

Building Multilateral Anticorruption Enforcement: Analogies between International Trade & Anti-Bribery Law

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In the last twenty years, the United States government has put substantial resources behind the fight against foreign bribery by using the Foreign Corrupt Practices Act (FCPA) to prosecute unilaterally foreign and domestic companies who engage in corruption abroad. The United States is not entirely alone in this effort, but other countries have been far less vigorous in investing resources in investigations and prosecuting cases. Because of the unilateral and extraterritorial nature of FCPA prosecutions, these cases are sometimes controversial as foreign governments resist American influence in their commercial relations.

In response to this international tension, as well as a desire for a more robust global anticorruption regime, commentators have called for a centralized international court to address corruption issues. This proposal, however, is legally fraught and highly politically infeasible, and, thus, quite unlikely to succeed. Nonetheless, the future trajectory of an international anti-bribery regime remains an important question, which could have significant effects on the future of U.S. extraterritorial enforcement.

This Article provides an alternative and far more politically viable outline of the likely development of a multilateral approach to anticorruption enforcement. Drawing on the U.S.'s experience in international trade law, where the U.S. was also an early and unilateral enforcer, this Article discusses how a multilateral compromise that increases global enforcement can emerge. In doing so, it seeks to sketch out helpful parallels in conceptualizing the history and effect of the two approaches to combatting official and unofficial barriers to global markets. Rigorous, and sometimes controversial, U.S. enforcement of international trade law led to an institutional shift in the World Trade Organization from unilateral to multilateral enforcement. This Article contemplates the likely trajectory of the FCPA and the OECD Anti-Bribery Convention through the same lens. It argues that the global anti-bribery regime is poised to follow a similar but

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The authors would like to thank Paul Stephan and members of the University of Virginia's Lansing B. Lee, Jr. Seminar in Global Politics for comments on earlier drafts. Sean McClelland and Bo Stewart provided outstanding research assistance.

less formal path as developments in trade law, where continued U.S. FCPA prosecutions are likely to be leveraged into a flexible multilateral anti-bribery framework built on notions of complementarity. This multilateral framework involves more deference by U.S. prosecutors to foreign prosecutors but also leads to higher levels of global anti-corruption enforcement.

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I. INTRODUCTION

In the last two decades, the United States has dramatically positioned its enforcement resources behind an effort to crack down on bribery of foreign government officials. Using the tools provided by the Foreign Corrupt Practices Act (FCPA), the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) made fighting overseas corruption a major goal of American civil and criminal corporate law. Between 2001 and 2015, the federal prosecutors initiated over 379 FCPA cases.¹ Enforcement in 2016 followed this upward trend.² The penalties in these cases are regularly in the tens or hundreds of millions of dollars and have gone as high as the \$800 million judgment against the German company Siemens AG.³ The American global enforcement of the FCPA has become a major source of international economic policy as well as an important tool of corporate law.

The FCPA, together with the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Treaty, is now one of the core legal regimes that govern the global economy. Along with international trade law, anti-bribery law is quickly becoming the new face of global market regulation, policing attempts to undermine markets through corrupt payments. Anti-bribery law complements international trade agreements—which traditionally have targeted lower *official* barriers to trade—by providing a regulatory structure to address *illicit* barriers to trade. While the rate of new trade law developments appears to be slowing, innovations in anti-bribery law are still accelerating as a few critical states adopt and strengthen their national laws to fight international corruption.

This Article argues that the link between international trade law and anti-bribery law extends to the evolution of the enforcement of the legal regimes as well. In both areas, the United States has historically been the first mover in enforcement, leveraging its market size to demand that other states follow treaty rules. This enforcement push inevitably results in some opposition from foreign partners, who resist the U.S.'s influence on foreign commercial interests. This opposition then results in a compromise

1 STANFORD LAW SCHOOL: FOREIGN CORRUPT PRACTICES CLEARINGHOUSE, fcpa.stanford.edu (last visited June 1, 2016).

2 By some metrics, four of the top ten all-time largest FCPA sanctions occurred in 2016. See Richard L. Cassin, *Reconsidered: Odebrecht and Braskem Are on our FCPA Top Ten List*, FCPA BLOG (Dec. 29, 2016), <http://www.fcpa.blog.com/blog/2016/12/29/reconsidered-odebrecht-and-braskem-are-on-our-fcpa-top-ten-1.html>.

3 Press Release, U.S. Dep't of Just., Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of \$1.6 Billion, (Dec. 15, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>.

agreement where the parties agree to greater enforcement globally in exchange for a lessening of U.S. unilateral enforcement.

This dynamic, which has already resulted in the establishment of the World Trade Organization's (WTO) lauded dispute settlement system, is beginning to unfold in the anti-bribery context as well. Some anticorruption advocates, particularly Judge Mark Wolf, have made highly publicized calls for the creation of an International Anticorruption Court.⁴ In contrast to these commentators, this Article does not expect an international court for anti-bribery law to emerge. A centralized international anticorruption court would be legally fraught and completely politically infeasible and, thus, quite unlikely to be successful. Instead, this Article argues that a less formal agreement between OECD members to increase enforcement of anti-corruption laws in return for more U.S. deference in resolving domestic cases may be on the horizon.

This Article proceeds in three parts: first, it introduces the relationship between international trade law and anti-bribery law as dual instruments to regulate global markets. This section also discusses how the American push for greater enforcement in international trade law led to the creation of the WTO's dispute settlement system, which raised global enforcement in trade but required the U.S. to agree to a multilateral dispute settlement system.

Second, the Article discusses the OECD's Anti-Bribery Convention, the U.S.'s use of its broad extraterritorial jurisdiction to enforce foreign anti-bribery law through the FCPA, and the relative dearth of enforcement by most, but not all, OECD countries (as documented by the OECD itself). The Article argues that the U.S. is currently taking as dominant a role in global anticorruption enforcement as it did in international trade. This practice is leading to some push back from other OECD members, who worry about bias against their "home" country companies.

Third, the Article explores different ways that the tensions between U.S. prosecutors and foreign enforcement agencies may be resolved. Although some commentators have argued in favor of a highly formal court, the Article maintains that this is infeasible and possibly counterproductive. Instead, we contend that, as other states adopt more robust foreign anti-corruption laws, American authorities will embrace a principle of complementarity, which offers greater deference to its domestic resolution

⁴ See Robert Rotberg, *It's time for Canada to back an International Anti-Corruption Court*, GLOBE & MAIL: OPINION (April 25, 2016), <https://www.theglobeandmail.com/opinion/why-canada-should-back-an-international-anti-corruption-court/article29725219/>; See also Mark L. Wolf, *The Case for an International Anti-Corruption Court*, BROOKINGS (July 23, 2014), <https://www.brookings.edu/research/the-case-for-an-international-anti-corruption-court/>; Mark L. Wolf, *We need an international court to stamp out corruption*, WASH. POST: OPINIONS (July 22, 2014), https://www.washingtonpost.com/opinions/mark-l-wolf-we-need-an-international-court-to-stamp-out-corruption/2014/07/22/a15ecc38-10ff-11e4-9285-4243a40ddc97_story.html?utm_term=.7576fae70adb.

of corruption cases in return for more robust domestic enforcement measures. Thus, we expect that there will likely be a less formal institutional resolution than in international trade law, but one that gives prosecutors greater flexibility to respond to overseas developments. While there may be a lesser role for American prosecutors in anti-bribery cases against foreign corporations, we do not anticipate more lax enforcement. Indeed, a coordinated multilateral system of more robust national enforcement will lead to greater global enforcement of anti-corruption law as the jurisdictional net expands and cross-national enforcement resources increase. This Article concludes that the most productive way forward (and what we already see a nascent movement towards) is a decentralized and coordinated regime, not a centralized court.

II. GOVERNING GLOBAL MARKETS: INTERNATIONAL TRADE LAW AND ANTI-BRIBERY LAW

International trade law and anti-bribery law together form the core legal principles regulating international commercial transactions.⁵ This section first discusses how these two legal regimes complement each other to regulate global markets. The section then discusses how the international trade regime developed its well-known multilateral enforcement system—the WTO’s dispute settlement system—as a response to an American drive to increase enforcement unilaterally. This section sets the stage for discussing the enforcement in anti-bribery law in the third and fourth sections.

A. *Dual Market Principles*

International trade law, revolving primarily around the WTO but increasingly around regional arrangements, lowers the formal barriers to trade. This body of law generally targets *official government policies* such as tariff levels, regulatory systems, and intellectual property law.⁶ The goal is to increase the flow of goods and services across borders while maintaining each state’s ability to choose its optimal regulatory policy.⁷ While critics of

⁵ See, e.g., Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 247 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013) (discussing how international trade law and international investment law work towards the same goals of non-discriminatory market treatment as anti-corruption law). This Article does not discuss international investment law, as investment does not necessarily involve trade in goods or services.

⁶ For an excellent overview of major elements of international trade law, see MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 25–50 (2d ed. 1999).

⁷ See DANIEL W. DREZNER, *U.S. TRADE STRATEGY: FREE VERSUS FAIR* 57–66 (2006) (discussing the relationship between WTO rules and domestic regulatory choices).

trade agreements from the left and the right debate how well the WTO and other trading blocs achieve this balance, there is little doubt that the trade agreements have structured international trading relationships and increased international commerce.⁸

Foreign anti-bribery law maintains the integrity of markets by criminalizing transactions that seek to gain an improper business advantage by making private payments to government officials. Almost every state has its own domestic law prohibiting corruption, but in many states these laws are rarely enforced. In 1997, members of the OECD committed to prosecuting private actors' offers of illicit payments in their business dealings at home *and abroad*.⁹ This explicitly extraterritorial enforcement of anti-bribery laws in a private actor's foreign business transaction can compensate for the "host" states' (the foreign state where the business transaction occurs) weak enforcement of their own anti-bribery rules.¹⁰ As such, foreign anti-bribery laws can provide for a more global and consistent enforcement system of anti-corruption laws.

Professor Susan Rose-Ackerman highlights that one of the goals of anti-corruption law is global market efficiency.¹¹ Corruption distorts markets in several ways.¹² First, the market for major government projects does not function efficiently when government officials make procurement decisions on the basis of bribes. In such "grand corruption" cases, government leaders often receive hundreds of thousands or millions of dollars in bribes in exchange for selecting a specific bid.¹³ These illicit transactions are harmful in (at least) three ways: (1) the transactions act as a tax on the state's population because the cost of the bribe is incorporated into the final price of the project so that the state's taxpayers end up footing the bill for the bribery, (2) government officials may have decided to undertake the project as a means to receive bribes, rather than because the project is in the best interests of the state,¹⁴ thus crowding out more socially and economically

8 See Judith L. Goldstein, Douglas Rivers, & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 37 (2007).

9 See discussion *infra* Section II.A.

10 These rules exempt activity consistent with the host jurisdiction's written law. As a result, host nations are free to devise their own anti-corruption rules and are not bound to foreign conceptions of corruption. See *id.*

11 Susan Rose-Ackerman, *Introduction: The Role of International Actors in Fighting Corruption*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 3, 8–9 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013).

12 For a broader discussion of all of the ways that anti-corruption law can influence markets, see Phillip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 NYU J INT'L L. & POL. 711 (1995).

13 See Susan Rose-Ackerman, "Grand" Corruption and the Ethics of Global Business, 26 J. BANK. & FIN. 1889 (2002).

14 ANDREI SHLEIFER & ROBERT W. VISHNY, THE GRABBING HAND, GOVERNMENT PATHOLOGIES AND THEIR CURES (1998).

beneficial projects, and (3) the work done on “corrupt” projects is often shoddily done because the contractors know that they are only accountable to the political leaders they have paid off.¹⁵ These economic costs do not include the social costs of corruption to democratic values or government legitimacy.

