic corporations are mostly contending against other multinational corporations, the exact corporations that are most likely to have ties to the United States.[72] As a result, the FCPA's effect is not nearly as prejudiced against United States companies as some suggest, since foreign competitors are frequently subject to the same limitations. This is reinforced by the SEC's use of so-called "industry sweeps," in which the SEC initiates extensive, industry-wide probes of global corruption.[73] These investigations, targeting the arms industry, the oil and gas industry and, most recently, the financial services industry for sovereign wealth funds, look into corrupt practices by both United States and non-United States companies alike.[74] As a result, they decrease the concern that United States companies will be at a disadvantage due to enthusiastic enforcement.[75]

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http://www.nber.org/papers/w7093 [http://perma.cc/T3N8-EUSH] (arguing that robust anti-corruption laws may actually be good for businesses subject to them and finding that firms that pay more bribes face more bureaucratic intrusion, in effect, red tape).

70. *See* Garrett, *supra* note 21, at 1780, ("Convicted foreign firms are also disproportionately public firms and large firms.").

71. *See* Committee on International Business Transactions, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS: SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION?, (N.Y.C. BAR ASS'N, December 2011), http://www.2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.

72. *Id.*

73. *See* Witten et al., *supra* note 51, at 72–74.

74. *Id.*

75. *Id.*

## V. THE DANGERS OF UNILATERAL ENFORCEMENT

### A. *Prejudiced Enforcement*

The extraterritorial application of the FCPA increases the likelihood of prejudiced enforcement by United States authorities. Prosecutors may require foreign companies to pay larger fines than their domestic counterparts or decide to pursue foreign corporations more than they pursue domestic corporations. Both possibilities find support in studies of FCPA enforcement actions.[76] Prejudiced application could potentially encourage other countries to actively enforce their own international corruptions laws,[77] but could also potentially be used to favor American corporations.[78] Should other countries perceive the United States as exercising the FCPA as an economic tool to harm foreign competitors, other countries may follow and therefore attempt to apply their own international anti-corruption laws against United States corporations.

Biased enforcement can become problematic if questions arise as to whether the United States is truly helping the public through the regulation of corporate bribery. If the FCPA is used as a tool for imposing costs on foreign companies, then the Act would be viewed less like a noble regulation and more like a power move by the United States. Further, if states perceive the FCPA as a non-cooperative maneuver by the United States, then we run the risk of losing their support in the preservation of the rule in the future.[79]

### B. *Over-Enforcement*

Should unilateral enforcement of corporate anti-bribery laws somehow turn out to be feasible in an unbiased method, there is

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76. *See* Witten, *supra* note 51 (providing that foreign companies have paid eight of the ten largest FCPA settlements in history); *see also* Garrett, *supra* note 21, at 1780 (noting in criminal prosecutions, foreign companies receive fines that are, on average, twenty-two times larger than the fines of their domestic counterparts).

77. *See Developments in the Law – Extraterritoriality, supra* note 62, at 1288 (arguing that "extraterritorial FCPA enforcement encourages signatories to launch their own prosecutions in accordance with the OECD Convention"); *see also* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 87 (2001) (arguing that unilateral economic sanctions imposed by the United States on human rights abusers can promote norm internalization by "formally provok[ing] numerous interactions between the United States and foreign governments in which global norms are raised and clarified").

78. *See* Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579, 587–88 (1986) (proposing that biased enforcement is one of the major worries of hegemonic stability theorists arguing a world of unilateral enforcement, the hegemon may be able to impose a form of "tax" on other countries for the provision of the good).