Corruption can also distort markets by giving corrupt actors an improper advantage in private markets. If a business can bribe government officials to waive regulatory rules (such as making sure buildings are earthquake-resistant)¹⁶ or to avoid taxes, then it may also be able to sell goods to consumers at a lower price than law-abiding businesses. For instance, in *U.S. v. Kay*, the Department of Justice alleged that American Rice Inc. (ARI) bribed Haitian customs officials to under-report ARI’s levels of imports, which reduced the import tax that ARI owed to the Haitian government.¹⁷ ARI could then turn this lower tax burden into a business advantage relative to other private firms by undercutting prices (in addition to depriving the Haitian government of needed tax revenue).¹⁸

Together, international trade law and international anti-bribery law target official and unofficial barriers to international commerce.¹⁹ The WTO Agreements (and regional arrangements) reduce tariff levels and limit discriminatory regulations that target imports. These rules address overt government policies and commit states to opening their markets to some degree. In contrast, international anti-bribery law focuses on illicit government action. It prohibits attempts to avoid competition (or gain an improper advantage) by offering corrupt payments to government officials. In combination, these two legal regimes address both overt and covert government actions.

Both of these regimes require government resources to enforce their principles, yet the regimes have chosen very different methods of enforcement. While both are based on international agreements, the trade regime has generally chosen to opt for state-to-state enforcement of the rules, whereas the anti-bribery regime is based on national enforcement of domestic law. The next sub-section discusses the development of the international trade regime’s dispute settlement system. Part Three turns to the anti-bribery regime’s enforcement system.

15 See Rose-Ackerman, *supra* note 11, at 8–9.

16 See, e.g., *Sichuan earthquake killed more than 5,000 pupils, says China*, THE GUARDIAN: WORLD (May 7, 2009), <https://www.theguardian.com/world/2009/may/07/china-quake-pupils-death-toll> (discussing allegation that corruption allowed below grade construction of buildings, which then collapsed during an earthquake).

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

18 *Id.*

19 See Pauwelyn, *supra* note 5 at 247–63.

B. *The Development of Trade Law Enforcement*

The global trade system primarily revolves around GATT/WTO treaties.²⁰ This system currently includes over 160 countries, including all of the world's large economies (except for some of the oil-producing states in the Middle East).²¹ The General Agreement on Tariffs and Trade (GATT) was born as part of the post-WWII system of economic coordination and re-integration. The pre-war period had seen a dramatic rise in tariff levels and other trade barriers that sharply decreased the volume of international trade.²² Post-war efforts to revive international trade were originally focused on the creation of the International Trade Organization (ITO), an international organization that would have been the trade portion of the Bretton Woods economic institutions.²³ The ITO had fully articulated dispute resolution provisions, but the organization failed to materialize when the U.S. refused to ratify the agreement.²⁴

Instead of attempting to renegotiate the trade organization, states fell back on the barebones bargaining rules that they had used to negotiate preliminary tariff reductions.²⁵ These GATT rules²⁶ included some non-discriminatory principles but did not address dispute resolution for ex post disagreement concerning implementation.²⁷ As a result, the system developed an ad hoc procedure of resolving disputes based on consensus.²⁸ Recalcitrant defendants could effectively veto the resolution of claims by refusing to agree to the formation of dispute resolution panels or rejecting

20 Even regional agreements must comply with WTO rules on preferential trade arrangements. See Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in NEW DIMENSIONS OF REGIONAL INTEGRATION (Jaime de Melo & Arvind Panagariya, eds., 1993).

21 For a full list of WTO members, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

22 See Douglas Irwin, *The GATT in Historical Perspective*, 85 AM. ECON. REV. 323, 323–25 (1995).

23 John H. Jackson, *Fragmentation or Unification Among International Institutions: the World Trade Organization*, 31 NYU J INT'L L. & POL. 823, 826–27 (1998).

24 *Id.* The ITO failed when the Truman Administration refused to submit the treaty to the Senate for advice and consent. The administration believed that the treaty lacked political support from free-trade groups and faced significant protectionist resistance in the Senate. With the beginnings of the Cold War on the foreign policy horizon, President Truman did not want to spend the political capital necessary to secure passage of the ITO. See William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. UL REV. 335 (1993).

25 JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 35–43 (2d. ed. 1999).

26 The bargaining rules were themselves called the “GATT,” the general agreement on tariffs and trade. Given that a more formal organization for trade issues did not exist, the trade regime took on the name GATT to reflect its reliance on these framework rules. *Id.*

27 Robert E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in THE URUGUAY ROUND AND BEYOND 101, 102–03 (Jagdish Bhagwati & Mathias Hirsch eds., 1998).

28 *Id.*

the panel's reports.²⁹ Over the history of the GATT regime, from 1947 to 1995, the system evolved to include some more formal procedures, but it remained slow and subject to abuse.³⁰

While the GATT system was the only internationally endorsed mechanism for resolving trade disputes, several states grew frustrated with these legal processes and began to use their own unilateral procedures to determine whether trading partners were breaching trade rules. In particular, the U.S. adopted a domestic law (Section 301 of the 1974 Trade Act) that required national regulators to consider private claims concerning whether GATT members were breaching trade law or otherwise adopting "unfair trade" practices.³¹ If the regulator determined that the partner state was breaching trade rules, then the statute enabled the U.S. president to impose trade sanctions on the offending state unilaterally.³² Thus, the U.S. acted as a shadow trade enforcer, imposing trade sanctions on states breaching GATT agreements.³³

The U.S. practice of unilaterally determining whether a foreign state had breached trade rules and, if so, what the proper remedy to such a breach would be was controversial.³⁴ GATT members unsurprisingly disagreed about the application of trade rules and protested American determinations that they were in breach of trade agreements.³⁵ In addition, many states did not appreciate the U.S. using its greater economic power to work outside of the GATT procedures to enforce trade rules.³⁶ Finally, many states argued that the U.S.'s Section 301 system was one-sided. They argued that the U.S. also breached trade rules, but, because unilateral sanctions relied on American economic power (specifically, the threat of exclusion from the large American market), the U.S. was effectively immune from enforcement. No other state had the economic size to threaten the U.S. when it was

29 William J. Davey, THE WTO DISPUTE SETTLEMENT MECHANISM 8 (Ill. Pub. L. Res. Paper No. 03-08, 2003), available at <http://papers.ssrn.com/abstract=419943>.

30 See generally ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990) (analyzing the development of GATT legal procedure and finding that it became more formal and effective over time); see also Rachel Brewster, *Rule-Based Dispute Resolution in International Trade*, 92 VA. L. REV. 251, 253-55 (2006) (summarizing the GATT dispute resolution process).

31 See JACKSON, *supra* note 25, at 127-32. The European Community also adopted a similar rule in the 1990s. *Id.*

32 *Id.*

33 *Id.* See also TREBILCOCK & HOWSE, *supra* note 6, at 8 (discussing how the US used the 1988 "Super 301" as a means of enforcing trade rules).

34 Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (arguing that U.S. policy is overly aggressive).

35 TREBILCOCK & HOWSE, *supra* note 6, at 8-9.

36 JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 149 (1995); Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102, 108 (2011).

alleged to have breached trade rules. In the late 1980s, the pace of U.S. unilateral sanctioning increased. Congress passed amendments to Section 301 through the 1988 Trade and Competitiveness Act that further increased the conditions under which sanctions could be applied.³⁷ All of this set the stage for a change in the process of trade law enforcement in the GATT's Uruguay Round of negotiations.

During this period, the U.S. consistently argued that it wanted a more robust enforcement mechanism at the international level. The executive branch argued for a more formal rule-based process for years (and over several administrations), and Congress included demands for strong international enforcement of trade rules in statutes.³⁸ European governments and the Japanese government were less enthusiastic about adopting a more rule-oriented dispute resolution system, preferring diplomatic approaches to managing trade disagreements.³⁹ However, the increased American use of unilateral sanctioning convinced these governments that, on net, a more judicial system would be beneficial if it required the U.S. to gain multilateral approval before adopting any sanctions.⁴⁰ The subsequent WTO "court" was the compromise. Though not a formal court, the WTO adjudicates disputes between its members. The WTO panel or, if appealed, the Appellate Body, must find that a member has breached trade law before another member is permitted to impose trade sanctions.⁴¹ The level of sanctions is also subject to WTO arbitration.⁴²

In effect, the U.S. government was able to leverage its practice of unilaterally enforcing trade law against other states into a strong multilateral enforcement of international trade law. The quid pro quo was the U.S. agreement to be bound by the WTO dispute resolution system. The U.S. would not apply sanctions against other countries until it received approval from the WTO system. In return, other WTO member states agreed to move away from the more diplomatic consensus-approach of the GATT regime and consent to litigate all trade disputes. The result was a greater role for law in the international trade regime.⁴³

37 JACKSON, *supra* note 25, at 130–32; Judith Hippler Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1 (1988).

38 See Brewster, *supra* note 30, at 278–79.

39 See Rachel Brewster & Andrew Chilton, *Supplying Compliance: Why and When the United States Complies with WTO Rulings*, 39 YALE J. INT'L L. 201, 205–06 (2014).

40 *Id.*; see also Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 13–14 (1999) (discussing how European powers viewed the new WTO system as a means to constrain Congress).

41 Brewster, *supra* note 36, at 112–16.

42 *Id.*

43 Under this dispute resolution system, the U.S. has been both a winning and losing litigant before the WTO. When the U.S. wins as a plaintiff, the system provides the U.S. sanctions (or threat of sanctions) with greater legitimacy because the authorization for sanctions comes from a multilateral

More broadly, and relevant to anti-bribery law, the American interest in aggressive enforcement of international trade law created global tensions. In the absence of a robust international institution to enforce trade rules, the U.S. reverted to unilateral enforcement. The U.S. generally understood its actions as fair, but other governments saw bias because the U.S. was single-handedly determining whether a breach occurred and what the appropriate remedy was. As U.S. enforcement increased, other governments became more willing to accept a strong multilateral commitment to enforcement as a means of constraining American enforcement.⁴⁴ Although the context is somewhat different, and the institutional solution will almost certainly be different, we see a similar pattern of events taking place in the anti-bribery regime. It is to that area that we now turn.

III. THE STATE OF INTERNATIONAL ANTI-BRIBERY ENFORCEMENT: THE FCPA AND THE OECD TREATY

This section begins by examining the history and the current application of the U.S. Foreign Corrupt Practices Act (FCPA). The FCPA was passed in the aftermath of the Watergate scandal in the 1970s but was not seriously enforced until the late 1990s. As the second part of this section describes, the uptick in U.S. enforcement occurred as it worked with other major exporting countries to negotiate and ratify the OECD's Anti-Bribery Convention.⁴⁵ The OECD treaty obligated all member states to adopt legislation similar to the FCPA. The third part of this section discusses how, while almost all states have ratified the treaty, there remains a dearth of enforcement of these rules by some national authorities. The result is that the U.S. is the overwhelming enforcer of anti-bribery law, although Germany, the United Kingdom (U.K.) and Switzerland are also active enforcers. As Section IV of this Article discusses, this has led to some tension between the U.S. and other OECD countries, which view the U.S. as aggressive in its application of the FCPA.

A. The History of the FCPA

adjudication process. However, the U.S. has not won all of its cases as a plaintiff and has had to accept foreign government policies as legal. As a defendant, the U.S. has also faced the threat of sanctions from other states when it breached trade rules.

⁴⁴ See Brewster, *supra* note 30; See also Hudec, *supra* note 40, at 13–14 (analyzing European states willingness to engage in dispute resolution discussions as a means of constraining American economic sanctions).

⁴⁵ See Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 V. L. Rev. 1611 (2017); Rachel Brewster & Sam Buell, *The Market for Global Anticorruption Enforcement*, 80 L. & CONT. PROB. 101 (2017).

Although it is now widely perceived as economically inefficient and bad for development,⁴⁶ corruption was once perceived as helpful and efficient.⁴⁷ Samuel Huntington once asserted that “the only thing worse than a society with a rigid, over-centralized, dishonest bureaucracy is one with a rigid, over-centralized, honest bureaucracy.”⁴⁸ But that view has changed dramatically.

The World Bank’s change in position exemplifies the broader change in the view of corruption.⁴⁹ The World Bank once labeled corruption a “political” issue, that is, an issue out of its purview.⁵⁰ In doing so, it was accepting the Samuel Huntington view that bribes could be a “valuable[] way to cut through bureaucratic red tape.”⁵¹ As information on the negative effects of corruption came to light, and pressure to act against corruption increased, one of the World Bank’s regional directors left in 1993 to found Transparency International, an anti-corruption non-governmental organization (NGO).⁵² By 1996, the World Bank had revised its classification of corruption, labeling it an economic issue, and it had changed its position to a firmly anti-corruption one.⁵³

One innovation that spurred this change in views of corruption is the FCPA.⁵⁴ During the investigation that followed Watergate, the SEC discovered that many U.S. corporations had been using unreported slush funds to make “questionable or illegal foreign payments.”⁵⁵ Upon realizing that the questionable-foreign-payments problem was likely widespread, the SEC instituted a Voluntary Disclosure Program.⁵⁶ This program asked companies to investigate and disclose questionable or illegal payments they had made; in exchange, the likelihood that the SEC would bring any enforcement action against these companies would be “diminished.”⁵⁷ Companies did disclose these payments, and, as it turned out, they had made substantial questionable payments, including payments to government

46 Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. LEGAL STUD. 141, 159–160 (2002).

47 *Id.* at 158.

48 SAMUEL HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968) (quoted in Abbott & Snidal, *supra* note 46, at 158).

49 Abbott & Snidal, *supra* note 46, at 158–159.

50 *Id.* at 159.

51 *Id.* at 158.

52 *Id.* at 159.

53 *Id.*

54 See Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §78dd-1 et seq.

55 SEC, REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 3 (1976) [hereinafter SEC REPORT]; see also Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 929, 932 (2012).

56 SEC REPORT, *supra* note 55, at 6–7.

57 *Id.* at 8–13.

officials while conducting business abroad.⁵⁸ In all, over 400 corporations had “reported paying out well in excess of \$300 million. . . to foreign government officials, politicians, and political parties.”⁵⁹ For example, it was discovered that Lockheed had paid off Prime Minister Tanaka of Japan, Prince Bernhardt of the Netherlands, and Italian government officials, all to win contracts.⁶⁰ The aftermath of this revelation had negative implications for U.S. foreign policy — “[f]oreign governments friendly to the United States in Japan, Italy, and the Netherlands ha[d] come under intense pressure from their own people.”⁶¹

Congress had several reasons for deciding to enact the anti-corruption legislation that would become the FCPA. First, as illustrated by the aftermath of the Lockheed scandal, these recently uncovered corruption scandals were bad foreign policy in the Cold War era.⁶² Corruption was harming the American reputation, and, as a result, “[t]he image of American democracy abroad ha[d] been tarnished.”⁶³ Corrupt American companies served only to fulfill the Soviet Union’s and others’ negative perceptions of the American system.⁶⁴ Not every American corporation was bribing abroad, but those that were bribing abroad were giving all American corporations a bad name.⁶⁵ Second, corruption was undermining market economics, because business was not won or lost based on price and quality but on the size of the bribe.⁶⁶ Thus, corruption was undermining the “promot[ion of] democratically accountable governments . . . in developing countries.”⁶⁷ Third, Congress was convinced that foreign anti-bribery legislation would not reduce business abroad.⁶⁸ Congress was presented with evidence that non-bribing American companies were achieving success abroad.⁶⁹ Furthermore, Congress was under the impression that American corporations that lost business because they did not bribe were often losing, not to foreign corporations, but to other American corporations that did

58 *See id.* at Appendix A (listing disclosing corporations and the type and amount of payments made).

59 REP. STAGGERS, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. Doc. No. 95-640, at 4 (1977) [hereinafter HOUSE REPORT 95-640].

60 Abbott & Snidal, *supra* note 46, at S161; HOUSE REPORT 95-640, at 5.

61 COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977, S. Doc. No. 95-114, at 3 (1977) [hereinafter SENATE REPORT 95-114].

62 Koehler, *supra* note 55, at 938-43.

63 SENATE REPORT 95-114, *supra* note 61, at 3.

64 HOUSE REPORT 95-640, *supra* note 59, at 5.

65 SENATE REPORT 95-114, *supra* note 61, at 4.

66 *Id.* at 3-4.

67 SEN. PROXMIER, CORRUPT OVERSEAS PAYMENTS BY U.S. BUSINESS ENTERPRISES, S. Doc. No. 94-1031, at 4 (1976) [hereinafter SENATE REPORT 94-1031].

68 *Id.*

69 *Id.*

bribe.⁷⁰ Combined, this information led to the conclusion that the FCPA would not be damaging to U.S. business interests abroad. Finally, Congress concluded that foreign anti-bribery legislation was needed because bribery was “morally repugnant.”⁷¹

The FCPA has two main components. First, it requires companies to keep accurate books and records and to institute adequate internal controls to prevent bribery.⁷² These provisions are meant to prevent the use of slush funds and the falsification of books and records to disguise bribes.⁷³

Second, it prohibits covered actors from bribing or offering a bribe to a foreign official to “obtain or retain business,”⁷⁴ or for a “business purpose.”⁷⁵ The leading FCPA case, *United States v. Kay*,⁷⁶ interprets the business purpose test. Business purpose, or that which is meant to obtain or retain business, is interpreted broadly to include anything that “secure[s] an improper advantage.”⁷⁷ *Kay* decided to interpret the term broadly because Congress had amended the FCPA to bring it into compliance with the OECD Convention.⁷⁸ However, the statute and the treaty defined “business purpose” differently. The OECD Convention language included as a “business purpose” not only obtaining and retaining business, but also securing an improper advantage.⁷⁹ On the other hand, the FCPA, as amended, listed securing an improper advantage among the acts that constitute bribery, while “business purpose” was still described only as obtaining or retaining business.⁸⁰ *Kay* concluded that the term should not be read narrowly as prohibiting only the initial gaining of government contracts and their subsequent renewal.⁸¹ As applied in the case, the FCPA could, under certain circumstances, prohibit paying a foreign official to gain a tax advantage.⁸²

⁷⁰ *Id.*

⁷¹ SENATE REPORT 95-114, *supra* note 61 at 4.

⁷² 15 U.S.C. § 78m(b).

⁷³ U.S. DEP’T OF JUST., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 38–41 (2016) [hereinafter DOJ GUIDE].

⁷⁴ 15 USCS § 78dd-1–3.

⁷⁵ DOJ GUIDE, *supra* note 73, at 12–14.

⁷⁶ *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

⁷⁷ *Id.* at 754 (quoting the OECD Anti-Bribery Convention).

⁷⁸ *Id.* at 753–55.

⁷⁹ *Id.* at 754.

⁸⁰ *Id.* at 754.

⁸¹ *Id.* at 755–56.

⁸² *Id.* at 761.

Like “business purpose,” what constitutes a bribe is interpreted broadly. A bribe can be “anything of value,”⁸³ which can include cash payments, charitable contributions, and travel and entertainment expenses.⁸⁴

“Foreign officials” include government officers and employees, candidates for office, and officers and employees of state-owned enterprises (SOEs), if those SOEs are operating as “government instrumentalities.”⁸⁵ “Government instrumentality” is defined in another important FCPA case, *United States v. Esquenazi*.⁸⁶ *Esquenazi* defined a government instrumentality as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”⁸⁷ Whether the government controlled the entity, and whether the entity performed a function the government treated as its own could be determined by looking at several factors. Factors for assessing whether the government controls an entity include:

“the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental fisc, and . . . the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.”⁸⁸

Factors for determining whether the entity performs a function the government treats as its own include:

“whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.”⁸⁹

Actors covered by the FCPA include U.S. citizens, nationals, and residents; business entities organized under U.S. law or having their principal place of business in the United States; and issuers that list their shares on a U.S. exchange.⁹⁰ Actors not otherwise covered by the FCPA are nonetheless

83 15 U.S.C. § 78dd-1.

84 DOJ GUIDE, *supra* note 73, at 14–19.

85 *Id.* at 19–21.

86 *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).

87 *Id.* at 925.

88 *Id.*

89 *Id.* at 926.

90 15 USCS § 78dd-1–2.

subject to its prohibitions if any part of their bribing activity occurs within the United States.⁹¹

B. The OECD Anti-Bribery Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention or OECD Convention) is substantially similar to the FCPA.⁹² Indeed, the FCPA as amended in 1998 was meant to implement the OECD Convention in the United States.⁹³ The OECD Convention requires states parties to criminalize the act of bribing a “foreign public official” to “obtain or retain business” or to gain any “improper advantage in the conduct of international business.”⁹⁴ It also requires states parties to enact accounting provisions requiring the keeping of accurate books and records.⁹⁵ The OECD Convention and the FCPA target only supply-side bribery. That is, both texts criminalize the *paying* of the bribe by a multinational corporation, not the *receiving* of the bribe by a foreign government official (the demand side).⁹⁶ The OECD Convention was opened for signature in 1997, and entered into force in 1999. Forty-one states have joined the OECD Anti-Bribery Convention, including seven states that are not members of the OECD.⁹⁷

After the U.S. passed the FCPA, it became apparent that, despite previous assurances otherwise,⁹⁸ the statute was costing the U.S. business abroad.⁹⁹ Before the passage of the FCPA, foreign bribery functioned like a Prisoner’s Dilemma.¹⁰⁰ All would be better off if no one paid bribes, but the incentive was to pay the bribe anyway, lest your competitor beat you to it.¹⁰¹ By passing the FCPA, the United States had committed its multinationals to

91 15 USCS § 78dd-3.

92 Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT’L L. 84, 100 (2014).

93 SEN. HELMS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, S. Doc. No. 105-19 (1998) [hereinafter SENATE REPORT 105-19].

94 Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1(1), Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

95 OECD Convention, *supra* note 94, art. 8(1)

96 Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT’L L. 665, 681–82 (2004).

97 OECD Convention, *supra* note 94.

98 SENATE REPORT 94-1031, *supra* note 67, at 4.

99 William J. Clinton, Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, Weekly Compilation of Presidential Documents Volume 34, Number 46 (1998).

100 Tarullo, *supra* note 96, at 669–71.

101 *Id.*

not bribing.¹⁰² This arguably provided other states with a competitive advantage and made other states averse to passing their own anti-bribery legislation.¹⁰³ Accordingly, the United States pushed for a treaty to “level the playing field.”¹⁰⁴ The OECD membership was understandably reluctant to form a treaty.

In addition to economic incentives not to enter into an anti-bribery treaty, there was a perception among European governments that the FCPA was “moralistic legislation that was naïve regarding how business operated in developing countries.”¹⁰⁵ Similarly, many of these governments thought that prohibiting foreign bribery would be an imperialistic interference with the way business was conducted in developing countries.¹⁰⁶

After several years of minimal progress at the OECD, three main factors turned previous reluctance into willingness to agree to a treaty, and the OECD Anti-Bribery Convention was formed. First, several European countries had their own corruption scandals that turned public opinion against foreign bribery.¹⁰⁷ Second, the U.S. made anti-corruption a much higher priority and implied that it might sanction countries that were permissive on foreign corruption.¹⁰⁸ Third, developing countries began prioritizing the issue of anti-corruption and suggested that “governments of developed countries had, by failing to act against foreign bribery by their own multinationals, become complicit in that bribery.”¹⁰⁹ Together, these factors motivated the OECD to adopt an anti-bribery treaty.

C. OECD Convention Enforcement

1. Under-Enforcement of the OECD Anti-Bribery Convention

The Prisoner’s Dilemma problem did not end when the OECD Convention entered into force; it simply shifted to the enforcement phase.¹¹⁰ Putting the requisite legislation on the books while not enforcing that legislation might be a strategic policy choice.¹¹¹ Indeed, several countries might have viewed the OECD Convention as a way to nominally go along with the anti-corruption regime while in practice continuing to allow their

102 *Id.* at 671–73.

103 *Id.* at 674.

104 SEN. D’AMATO, INTERNATIONAL ANTI-BRIBERY ACT OF 1998, S. Doc. No. 105-277, at 2 (1998).

105 Brewster, *supra* note 92, at 99.

106 Tarullo, *supra* note 96, at 674.

107 Abbott & Snidal, *supra* note 46, at 159, 164; Tarullo, *supra* note 96, at 678–79.

108 Tarullo, *supra* note 96, at 677–78.

109 *Id.* at 679.