79. *Id.* at 579.

still a possibility it would lead to over-enforcement of the corruption laws.[80] The concern is that national officials, acting alone and without organization with other national officials, might discourage advantageous corporate behavior or promote wasteful corporate behavior. Through unilateral accomplishments, countries could possibly end up generating overlapping, or even conflicting regulations that create needless costs for businesses functioning in international corporate settings.[81]

It is worth noting that unilateral corporate regulation overturns the worries that unilateral disarmament promotes. Formerly, the concern was principally about under-regulation. When domestic efforts against international corporate bribery was understood as unilateral disarmament, the apprehension was, without multilateral cooperation, we would not have enough regulation of corporate bribery worldwide.[82] Under this model, no state acting alone had sufficient motivation to regulate globally and thus regulation became deficient.[83]

However, with unilateral corporate regulation the concern changes from under-enforcement to over-enforcement. The United States has proven a strong willingness to discipline foreign companies for bribery abroad.[84] The United Kingdom has endorsed its own international anti-bribery law with even more rigorous provisions.[85] Should multiple countries begin to enforce their anti-bribery laws concurrently and without coordination, companies may be subject to overlapping or conflicting regulations. It may be that the ideal level of corruption is zero, and multiple punishments for the same crime merely serve to ensure that there is no incentive to bribe at all. However, corruption laws similarly carry business costs with them, such as reporting requirements and compliance programs. The adoption of unilateral corporate regulations by multiple governments without regard to the efforts of other countries, they could impose pointless costs on

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80. *See* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1744 (2005) (arguing some believe that over-enforcement occurs when the total sanction suffered by the violator of a legal rule exceeds the amount optimal for deterrence).

81. *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002) (setting forth a system for more efficient regulation of cross-border activity to avoid these kinds of problems).

82. *See* Snidal, *supra* note 78, at 142; Tarullo, *supra* note 64, at 675–76; Brewster, *supra* note 22, at 303–11; Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634 (2008).

83. Tarullo, *supra* note 64, at 678.

84. *See supra* Section IV.

85. *See* DELOITTE, ANTI-CORRUPTION PRACTICES SURVEY 2011—CLOUDY WITH A CHANCE OF PROSECUTION? (2011), http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047888.pdf [http://perma.cc/M55A-A7TW].

corporations. Additionally, if prejudiced enforcement does become a reality, then over-enforcement becomes even more problematic. In reply to overenthusiastic enforcement by the United States, other states may begin to prosecute foreign companies for non-problematic behavior solely to benefit local companies.[86]

In some situations, United States actions against foreign companies have conflicted with decisions of foreign governments. The United States has prosecuted businesses after their home country governments have completed investigations and reached final settlements, in what seems to be an effort to register dissatisfaction with the resolution of the matter by home countries, either because the penalty was inadequate or the examination was inadequately comprehensive.[87]

Should over-enforcement be the concern, it might appear strange that United States companies have argued that foreign countries should adopt FCPA-like corporate bribery laws. If companies believe that unilateral bribery regulations will work towards over-regulation, they would possibly want fewer, not more, countries to have such laws. Nevertheless, it seems that is not the case.[88] This may propose the idea that over-enforcement is not a particularly noticeable concern with unilateral bribery regulation, either because the present government still, for the most part, does not discourage bribery enough or because there are small areas of international businesses that remain protected from United States prosecution. If the existing level of prevention attained under unilateral regulation is under the desired level, companies may favor the spread of bribery laws to other countries. Moreover, the harms associated with a small level of over-enforcement may be less distinct than the problems from under-enforcement. Put together, these factors could clarify why United

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86. *See* Max Colchester, Liz Rappaport & Damian Paletta, *In U.K., A Backlash Over Standard Chartered Probe*, WALL ST. J., (Aug. 9, 2012), http://online.wsj.com/article/SB10000872396390443991704577577154126976 [http://perma.cc/6PWY-W3MQ] (providing that accusations of biased enforcement have recently arisen with regard to sanctions-dodging by financial institutions, noting when New York prosecutors unveiled allegations that the United Kingdom-based bank Standard Chartered had illegally concealed more than $250 billion of transactions with Iran, United Kingdom politicians publicly complained about the "increasingly anti-British bias" by United States regulators, which had "start[ed] to shade into protectionism").

87. *See* Philip Urofsky, *It Doesn't Take Much: Expansive Jurisdiction in FCPA Matters*, SHEARMAN & STERLING LLP (Mar. 4 2009), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2009/03/It-Doesnt-Take-Much-Expansive-Jurisdiction-in-FC__/Files/View-Full-Text/FileAttachment/LT030409ExpansiveJurisdictioninFCPAMatters.pdf [http://perma.cc/UXA2-4UMK] (pointing out that the SEC and the DOJ charged Statoil, a Norwegian state-owned oil company, with the bribery of an Iranian official in an effort to obtain oil and gas development contracts, after Norwegian authorities had previously fined the company for the same behavior).