110 Brewster, *supra* note 92, at 100–01.

111 *Id.* at 101.

multinationals to use bribery to win business abroad.¹¹² Regardless of whether this was the intent of some of the states when they agreed to the OECD Convention, under-enforcement has become the state of affairs.

Although states have successfully implemented more or less the correct legislation as required by the treaty,¹¹³ most states have not taken the next step of meaningfully enforcing that legislation. The OECD Convention requires legislation but does not explicitly require enforcement.¹¹⁴ Nor does it indicate what level of enforcement is appropriate.¹¹⁵ This creates the possibility that a country could nominally comply with all treaty requirements—implementing the correct legislation criminalizing foreign bribery and requiring accurate books and records to be kept—while actually continuing the practice of allowing bribery just as before.

Since the OECD Convention entered into force in 1999, almost half of the states have never prosecuted a foreign bribery case.¹¹⁶ Table One groups OECD Convention signatories by the number of enforcement actions each state has prosecuted. Transparency International (TI) also categorizes states parties to the OECD Convention as active enforcers, moderate enforcers, limited enforcers, or little-to-no enforcers.¹¹⁷ According to TI's most recent report on the state of the OECD Convention's enforcement, only four states qualify as active enforcers: the U.S., Germany, the U.K., and Switzerland.¹¹⁸ These active enforcers account for 22.8% of world exports. Meanwhile, almost half of the states—twenty states total—have little to no enforcement.¹¹⁹ These no-enforcement countries account for 20.5% of world exports.¹²⁰ In the middle, six countries with 8.9% of world exports qualified as moderate enforcers, and nine countries with 12.6% of world exports qualified as limited enforcers.¹²¹ By logical extension, countries that do not belong to the OECD Convention, and which therefore have zero obligations to enforce it, account for 35.2% of world exports.¹²²

112 Tarullo, *supra* note 96, at 680.

113 OECD, MINISTERIAL DECLARATION: THE OECD ANTI-BRIBERY CONVENTION AND ITS ROLE IN THE GLOBAL FIGHT AGAINST CORRUPTION: TOWARDS A NEW ERA OF ENFORCEMENT 2 (2016), <https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Ministerial-Declaration-2016.pdf>.

114 Brewster, *supra* note 92, at 100.

115 *Id.*

116 TRANSPARENCY INTERNATIONAL (TI), EXPORTING CORRUPTION, PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY (2015) [hereinafter EXPORTING CORRUPTION].

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

*Table One: Number of Successful Prosecutions (1999—2014)*¹²³

Number of Actions	OECD Anti-Bribery Convention Signatories (includes countries that are not in the OECD but have joined the treaty)
Zero	Argentina, Australia, Austria, Brazil, Chile, Colombia, Czech Republic, Denmark, Estonia, Finland, Greece, Iceland, Ireland, Israel, Latvia, Mexico, New Zealand, Portugal, Russia, Slovak Republic, Slovenia, South Africa, Spain, Turkey
1-9	Belgium, Bulgaria, Canada, France, Japan, Luxembourg, Netherlands, Norway, Poland, Sweden, Switzerland
10-49	Hungary, Italy, Korea, United Kingdom
50 or More	United States, Germany

The OECD enforces Convention obligations through peer-review reports. These reports include detailed information in targeted “phases” laying out a country’s compliance with the various treaty requirements.¹²⁴ Among these reports are “Phase 3 Reports,” which report on the state’s enforcement of the OECD Convention.¹²⁵ Thus, despite ambiguous enforcement requirements in the treaty itself, the OECD expects countries not only to put anti-bribery laws on the books but also to enforce those laws.

The reports highlight political barriers to enforcement.¹²⁶ For instance, the Phase 3 Report for Greece highlighted the lack of priority government officials gave to investigating and prosecuting foreign bribery.¹²⁷ The lack of priority (including low levels of financial resources in this area) resulted in minimal efforts to seek out or report allegations of bribery. Similarly, the OECD Working Group that conducted Belgium’s Phase 3 evaluation noted that Belgium’s enforcement of its anti-bribery laws suffers from a “flagrant

¹²³ “Successful prosecutions” means prosecutions resulting in sanctions. *See* OECD Anti-Bribery Working Group Data, available at <http://www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2014.pdf>.

¹²⁴ COUNTRY MONITORING OF THE OECD ANTI-BRIBERY CONVENTION, OECD, <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheocdanti-briberyconvention.htm>.

¹²⁵ *Id.*

¹²⁶ *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN HUNGARY 22 (2012), <http://www.oecd.org/daf/anti-bribery/Hungaryphase3reportEN.pdf> [hereinafter HUNGARY PHASE 3].

¹²⁷ *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GREECE 53 (2012), <http://www.oecd.org/daf/anti-bribery/Greecephase3reportEN.pdf>.

lack of resources.”¹²⁸ Denmark’s Phase 3 Report raised concerns that Denmark was closing cases without thoroughly investigating them.¹²⁹ Furthermore, the Working Group conducting Hungary’s Phase 3 evaluation concluded that Hungary needed to become more proactive in its information-gathering efforts.¹³⁰

Another significant barrier to enforcement was improper political influence of police, prosecutors, and judges, or improper consideration by police, prosecutors, and judges of the “national economic interest.”¹³¹ Consideration of the “national economic interest” is expressly prohibited by the OECD Convention.¹³² These political and economic pressures seemed to come in two varieties. First, judges and prosecutors were not independent and were subject to political control.¹³³ An example of this is the Czech Republic, where the prosecutor’s office is subject to political oversight.¹³⁴ Second, authorities weighed economic and political factors in deciding how to proceed with foreign bribery cases.¹³⁵ For example, South Africa used to require prosecutors to consider economic impact, though its laws have since been amended.¹³⁶ But weighing the national economic interest is not always so obvious. Because consideration of the national economic interest is expressly prohibited, and because consideration of such factors can be difficult to detect when prosecutors have discretion, the weighing of these factors can sometimes be subtle. Sweden’s Phase 3 Report, for instance, discussed the implications of a consideration of Swedish prosecutors—whether prosecution was in the “public interest, which had not been explicitly stated not to include the national economic interest.”¹³⁷

But those are merely some of the many reasons why anti-bribery laws are under-enforced. New Zealand believes that its multinational

128 OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BELGIUM 32. (2013), <http://www.oecd.org/daf/anti-bribery/BelgiumPhase3ReportEN.pdf>.

129 OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN DENMARK 27–28 (2013), <https://www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf>.

130 HUNGARY PHASE 3, *supra* note 126, at 22.

131 OECD Convention art. 5 (prohibiting the consideration of the “national economic interest” in investigating and prosecuting foreign bribery cases).

132 *Id.*

133 *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE CZECH REPUBLIC 30 (2013), <http://www.oecd.org/daf/anti-bribery/CzechRepublicphase3reportEN.pdf>.

134 *Id.*

135 *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SWEDEN 29 (2012), <http://www.oecd.org/daf/anti-bribery/Swedenphase3reportEN.pdf> [hereinafter SWEDEN PHASE 3]; OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SOUTH AFRICA 34–35 (2014), <http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf> [hereinafter SOUTH AFRICA PHASE 3].

136 SOUTH AFRICA PHASE 3, *supra* note 135, at 34–35.

137 SWEDEN PHASE 3, *supra* note 135, at 29.

corporations simply do not commit bribery abroad.¹³⁸ Argentina, among other countries, does not have laws in place to adequately protect whistleblowers.¹³⁹ Several states have insufficient penalties for the offense of foreign bribery. For example, Argentina's foreign anti-bribery legislation does not provide for corporate liability,¹⁴⁰ and the maximum fine for an individual who bribes abroad is a mere \$10,000.¹⁴¹ Some states, like Italy, have unique defenses to the offense of foreign bribery. In Italy, there is a defense called "concussione."¹⁴² If a public official abuses power to induce a bribe, then the official is guilty of concussione, and the briber is considered the victim.¹⁴³ Portugal, like some other states, does not make effective use of mutual legal assistance, often not seeking it, even when it would be appropriate to do so.¹⁴⁴ States like Bulgaria might not have sufficient capacity to enforce foreign bribery and related offenses; Bulgaria's Phase 3 Report raised concerns that it lacks the capacity to conduct complex financial investigations.¹⁴⁵ Other states, like Mexico, do not have sufficient legislation for related offenses, such as money laundering; Mexico's anti-money laundering laws do not address money laundering specific to foreign bribery.¹⁴⁶ In short, states under-enforce anti-bribery laws in a variety of ways and for a variety of reasons.

2. *Enforcement of the OECD Convention by Active Enforcers*

The U.S. is currently an active enforcer of the OECD Convention, but it was not always an active enforcer of its anti-bribery laws. Although the FCPA had been on the books since 1977, it was not seriously enforced until

138 OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN NEW ZEALAND 8 (2013), <http://www.oecd.org/daf/anti-bribery/NewZealandPhase3ReportEN.pdf>.

139 *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ARGENTINA 60 (2014), <http://www.oecd.org/daf/anti-bribery/Argentina-Phase-3-Report-ENG.pdf>.

140 *Id.* at 17–19.

141 *Id.* at 19.

142 *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ITALY 11–13 (2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Italyphase3reportEN.pdf>.

143 *Id.*

144 *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN PORTUGAL 24–25 (2013), <http://www.oecd.org/daf/anti-bribery/Portugalphase3reportEN.pdf>.

145 *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BULGARIA 23 (2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Bulgariaphase3reportEN.pdf>.

146 *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN MEXICO 23–24 (2011), <http://www.oecd.org/daf/anti-bribery/Mexicophase3reportEN.pdf>.

1998, around the same time the OECD Convention entered into force.¹⁴⁷ Currently, the U.S. actively enforces anti-bribery laws primarily against its own multinationals.¹⁴⁸ To enforce anti-bribery laws against other countries' multinationals, it also uses a "very broad jurisdiction approach" that was facilitated by the implementation of the OECD Convention.¹⁴⁹

The OECD Convention has allowed the United States to expand its jurisdiction over a wide range of actors. In ratifying the treaty, Congress amended the FCPA to apply to any person or entity that engages in bribery (or engages in some action that is part of scheme to bribe) within U.S. territory.¹⁵⁰ It also amended the FCPA to apply to U.S. nationals conducting business abroad, irrespective of whether the business has a territorial link to the U.S.¹⁵¹

Current U.S. practice is to resolve most FCPA cases not by going to trial but by using various types of settlement agreements. "The DOJ resolves most FCPA matters through plea agreements . . . , deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs)."¹⁵² Plea agreements are used primarily with individual, not corporate, defendants.¹⁵³ They require the defendant to admit to particular facts and plead guilty to the offense, and they recommend a sentence or a fine that was agreed upon by the DOJ and the defendant.¹⁵⁴ DPAs and NPAs are often used for corporate defendants. They require the defendant company to pay a fine and to "enter into certain compliance and remediation commitments."¹⁵⁵ If the company has fulfilled its commitments, the DOJ will drop the charges (or, in the case of NPAs, the DOJ will never formally file charges).¹⁵⁶

As an example of the frequent use of these agreements, in 2015, both corporate defendants charged that year had their FCPA cases resolved by a DPA or an NPA.¹⁵⁷ Seven of the twelve individuals against whom the DOJ

147 Brewster, *supra* note 92, at 98.

148 *Id.* at 107.

149 *Id.*

150 SENATE REPORT 105-19, *supra* note 93.

151 *Id.*

152 OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 32 (2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf>.

153 DOJ GUIDE, *supra* note 73, at 74.

154 *Id.* at 74.

155 *Id.* at 74.

156 *Id.* at 74-75.

157 See U.S. DEP'T OF JUST., FOREIGN CORRUPT PRACTICES ACT: RELATED ENFORCEMENT ACTIONS: 2015, <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2015> (providing the corporate defendants—Louis Berger International Inc. and IAP Worldwide Services, Inc.).

brought charges had their cases resolved with a plea agreement.¹⁵⁸ The remaining five individuals also seemingly entered into plea agreements, but as of the date of writing have yet to be sentenced.¹⁵⁹

Another important aspect of present-day FCPA practice is self-reporting. The DOJ and the SEC have incentivized self-reporting FCPA violations; they “place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.”¹⁶⁰ From the defendant’s perspective, self-reporting can be an excellent option because companies that report may reduce their fines,¹⁶¹ and may increase the likelihood that the DOJ offers an NPA instead of a DPA.¹⁶² Companies seem to be responding to these incentives. For instance, from 2011 to 2016, the majority of companies against which the DOJ brought an FCPA case had voluntarily reported FCPA violations.¹⁶³ In fact, ten of the thirteen companies whose cases were resolved with NPAs had self-reported their violations.¹⁶⁴

The U.S. is not the only active enforcer, although it remains the most vigilant. Germany, like the U.K. and Switzerland, is an active enforcer of the OECD Convention. In contrast to many states that do not enforce the OECD Convention actively, Germany has undertaken efforts to raise awareness of the crime of foreign bribery.¹⁶⁵ In addition, Germany provides sufficient resources for the investigation and prosecution of such crimes,¹⁶⁶ and has specialized police and prosecutors’ offices for economic crimes.¹⁶⁷ Perhaps most significantly, Germany has demonstrated excellent

¹⁵⁸ See *id.* (listing the individual defendants as Harder, Rubizhevsky, Rama, Condrey, Hirsch, McClung, and Mikerin).

¹⁵⁹ See *id.* (listing the individual defendants as Castillo, Barillas, Munoz, Bastidas, and Fernandez). For an indication that Fernandez has entered into a plea agreement, see Press Release, U.S. Dep’t of Just., Businessman Pleads Guilty to Foreign Bribery and Tax Charges in Connection with Venezuela Bribery Scheme (June 16, 2016), <https://www.justice.gov/opa/pr/businessman-pleads-guilty-foreign-bribery-and-tax-charges-connection-venezuela-bribery-scheme>. For an indication that Castillo, Barillas, Munoz, and Bastidas have entered into plea agreements, see Press Release, U.S. Dep’t of Just., Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme (March 23, 2016), <https://www.justice.gov/opa/pr/miami-businessman-pleads-guilty-foreign-bribery-and-fraud-charges-connection-venezuela>.

¹⁶⁰ DOJ GUIDE, *supra* note 73, at 54.

¹⁶¹ *Id.* at 54.

¹⁶² See *id.* at 78 (offering some examples of considerations that went into decisions to decline to prosecute FCPA violations).

¹⁶³ See *id.*

¹⁶⁴ For FCPA cases and relevant information, see U.S. DEP’T OF JUST., FOREIGN CORRUPT PRACTICES ACT: RELATED ENFORCEMENT ACTIONS, <https://www.justice.gov/criminal-fraud/related-enforcement-actions> (last visited Aug. 5, 2016).

¹⁶⁵ OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY 62 (2011), <http://www.oecd.org/daf/anti-bribery/germany-oecdanti-briberyconvention.htm> [hereinafter GERMANY PHASE 3].

¹⁶⁶ *Id.* at 41.

¹⁶⁷ *Id.* at 40–41.

coordination with other countries in investigating and prosecuting foreign bribery, as demonstrated by the Siemens case.¹⁶⁸ Correspondingly, Germany has been, on the whole, “efficien[t] and flexib[le]” in managing requests for mutual legal assistance (MLA), as required by the OECD Convention.¹⁶⁹

In the 2008 Siemens case, Germany and the United States coordinated their OECD Convention enforcement efforts to prosecute Siemens AG and three of its subsidiaries.¹⁷⁰ Siemens and its subsidiaries had engaged in corruption that amounted to over “\$1.4 billion in bribes [being paid] to government officials in Asia, Africa, Europe, the Middle East and the Americas.”¹⁷¹ These bribes were not random, unplanned payments. Rather, they were systemic: “bribery was nothing less than standard operating procedure for Siemens.”¹⁷² The bribery at issue dated back to the 1990s and included payments and kickbacks to win government contracts for a variety of projects: “a national identity card project in Argentina [(\$31 million)], mass transit work in Venezuela [(\$19 million)], a nationwide cellphone network in Bangladesh [(\$5 million)] and a United Nations oil-for-food program in Iraq under Saddam Hussein [(\$1.7 million)].”¹⁷³ The Munich Public Prosecutor’s Office initiated the bribery investigation into Siemens when it searched Siemens’ offices and the homes of certain Siemens executives.¹⁷⁴ Siemens then began its own very thorough internal investigation and gave the DOJ the results.¹⁷⁵ Germany and the U.S. coordinated their efforts to prosecute Siemens to such an extent that that they announced their respective sentencing of Siemens on the same day.¹⁷⁶

Switzerland, another active enforcer of the OECD Anti-Bribery Convention, has made exemplary use of confiscation.¹⁷⁷ It has engaged in awareness-raising efforts, particularly for companies that might be in

¹⁶⁸ *Id.* at 48.

¹⁶⁹ *Id.* at 61.

¹⁷⁰ Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT’L. L. 1, 26–27 (2012); Press Release, U.S. Dep’t of Just., 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), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>.

¹⁷¹ DOJ Press Release, *supra* note 170 (quoting Linda Chatman Thomsen, Director of the SEC’s Division of Enforcement).

¹⁷² *Id.* (quoting Acting Assistant Attorney General Matthew Friedrich).

¹⁷³ Eric Lichtblau & Carter Dougherty, *Siemens to Pay \$1.34 Billion in Fines*, N.Y. TIMES, Dec. 15, 2008, http://www.nytimes.com/2008/12/16/business/worldbusiness/16siemens.html?_r=0; DOJ Press Release, *supra* note 170.

¹⁷⁴ DOJ Press Release, *supra* note 170.

¹⁷⁵ *Id.*

¹⁷⁶ GERMANY PHASE 3, *supra* note 165, at 48.

¹⁷⁷ OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SWITZERLAND 22 (2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Switzerlandphase3reportEN.pdf> [hereinafter SWITZERLAND PHASE 3].

positions that put them at risk of violating anti-bribery laws.¹⁷⁸ Additionally, Switzerland has established a specialized section of its Office of the Attorney-General for economic crime and foreign bribery.¹⁷⁹ Like other active enforcers, Switzerland has cooperated with other states in investigating and prosecuting foreign bribery. Switzerland has responded in the affirmative to the majority of the MLA requests it has received.¹⁸⁰ It has provided investigative assistance on the basis of these MLA requests, and it has coordinated with the other states involved in an investigation and prosecution to determine the most effective way to proceed against a violator and how best to avoid double jeopardy, or *ne bis in idem*, when determining the final outcome of the case.¹⁸¹ For example, Switzerland assisted France in its investigation of Alstom,¹⁸² shared information related to the Alstom investigation with British authorities,¹⁸³ and assisted the United States in its investigation of Alstom that resulted in Alstom paying \$772 million in criminal fines for its FCPA violations.¹⁸⁴

The U.K. overhauled its anti-bribery laws in 2010 when it passed the Bribery Act,¹⁸⁵ and later became an active enforcer of the OECD Anti-Bribery Convention in 2014.¹⁸⁶ The new legislation and the newfound enthusiasm for enforcement likely stem from embarrassment over a case against BAE Systems.¹⁸⁷ In the 1990s, BAE paid hundreds of millions of pounds in bribes to Saudi officials to secure an arms deal.¹⁸⁸ Although the Serious Fraud Office (SFO) investigated, then-Prime Minister Tony Blair stopped the prosecution from going forward, citing national security

178 OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SWITZERLAND: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 19 (2014), <http://www.oecd.org/daf/anti-bribery/SwitzerlandP3WrittenFollowUpReportEN.pdf>.

179 SWITZERLAND PHASE 3, *supra* note 177, at 25.

180 *Id.* at 34–35.

181 *Id.*

182 *Id.*

183 *Id.* at 35.

184 Press Release, U.S. Dep't of Just., Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), <https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>.

185 OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM 9 (2012), <https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf> [hereinafter UNITED KINGDOM PHASE 3].

186 Press Release, TI UK, Welcome Surge in UK Anti-Bribery Activity Must Be Sustained (July 28, 2014), <http://www.transparency.org.uk/press-releases/welcome-surge-in-uk-anti-bribery-activity-must-be-sustained/>.

187 Spahn, *supra* note 170, at 22.

188 Richard Norton-Taylor & David Pallister, *Millions in Secret Commissions Paid Out for Saudi Arms Deal*, THE GUARDIAN (June 23, 1997), <https://www.theguardian.com/world/1997/jun/23/bae>.

concerns that MI5 and MI6 did not back up.¹⁸⁹ In one of its reports, the OECD publicly criticized the U.K. for its failure to prosecute¹⁹⁰ and has even recommended that it reopen the case.¹⁹¹ Ultimately, the U.S. pursued an FCPA case against BAE that resulted in the company's paying \$400 million in criminal fines.¹⁹² The U.K.'s SFO assisted the DOJ in this investigation.¹⁹³ By the time of the U.K.'s 2012 Phase 3 Report, it had made "significant efforts to raise awareness of the Bribery Act and the foreign bribery offen[s]e in both the public and private sectors."¹⁹⁴ The report also praised the country for a substantial increase in enforcement, compared to previous years.¹⁹⁵

IV. RESOLVING TENSION: THE TRAJECTORY OF NATIONAL ANTI-BRIBERY LAW ENFORCEMENT

This section analyzes the possible future of cooperation in international anti-bribery law enforcement. As Section III discussed, the U.S. remains at the vanguard of foreign anti-corruption prosecutions, but it is not alone—several other states are also increasing enforcement of their own laws. Nonetheless, most OECD member countries remain slow to bring prosecutions for foreign bribery. As discussed above, the OECD treaty has been a particularly effective mechanism for enforcing anti-bribery law not because most OECD states are robust enforcers,¹⁹⁶ but because it has permitted a few motivated states, most notably the U.S., to be robust enforcers.¹⁹⁷

As this section discusses, the U.S. enforcement of anti-bribery rules has created some tensions abroad but may create the conditions necessary for more explicit cooperation and additional multilateral enforcement. Much like the international trade experience, the tensions created by unilateral enforcement can establish a basis for a new institution to resolve enforcement conflicts. The first section discusses the pattern of American prosecutions and the high fines imposed on foreign firms. The second

189 Spahn, *supra* note 170, at 22; David Leigh & Rob Evans, *Blair Forced Goldsmith to Drop BAE Charges*, THE GUARDIAN (Jan. 31, 2007), <https://www.theguardian.com/world/2007/feb/01/bae.saudi-arabia>.

190 Spahn, *supra* note 170, at 23.

191 UNITED KINGDOM PHASE 3, *supra* note 185, at 39–40.

192 Press Release, U.S. Dep't of Just., BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>.

193 *Id.*

194 UNITED KINGDOM PHASE 3, *supra* note 185, at 53.

195 *Id.* at 6.

196 Brewster, *supra* note 45.

197 *Id.*

section discusses the possible resolutions of this tension through greater national enforcement regimes.

A. American Enforcement and Foreign Companies

The willingness of the U.S. to prosecute foreign companies can create tensions with other countries, particularly if the U.S. is perceived as possibly being less than even-handed. It is important to point out that there is no direct evidence that U.S. prosecutors are biased in their enforcement and we do not believe there is bias. Other countries may not perceive the situation similarly, however, when fines against foreign firms appear to be particularly high.

Table Two presents the top ten fines for FCPA violations. Eight of the top ten fines have been against foreign firms. In addition, an empirical study by Professors Choi and Davis found that foreign companies were more likely to be fined at a higher rate than domestic ones, although that study could not control for several relevant factors, such as the extent of executive involvement in bribery, the quality of the evidence (and thus likelihood of the outcome at trial), and the firm's benefit from corruption.¹⁹⁸ As such, this study did not claim that there was bias in the U.S.'s FCPA enforcement.