88. *See* Tarullo, *supra* note 64, at 675.

States companies often argue that foreign countries should adopt FCPA-like international bribery laws.

### C. *Stability*

An additional concern brought by the FCPA's assertive extraterritoriality is that a unilateral approach may not supply a stable resolution to the problem, that is to say it may not be sustainable. The sustained efficiency of United States anti-corruption regulation relies on the extraterritorial influence of the FCPA. Nevertheless, jurisdiction only reaches so far. There is a growing indication that the aggressiveness and desirability of United States capital markets have weakened in recent years.[89] Part of this decline is attributable to the progressively arduous corporate regulation applicable to United States companies.[90] Companies incorporated in the United States are subject to a variety of governance and reporting requirements that impose a substantial cost on business.[91] Equally as important, corporate tax rates in the United States are greater than those in many countries, and these taxes apply to worldwide income, rather than income earned inside the country.[92] Likewise, large amounts of capital have accrued in foreign markets and investors are more readily able to invest abroad.[93]

The implementation of the anti-bribery provisions against foreign corporations strengthen the problem by increasing costs and decreasing benefits of listing securities in the United States. In the past, non-United States companies that needed capital had little choice about whether to offer securities in the United States because the markets provided access to capital in ways other countries could not.[94] Nowadays, companies in need of capital have

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89. *See* Committee on International Business Transactions, *supra* note 71, (stating that a report by the Committee of International Business Transactions of the New York City Bar has suggested that the intensified enforcement of the FCPA may be explained by the personal incentive of U.S. prosecutors eager to "perform." And further providing that in the 1990s, United States IPOs accounted for 26.7% of all global IPOs).

90. *See* Steven M. Davidoff, *The Benefits of Incorporating Abroad in an Age of Globalization*, N.Y. TIMES, DEALBOOK (Dec. 20, 2011. 3:53 PM), http://dealbook.nytimes.com/2011/12/20/the-benefits-of-incorporating-abroad-in-an-age-of-globalization/ [http://perma.cc/F8CL-W6VD].

91. *See Competitiveness Position*, *supra* note 54.

92. *See id.* (noting that corporations incorporated within the United States need only pay taxes on their worldwide income when they repatriate the income into the United States).

93. *See* Luigi Zingales, *Is the U.S. Capital Market Losing its Competitive Edge?* (European Corp. Governance Inst., Working Paper No. 192, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028701 [http://perma.cc/5XGQ-CV7P].

94. *See id.*

other options beyond the United States.[95] A number of companies have delisted their securities from United States stock exchanges in an effort to avoid the great regulatory charges associated with listing the company.[96] At least four companies (Siemens, Daimler, Volvo, and ABB) delisted their securities from the New York Stock Exchange after being prosecuted for FCPA violations.[97]

## VI. CONCLUSION

By focusing on how the FCPA has disadvantaged United States corporations in international business, the standard account has lost track of the important extraterritorial facets of the FCPA's enforcement. Unilateral enforcement of international corruption resolves many of the problems traditionally associated with the regulation of corruption, including concerns about self-imposed costs and the issues associated with achieving multilateral cooperation. However, unilateral enforcement raises a new set of issues, ones that have not been addressed sufficiently in scholarly articles.

*Bianca Ybarra*

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95. *See id.*

96. *See* INT'L BAR ASS'N, *supra* note 47, at 21 (observing that between the years of 2007 and 2011, at least sixty companies delisted securities from United States exchanges due to high administrative, regulatory and other costs).

97. *See* Thomas Gorman & William McGrath, *The New Era of FCPA Enforcement: Focus on Individuals and Calls for Reform,* SEC Actions Blog (Aug. 31, 2011, 9:00 PM), http://www.secactions.com/part-iv-the-new-era-of-fcpa-enforcement-focus-on-individuals-and-calls-for-reform/print/ [http://perma.cc/4LGT-J6WL].

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