*Table Two: Top Ten FCPA Penalties (as of December 2016)*¹⁹⁹

1. Siemens (Germany): \$800 million in 2008.
2. Alstom (France): \$772 million in 2014.
3. KBR/Halliburton (U.S.): \$579 million in 2009.
4. Teva Pharmaceutical (Israel): \$519 million in 2016
5. Och-Ziff (U.S.): \$412 million in 2016
6. BAE (U.K.): \$400 million in 2010.
7. Total SA (France): \$398 million in 2013.
8. VimpelCom (Holland): \$397.6 million in 2016.
9. Alcoa (U.S.): \$384 million in 2014.
10. Snamprogetti Netherlands B.V./ENI S.p.A (Holland/Italy): \$365 million in 2010.

¹⁹⁸ Stephen Choi & Kevin Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409 (2014). The authors controlled for a number of factors but did not have data on the quality of the evidence against the firm or the level of cooperation that the firm provided to the DOJ. See also Brandon L. Garrett, "Globalized Corporate Prosecutions," 97 VA. L. REV. 1775, 1836 (2011). (also not controlling for fine relevant variables).

¹⁹⁹ See Richard L. Cassin, *Teva Ranks Fourth on our New Top Ten List*, FCPA BLOG (Dec. 27, 2016), <http://www.fcpablog.com/blog/2016/12/27/teva-ranks-fourth-on-our-new-top-ten-list.html#sthash.MINpOk6j.dpuf>.

Notwithstanding that lack of direct evidence of bias, some commentators argue that the DOJ and SEC may not be blind to nationality.²⁰⁰ The New York Times' Dealbook discussed the perception among European regulators that the U.S. was targeting foreign companies.²⁰¹ Among others, Dealbook cites a French anti-corruption official complaint that the U.S. used prosecutions to promote its own economic interests not only in anti-bribery cases but also for sanctions violations (such as the case against BNP Paribas) and money laundering.²⁰² The French official stated that the U.S. needed to be careful to ensure that its actions were not "considered to be extortion by countries."²⁰³

Such claims of targeting are rare but not unheard of, and they go in both directions. The U.S. has recently accused the European Union (E.U.) of targeting American firms for tax enforcement.²⁰⁴ Most notably, the Treasury Department has objected to the E.U. demand that Apple pay approximately \$14.5 billion in back taxes to Ireland.²⁰⁵ Treasury Secretary Jacob Lew said, "I have raised the issue that [the] pattern of action appears to be highly focused on U.S. firms. They point to some small actions against non-U.S. firms but the largest actions do appear to be aimed squarely at our tax base."²⁰⁶ When, shortly after the Apple tax case, news leaked out that the DOJ initially offered to settle mortgage-based claims against Deutsche Bank for \$14 billion, commentators questioned whether this was retaliation for the Apple judgement and the beginning of a tit-for-tat regulatory dispute between the two economies.²⁰⁷

200 See, e.g., Annalisa Leibold, *The Extraterritorial Application of the FCPA Under International Law*, 51 WILLAMETTE L. REV. 225 (2015) (arguing that the US's "targeting" of foreign firms for FCPA prosecution is a violation of international law and "has the effect of giving U.S. companies an unfair competitive edge in the global marketplace" — quote in abstract on SSRN).

201 Jesse Eisinger, *France Sees Double Standard in U.S. Prosecutions of BNP, but Justice is Weak*, N.Y. TIMES: DEAL BOOK, June 18, 2014, <https://dealbook.nytimes.com/2014/06/18/questions-of-a-double-standard-but-really-just-weak-justice/>. See also Charles F. Smith & Brittany D. Parling, "American Imperialism": A Practitioner's Experience with Extraterritorial Enforcement of the FCPA, 2012 U. CHI. LEGAL F. 237, 249–51 (discussing foreign perceptions of bias in U.S. investigations of foreign firms).

202 *Id.*

203 *Id.*

204 James Kanter & Mark Scott, *Apple Owes \$14.5 Billion in Back Taxes to Ireland, E.U. Says*, N.Y. TIMES: TECHNOLOGY, August 30 2016, <https://www.nytimes.com/2016/08/31/technology/apple-tax-eu-ireland.html> (In addition to Apple, the EU has brought tax claims against "Starbucks in the Netherlands, Amazon in Luxembourg and Anheuser-Busch InBev in Belgium. The United States Treasury, one of the most vocal critics of these moves, has said that Europe is overstepping its power, unfairly targeting American companies and hurting global efforts to curtail tax avoidance.").

205 Saleha Mohsin, *EU Apple Tax Ruling Shows US Firms Targeted, Lew Says*, BNA INT'L TRADE REP., (Aug. 31, 2016) <https://www.bloomberg.com/news/articles/2016-08-31/eu-tax-ruling-on-apple-a-sign-that-u-s-firms-targeted-lew-says>.

206 *Id.*

207 Martin Arnold, *Berlin Urges US to Treat Deutsche Fairly in Mis-selling Case*, FIN. TIMES, Sept. 26, 2016, <https://www.ft.com/content/28534ee2-7b95-11e6-ae24-f193b105145e> (noting that "there is

These claims of targeting imply bias; the idea is that regulators are not treating similarly situated firms the same because of nationality (and perceived national interest). The perception of bias can undermine states' willingness to cooperate on international economic issues, including corruption investigations and recouping back taxes.

While such tensions can undermine cooperation in the short term, they can also provide the leverage to seek a new institutional resolution of the conflict. Governments may reassess the benefits of the status quo and may be more willing to consider new policies. The U.S. government's strong unilateral enforcement of trade law lowered the benefits of the status quo for other GATT members willing to accept a centralized rule-based dispute resolution system.²⁰⁸ Similarly, strong enforcement of anti-bribery law against foreign firms may make countries reassess the benefits of weak national enforcement.²⁰⁹ Policies that were previously not politically tenable may be revived as a means to curtail foreign regulators.

B. Possible Institutional Innovations

What is the most likely resolution of this tension regarding enforcement? This Article argues that an international corruption court, as proposed by Judge Mark Wolf, is a highly unlikely outcome for practical and political reasons. Instead, we expect that OECD enforcement officials will reach an informal agreement to provide a corporation's home country greater deference in prosecuting corruption allegations if the country becomes a more active enforcer generally. This would resolve many of the concerns with possible American bias in enforcement by allowing the corporation's home government to prosecute and lead to greater overall enforcement of anti-corruption measures by increasing the resources dedicated to enforcement in multiple countries.

1. The Impractical Court

some suspicion in financial circles that Deutsche could be the victim of US revenge on Europe."); Stephen Beard, *Deutsche Bank woes highlight European bank issues*, MARKETPLACE (Sept. 30, 2016), <https://www.marketplace.org/2016/09/30/world/deutschebank-woes-highlight-european-bank-issues> (quoting a commentator stating that "\$14 Billion figure sounds suspiciously like retaliation"); Alistair Osborne, *US Plays Tit-for-Tat over Apple Tax*, TIMES (LONDON) (Sept. 17, 2016), <https://www.thetimes.co.uk/article/us-plays-tit-for-tat-over-apple-tax-0nvnwijnwh> (noting "you don't have to be a total cynic to spot a sort of proxy trade war").

²⁰⁸ See *infra* Section II.

²⁰⁹ This is true in the tax case as well. The tensions between the US and EU may speed up the creation of an international agreement to coordinate tax policy over certain multinationals, which are perceived as engaged in tax avoidance. See Mohsin, *supra* note 205, (noting that Secretary Lew hoped that Apple dispute would speed up a tax overhaul by Congress to address this issue).

In the international trade context, greater American pressure for enforcement of GATT trade rules led to the adoption of a formalized dispute resolution process in the WTO.²¹⁰ The U.S. was the major party leading this political charge, and it successfully leveraged international tensions over unilateral enforcement into a binding multilateral process.²¹¹ The WTO's Dispute Settlement Understanding is very successful, but it is important to note that it is limited in a number of ways that minimize the political reach of the process. First, only WTO members can sue one another; there is not an independent prosecutor who can bring cases and there is no private party standing.²¹² As such, states are a political gatekeeper on issues presented at the WTO. Second, only governments, not officials, can be sued.²¹³ Third, the parties are free to settle cases at any time for less than full compliance.²¹⁴ Fourth, there are no retrospective damages, so states do not face any costs for WTO-inconsistent policies that are removed post-adjudication.²¹⁵

We believe that a court in the anti-corruption area is significantly less likely to develop, because the field cannot have many of the same political limits that the WTO system includes. Unlike the WTO context, anti-corruption cases are generally cases brought by individual prosecutors against individuals or companies seeking to punish past actions. For instance, Judge Mark Wolf has put forward the most noted proposal for an international court to address corruption.²¹⁶ Wolf proposes an international court similar to the International Criminal Court (ICC): it would have an independent prosecutor's office which could bring criminal or civil charges against government leaders or private parties; all signatory states would have to agree to cooperate with the prosecutor's office; and the court could order the imprisonment of those found guilty of corruption.²¹⁷ While all of these characteristics might make the court attractive in a political vacuum, these same elements will most likely make the court untenable as a matter of international politics.²¹⁸

210 See *infra* Section II.2.

211 *Id.*

212 Brewster, *Remedy Gap*, *supra* note 36, at 112–16.

213 *Id.*

214 *Id.*

215 *Id.* As the article discusses, WTO members have the odd incentive to drag out litigation for as long as possible under this remedy rule.

216 See Mark L. Wolf, *The Case for an International Anti-Corruption Court*, BROOKINGS INSTITUTION PAPER (2014); see also Wolf, *Opinion*, *supra* note 4.

217 Wolf, *International Anti-Corruption Court*, *supra* note 216, at 10–13.

218 See Julian Ku, *Let's Be Real: An International Anti-Corruption Court Would Never Work*, OPINIO JURIS BLOG (Nov. 25, 2014), <http://opiniojuris.org/2014/11/25/lets-real-international-anti-corruption-court-never-work/>; see also Matthew Stephenson, *The Case Against the International Anti-Corruption Court*, GLOBAL ANTI-CORRUPTION BLOG (July 31, 2014),

Government leaders would be very cautious about signing up for a court that would have jurisdiction to indict them *personally* for corrupt activities.²¹⁹ Wolf responds that this could be handled by making WTO membership and future World Bank loans contingent on joining the court.²²⁰ Wolf evidently believes that only economically developing states would be reluctant to join (and thus why economic strong arming would be effective).²²¹ Even ignoring the legitimacy issues this would raise, it is far from clear that developed states could achieve or would want to achieve such an outcome.

First, there is little reason to think that G7 members of the WTO have any interest in tying anti-corruption law to international trade law.²²² The WTO agreements could include anti-bribery principles but trade negotiators have decided to isolate anti-corruption rules from general trade rules.²²³ During the 1980s, American trade negotiators made a significant push to incorporate anti-bribery rules into the multilateral trading system, but the effort failed as other states demanded that the U.S. provide market-access concessions.²²⁴ The U.S. is no more likely to provide market-access concession for anti-corruption now than it was in the 1980s.²²⁵

Furthermore, neither the U.S. nor the E.U. is in a position to simply demand that such a condition be a new requirement of WTO membership.

<https://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/> (noting the threat of prosecuting government leaders will make government leaders reluctant to join the court in developed and developing states).

219 See Wolf, *supra* note 218.

220 Wolf, *International Anti-Corruption Court*, *supra* note 216, at 10–13.

221 *Id.* (recommending the use of economic coercion as a mechanism to get developing states to join the Anticorruption Court agreement).

222 The WTO addresses corruption only vaguely in one plurilateral agreement, the 2012 Revised Agreement on Government Procurement. As a plurilateral agreement, not all WTO members need to join the agreement and many have not. The agreement regulates the governments' own procurement procedures and does not criminalize corrupt behavior. The agreement calls for states to have bidding processes for government contracts that prevents conflicts of interest and prevents corruption. See Annex to the Protocol Amending the Agreement on Government Procurement Art. IV(4)(b-c), adopted on 30 March 2012 (GPA/113) (entered into force April 6, 2014).

Some commentators hope that another voluntary WTO Agreement, the Trade Facilitation Agreement (TFA) could also reduce corruption, although it is not explicitly a requirement of the agreement. The TFA standardizes port procedures and may have the effect of making corruption at customs offices more difficult. See Evelyn Suarez, *Does Trade Facilitation Matter in the Fight against Corruption?*, GLOBAL TRADE MAGAZINE (Sept. 10, 2015), <http://www.globaltrademag.com/global-trade-daily/commentary/does-trade-facilitation-matter-in-the-fight-against-corruption>.

223 Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. OF INT'L ECON. L. 2, 275–296 (2001); Krista N. Schefer, & Mintewab G. Woldeesenbet, *The Revised Agreement on Government Procurement and Corruption*, 47 J. OF WORLD TRADE 5, 1129–1161 (2013).

224 Abbott, *supra* note 223, at 277.

225 If anything, the American political system is now less inclined to grant any trade concessions for almost any purpose. The election of Donald Trump in November 2016 may represent a high water mark for resistance to additional trade concessions. See, e.g., Peter S. Goodman, *As EU and Japan Strengthen Trade Ties, US Risks Losing Its Voice*, N.Y. TIMES: BUSINESS DAY, July 6, 2017, <https://www.nytimes.com/2017/07/06/business/eu-japan-trade-us.html> (discussing the Trump Administration's rejection of trade deals and return to protectionist policies).

The Doha negotiations, the WTO's platform for further trade deals, have famously collapsed, as many emerging market countries demand changes to trade rules as the condition for further liberalization.²²⁶ As a result, it is far from clear that efforts by developed states to renegotiate the WTO Agreement to demand membership in an international anti-corruption court would be successful without major concessions on highly sensitive trade issues.

Second, developed countries may prefer to maintain control over their own foreign corruption prosecutions. Deciding what cases to bring and on what terms to settle involves significant discretion, and national governments may prefer to keep this discretion in-house rather than delegate this power to an international prosecutor. As Professor Matthew Stephenson, who runs the Global Anti-Corruption Blog, points out, the U.S. government has refused to join the International Criminal Court because of the possible ambiguity in what qualifies as a violation of the conduct of war.²²⁷ Corruption is arguably even more ambiguous and applies to significantly more government activity, and, thus, the risks of establishing an independent international prosecutorial office are even greater here.²²⁸

In short, there is no political momentum to create an international anti-corruption judicial system to centralize global enforcement of national bribery laws. For all the reasons listed above, there is very little chance that governments will wish to develop a supranational enforcement system in the near future. However, the impracticality of an international anti-corruption court does not mean that states cannot cooperate on anti-corruption policy. The next section outlines how informal coordination could emerge.

2. *Informal Resolutions*

If not a formal international dispute resolution system, then what? An alternative is to maintain the current system of national level prosecutions but to more explicitly coordinate these prosecutions. This could take the form of a tacit or informal but overt agreement for the U.S. to defer to national regulators of the corporation's home state if that state provides robust enforcement. Such an agreement could decrease the allegations of bias in U.S. prosecutions. National prosecutors would effectively have the first bite at prosecuting national companies for foreign bribery. Where national prosecutors fail to bring cases (or only bring "sham" cases), U.S. regulators could step in. The promise of U.S. deference to national

²²⁶ *The Doha Round Finally Dies a Merciful Death: Governments Must Now Pursue Trade Multilateralism Piece by Piece*, FIN. TIMES. (Dec. 21, 2015), <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879>.

²²⁷ Stephenson, *supra* note 218.

²²⁸ *Id.*

prosecutors could also increase the global enforcement of anti-bribery rules (and thereby broaden the enforcement net) as more countries devote resources to prosecuting foreign bribery and develop expertise in resolving these cases under their own national laws.

As it did in international trade law, the U.S.'s unilateral enforcement of anti-corruption rules has the potential to spur greater multilateral enforcement. Transnational conflict over the American application of the FCPA may create the bargaining space for OECD governments to reach a new (although still decentralized) agreement on the domestic enforcement of national laws prohibiting foreign bribery. If OECD governments want American enforcers to have greater deference for "home" government enforcement, then the price of this bargain can be greater enforcement efforts.²²⁹ Foreign governments' first preference may be for low enforcement of bribery laws. However, if that option is off the table because of American FCPA enforcement efforts, then foreign governments may find that they prefer to step up their own enforcement efforts rather than delegate the settlement of these cases to the DOJ and SEC.

Currently, some OECD governments are already increasing their domestic enforcement of foreign bribery law to compete with American prosecutors. As the next section discusses, Germany and the U.K. have become active enforcers, in part, to have a hand in the regulation of important national companies. Similarly, France is in the process of improving its foreign bribery law to have a voice in the settlement terms for its companies.

We argue that this tacit coordination may become an informal agreement between OECD members. Specifically, if a country is an "active enforcer" of anti-bribery law, then other states (including the U.S.) will defer to its prosecution of a state's company. However, if the country is not an aggressive enforcer or the country offers overly lenient settlements, then others would be free to bring their own prosecutions. Such an agreement would increase the overall enforcement of anti-bribery rules by expanding the number of states dedicating resources to prosecutions and extending the geographic scope of transactions that are likely to be prosecuted. Although

²²⁹ International law does not prohibit countries from trying a person or corporation for the same crime. That is, there is no double jeopardy between countries' jurisdiction as a matter of international law. See Paul B. Stephan, *Regulatory Competition and Anti-Corruption Law*, 53 VA. J. INT'L L. 53 (2012) (discussing regulatory competition between states over anti-corruption law and how multiple can have jurisdiction to prosecute concurrently). As a matter of domestic law, some countries may prohibit the prosecution of a person or corporation if the matter was already adjudicated in another country's legal system but it is a matter of discretion for each state. The U.S. does not have a bar on cross-national double jeopardy. See Fredrick Davis, *Does International Law Require an International Double Jeopardy Bar?*, GLOBAL ANTICORRUPTION BLOG (Oct. 18, 2016), <https://globalanticorruptionblog.com/2016/10/18/guest-post-does-international-law-require-an-international-double-jeopardy-bar/> (discussing international law, American law, and French law).

the number of U.S. enforcement actions may decrease, the potential for the U.S. to bring more foreign prosecutions would provide a backstop to lax enforcement abroad. As is discussed in the final part of this section, it is unlikely that *all* OECD members will enter into such an informal agreement with the U.S., but a number of major economies may do so.

a. Current Trends in Germany, the U.K., and France

There is some evidence of this political dynamic already playing out as key European governments ramp up enforcement after working jointly with American prosecutors on a case against a major domestic company.²³⁰ For instance, German enforcement of anti-bribery laws increased significantly after the Siemens case, where the two countries worked together to bring charges. Siemens settled simultaneously with both American and German prosecutors, paying each country approximately \$800 million in criminal fines and other penalties.²³¹ Similarly, the U.K. increased enforcement of its domestic foreign anti-bribery law (including passing new legislation that dramatically increased the range of corporate behavior that could be prosecuted and increased the prosecutor's jurisdiction) after working with American prosecutors in the BAE case.²³² There, the Blair government had quashed the domestic investigation of BAE after the Saudi Royal family (who had allegedly received the bribes from BAE executives) objected.²³³ The DOJ then stepped in to bring its own case against BAE, which the British government eventually joined.²³⁴

In both of those cases, important OECD countries arguably saw the potential for U.S. prosecutors to be the primary anti-bribery regulators of important national companies and responded. By joining the prosecutions of these companies, German and British officials had a seat at the settlement

²³⁰ In fact, one empirical study of the FCPA found that the best predictor of a state's willingness to enforce its own anti-bribery laws in the future was its cooperation with an American FCPA prosecution. Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745 (2011).

²³¹ Dougherty & Lichtblau, *supra* note 173 (noting that Siemens paid a total of \$1.6 billion including criminal fines and other penalties).

²³² The new U.K. law is generally considered as strong (if not stronger) than the FCPA. See Jon Jordon, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 NYU J. L. & BUS. 845, 863–68 (2010) (reviewing the ways in which the U.K. Bribery Act strengthens domestic law). It is unclear, however, the British Serious Frauds Office (SFO) will be as effective an enforcer as the DOJ. See Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1 (2013) (discussing the strength of the law but questioning the SFO's ability to enforce the law as rigorously as the DOJ).

²³³ Lowell Bergman & Nelson D. Schwartz, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES (Nov. 25 2007), <http://www.nytimes.com/2007/11/25/business/25bae.html> (discussing the termination of the BAE case in the U.K.).

²³⁴ *Id.*

table.²³⁵ Given the importance of Siemens and BAE (in terms of employment, the tax base, and exports) to the German and British economies, respectively, these governments would be very interested in having a voice in determining the level of criminal and civil fines and, possibly more importantly, the terms of the company's anti-bribery monitoring going forward. For instance, in the Siemens case, the DOJ agreed with German prosecutors to appoint a German national to monitor Siemens's future business practices and ensure the company refrained from re-engaging in foreign bribery.²³⁶ The German national, Dr. Theo Waigel, had served as the German Finance Minister from 1989 to 1998, and so was much attuned to the German government's interests in rehabilitating Siemens as an internationally competitive corporation.²³⁷ Only by increasing their own prosecutorial efforts could Germany and the U.K. have the opportunity to be part of future settlement negotiations.

These dynamics are currently playing out in France. In 2015, the DOJ successfully prosecuted the French energy giant, Alstom, under the FCPA.²³⁸ Unlike the Siemens and BAE cases, the French government did not join the prosecution and did not have a role in the settlement. DOJ prosecutors exacted the largest criminal fine in FCPA history, \$772 million.²³⁹ Shortly after the Alstom prosecution, the French government decided to revise its foreign anti-bribery law to strengthen the power of French prosecutors in bribery cases, and to make settlements easier under French law.²⁴⁰ The French government certainly has many reasons motivating its efforts to strengthen its foreign anti-bribery laws, but one appears to be an effort to stave off more American-only prosecutions. Having greater domestic enforcement power allows French prosecutors to

235 Press Release No. 08-1105, Dep't of Just. Off. of Pub. Aff., 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), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> {DE: Needs permalink} (announcing the Siemens settlement with the DOJ for \$450 million, the SEC for \$350 million, and German authorities for approximately another \$800 million. Siemens also agreed to a government-imposed independent monitor.); Press Release, No. 10-209, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine, Dep't of Just. Off. of Pub. Aff. (March 1, 2010) (acknowledging joint British settlement).

236 Anne Richardson & Alexandra Wrage, *Siemens AG — Violations of the Foreign Corrupt Practices Act*, 48 INT'L L. MAT. 232, 234 (2009).

237 *Id.*

238 Press Release, U.S. Dep't of Just., Alstom Sentenced to Pay \$772 Million Criminal Fine to Resolve Foreign Bribery Charges, Nov. 13, 2015.

239 *Id.*

240 *La loi Sapin 2 contre la corruption arrive à l'Assemblée nationale [Sapin 2 anti-corruption law arrives before the National Assembly]*, LE MONDE, June 6, 2016; see also *New French Anti-Bribery Law Expected in 2016*, TRACE INTERNATIONAL BLOG (Oct. 20, 2015), <https://www.traceinternational.org/blog/154> (noting that "In the absence of robust French enforcement, U.S. regulators have been active in the jurisdiction — three of the top ten largest settlements under the Foreign Corrupt Practices Act (FCPA) belong to French companies (Alstom, Total SA, and Technip)").

join the enforcement process and have more of a role in reaching settlements with important national companies.

The current state of affairs appears to be a tacit agreement among national prosecutors to work together in bringing cases against major multinational companies if both governments are actively investigating the company. However, this tacit coordination could develop into an informal agreement if more OECD governments started rigorously enforcing their anti-bribery laws. As is discussed in the next part, such an agreement could be informal, in the sense that it would not have to be memorialized in an amendment to the OECD treaty. Rather, the agreement could be an understanding between prosecutors that “home” governments have primary jurisdiction over a company if they have a robust enforcement program. The potential benefit of having primary jurisdiction over these cases could be a sufficient incentive to encourage lagging states to increase their enforcement capacity.

b. The Outline of an Informal Agreement

One means of achieving greater cooperation between OECD countries would be to implicitly incorporate a deference principle of horizontal complementarity between states in anti-bribery prosecutions.²⁴¹ Prosecutors in the OECD Working Group could operationalize this principle on a case-by-case basis. Governments with a good record of enforcing their national law on foreign bribery would have a “first right” to bring charges against a company based in their country. Other national prosecutors would defer to the home government’s prosecution.

²⁴¹ Complementarity is a legal doctrine providing that one party will respect the primary jurisdiction of another party. The Rome Statute establishing the International Criminal Court (ICC) incorporates complementarity as a fundamental principle by rendering cases “inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless* the State is unwilling or unable genuinely to carry out the investigation or prosecution...” Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, *entered into force* 1 July 2002, Art. 17 (emphasis added). For a discussion of the application of complementarity see Philippa Webb and Morten Bergsmo, *International Criminal Courts and Tribunals, Complementarity and Jurisdiction*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT’L LAW (Nov. 10, 2010), at ¶ 11 (“States have the first responsibility and right to prosecute the most serious crimes of international concern. The ICC may only exercise jurisdiction where the national legal system ‘is unwilling or unable genuinely to carry out the investigation or prosecution.’”) (describing complementarity principles in the International Criminal Court).

Horizontal complementarity is the term used to refer to situations where there is a horizontal relationship (e.g. co-equal sovereign states) rather than a vertical relationship (national court and international court) between parties. See Cedric Ryngaert, *Horizontal Complementarity*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 855–87 (C. Stahn & M. El Zeidy eds., 2014) (discussing complementarity between state prosecutors); see also, Laura Burens, *Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International Criminal Court*, 27 CRIM. L. FORUM 75 (2016) (same).

The prosecutors in the OECD's working group would not need to explicitly adopt a formal doctrine of complementarity as the ICC has done. Indeed, the formulation of the complementarity concept would not have to be as formal or rigid as the ICC's principle. Instead, the prosecutors in the OECD working group could reach a consensus that governments with a good track record of enforcing their national laws on foreign bribery would have the "first right" to bring anti-bribery charges against a company based in their country independently. Other jurisdictions would defer to the home government's prosecution.

This would change the status quo by leading to fewer dual prosecutions even where dual jurisdiction exists. For instance, if a Germany company that listed on a U.S. exchange (as Siemens did) engaged in foreign bribery, then both American and German regulators would have jurisdiction under their anti-bribery laws.²⁴² Ordinarily, U.S. regulators would bring a prosecution and coordinate with German prosecutors (as in the Siemens case). However, with a complementarity principle in place, German regulators would bring the prosecution, and American regulators would defer to their action and provide assistance. Prioritizing home government prosecutions would limit the claims of overreaching and concerns about bias that currently exist within the system of American-led enforcement.

Such a system could encourage OECD states to invest greater resources in their anti-bribery enforcement systems. Effectively, the U.S. would be offering the carrot of greater prosecutorial control over the foreign country's own companies in return for greater dedication to domestic enforcement. Given the importance of major multinational companies, such as Apple, Google, Siemens, and BAE, to a national economy, governments (particularly states with smaller economies) will put a premium on the ability to be the primary regulator of that company. Currently, American regulators will bring an FCPA prosecution against major foreign corporations even if the home state does as well, as occurred in the Siemens and BAE cases. Countries will have a greater incentive to invest in their domestic enforcement capacity if they believe that they will have full control of the prosecution and not just a seat in settlement talks.

In return for implementing a norm of complementarity, the U.S. government could demand that other OECD signatories increase their domestic efforts to police their national companies, particularly those companies that do not list on American stock exchanges. Such a trade could increase the jurisdictional net from the current system. The American-led enforcement system has been very successful in providing anti-bribery law

²⁴² German prosecutors would have jurisdiction under the nationality principle. The FCPA provides US prosecutors with jurisdiction if there is a territorial link. *See* 15 U.S.C. § 78dd-3(a) (1998).

real bite for the world's biggest multinational companies, the vast majority of which list on American exchanges. However, American enforcement has limited jurisdictional hooks to private overseas foreign corporations or small and medium enterprises that do not list on American exchanges.²⁴³ If other OECD states increased their enforcement of anti-bribery laws against this class of corporation, then the worldwide scope for effective anti-bribery law would expand. In addition to decreasing the supply of bribes globally, this could also increase the global competitiveness of American small-to-medium-sized enterprises, which already face strict FCPA enforcement.

On balance, such an informal agreement could benefit all OECD countries. The U.S. could benefit by having other countries take on greater enforcement responsibilities. This would increase the jurisdictional net for anti-bribery enforcement (by reaching companies and individuals that fall outside of the FCPA's jurisdiction) and by allowing U.S. authorities to direct resources to additional cases. Other OECD nations could also gain advantages by having greater control over the prosecutions of "home" companies.²⁴⁴ However, not all OECD states will want to increase their domestic enforcement of anti-bribery law. For those states, American prosecutors need not defer to national regulators; instead, it should continue the current practice of American-led dual (or solo U.S.) prosecutions. Thus there is a possible two-track system in the future where some states benefit from complementarity and others do not.

Two caveats are appropriate here. First, an informal agreement to implement a norm of complementarity would not be a bar to dual prosecutions. Most obviously, the U.S. could continue to bring cases in coordination with foreign governments that have lax anti-bribery enforcement. In addition, American prosecutors could bring a case when the home state only brings a "sham" prosecution—that is, settles the case on terms that are grossly disproportionate with the severity and extensiveness of the crime.²⁴⁵ Finally, the "host" country (the country where the bribe was offered) could also always have jurisdiction over the case since the corruption occurred in its territory and was designed to influence its government officials. For instance, if a British firm was involved in bribing

²⁴³ The FCPA can still apply if part of the bribery scheme occurred within the territory of the United States. *See* 15 U.S.C. § 78dd-3(a) (1998). Also, the DOJ can have jurisdiction over any American employees, members of the board of directors or agents. *See id.* 3(d).

²⁴⁴ These states would also get to keep a greater proportion of the criminal fines collected against the companies. On the whole, however, these fines are not a significant source of state revenue and will not be a major motivation for states to undertake higher levels of enforcement.

²⁴⁵ A similar idea may be found in the ICC — sham prosecutions (non-genuine to use the language of the Rome Statute) don't trigger Article 17 and the ICC may admit the case. *See supra*, note 240.

an Italian official, the U.S. might defer to a U.K. government prosecution, but Italian prosecutors would not need to do so.

Second, how would an informal agreement at the OECD be enforced? The OECD does not have a binding dispute resolution system and the agreement that is proposed here would not be “hard law,” in the sense that it would not be a formal amendment to the OECD Anti-Bribery treaty.²⁴⁶ Indeed, it is likely that prosecutors will reach an informal consensus regarding the proper level of deference between home and extraterritorial regulators. Nonetheless, this agreement would be relatively easy to enforce.²⁴⁷ Enforcement of an international agreement does not require third-party dispute resolution systems.²⁴⁸ Parties can enforce an agreement themselves when they can accurately monitor one another’s behavior and impose costs on one another’s non-compliance.²⁴⁹

In this case, there are two elements that would need to be monitored: whether the country is rigorously enforcing its anti-bribery law (and is thereby entitled to deference) and, if so, whether a country is engaging in a sham prosecution (and other states may intervene to bring their own prosecutions). The first element is already the subject of extensive monitoring. The OECD issues regular reports on countries’ enforcement efforts and is known to be quite critical.²⁵⁰ Transparency International also conducts an assessment of countries’ anti-bribery enforcement,²⁵¹ so there is redundancy in this monitoring process (and thus politics is less likely to distort a country’s assessments).

Countries are also in a good position to monitor sham prosecutions. The OECD Working Group on Bribery is made up, in part, of national prosecutors.²⁵² They generally share professional norms and experiences,

246 Our definition of hard law refers to international law that is formally binding as part of a treaty regime. It holds the status of a contract, a legal binding commitment between two parties. See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 582–83 (2005) (discussing the idea of hard law). Other commentators will sometimes refer to law being “hard” or “soft” based on its precision. We respect but do not adopt this definition. *Contra* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 445 (2000).

247 See Jean Galbraith & David Zaring, *Foreign Relations Law as Soft Law*, 99 CORNELL L. REV. 735, 745–47 (2014) (discussing a host of soft law agreements where national regulators meet to share information and coordinate enforcement).

248 See ROBERT SCOTT & PAUL STEPHAN, *THE LIMITS OF THE LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006) (discussing the conditions under which questions of compliance with international law are better resolved between the parties). These authors draw upon a much more extensive literature in international relations theory (and contract law) about what is necessary to sustain cooperation. See, e.g., George Downs et al., *Is Good News About Compliance Good News about Cooperation?* 50 INT’L ORG. 379 (1996) (discussing the minimum conditions required to enforce international agreements).

249 SCOTT & STEPHAN, *supra* note 248, at 4.

250 See discussion, *supra* notes 123–152.

251 See EXPORTING CORRUPTION, *supra* note 116.

252 Ben W. Heineman & Fritz Heimann, *The long war against corruption*, 85 FOREIGN AFF. 75, 83–85 (2006) (discussing the role of OECD working group in evaluating state enforcement efforts).

such as commitment to the rule of law, experience with the difficulties of litigating cases, and concepts of “fair” settlements. By using this existing network, prosecutors, even those from different legal systems, will be able to monitor whether other governments are resolving cases within the range of feasible outcomes, given the strength of the evidence and the seriousness of the charges. These actors will be able to detect weak or sham settlements and call each other out on them.

Finally, the parties are able to self-enforce the agreement because they can always revert to their previous policies. If some countries think that American regulators are not honoring their promise to respect complementarity in prosecutions, they can scale back their domestic enforcement. If American regulators think that other states are bringing sham prosecutions or are enforcing too weakly, they can start bringing more solo or dual prosecutions. In short, a coordinated, informal agreement will survive only if both sides see a benefit and adjust their behavior accordingly. While an informal agreement to adopt a consensus norm of complementarity may or may not succeed, this is likely to be the most fruitful path to increase global anti-bribery enforcement.

V. CONCLUSION

The evolution of the international anti-bribery and trade regimes has dramatically altered the terrain of global market regulation. Currently, scholarly analysis has considered the development of the two fields as the product of independent processes, each addressing conceptually distinct aspects of international economic law. This Article posits that the two regimes are intertwined, regulating different aspects of the same competitive global market conditions. Furthermore, understanding the history of multilateral enforcement in international trade law yields key insights into the tensions and opportunities presented in multilateral efforts to enforce international anti-bribery law.

By reconceiving the foreign anti-bribery regime as responsive to similar concerns confronted by the international trade framework, it is possible to sketch out helpful parallels in conceptualizing the history and effect of the two approaches to combatting official and unofficial barriers to global markets. Noting that persistent U.S. enforcement of international trade law resulted in a shift from unilateral to multilateral enforcement, we must contemplate the trajectory of the FCPA and the OECD Anti-Bribery Convention through the same lens. The global anti-bribery regime is poised to follow a similar path as trade law, wherein continued U.S. FCPA prosecutions are likely to be leveraged into an informal and flexible multilateral anti-bribery framework built on notions of complementarity.

The emergent multilateral anti-bribery regime would have notable differences from the international trade regime. The regime would remain decentralized in national legal systems, rather than centralized in an international organization or independent court. In addition, the anti-bribery regime would be far more fluid, with national authorities (particularly U.S. prosecutors) reviewing partner countries' investigative efforts, prosecutions, and settlements. Although there would not be a "corruption court," this informal multilateral agreement could coordinate national enforcement efforts to maximize global enforcement in a politically feasible manner.

Informality and flexibility do not connote weakness. Quite the opposite, these institutional features provide the highest up-side potential for expanding the jurisdictional reach of existing national anti-bribery laws while, concurrently, limiting the down-side potential by retaining existing enforcement capacity. Restated, the U.S. government can potentially expand global enforcement by establishing a complementarity principle with foreign prosecutors who similarly adopt rigorous anti-bribery standards. The U.S. government could defer to foreign prosecutors but maintain its existing system of strong extraterritorial enforcement if international cooperation failed.