FOREIGN BRIBERY LEGISLATION IN THE UNITED STATES

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The notes below introduce current and historical debates surrounding American regulation of bribery in international business transactions. Section I outlines the provenance of the Foreign Corrupt Practices Act ("FCPA")[1] and the OECD Anti-Bribery Convention ("Convention").[2] Section II discusses selected issues of current controversy in their enforcement.

I: THE HISTORY OF THE FCPA AND THE OECD CONVENTION

A: THE PASSAGE OF THE FOREIGN CORRUPT PRACTICES ACT

To Samuel Huntington, "[t]he only thing worse than a society with a rigid, over-centralized, dishonest bureaucracy, [was] one with a rigid, over-centralized, honest bureaucracy."[3] This benign view of corruption as "efficient grease" that prevents excessive taxation and regulation from turning into "'real' red tape," remained prevalent among economists and political scientists through the early 1990s.[4]

Nevertheless, in 1977, President Jimmy Carter signed the FCPA into law. The FCPA prevents covered persons from making (1) "corrupt[]," (2) payments or promises to pay "anything of value," (3) to foreign officials, politicians or political parties, (4) in pursuit of "any improper advantage" in obtaining or retaining business. Covered persons include U.S. nationals and corporations ("domestic concerns"), as well as foreign corporations that issue securities on American securities markets ("issuers"). Under the 1998 amendments to the FCPA, foreign companies and nationals who "act in furtherance" of a corrupt payment within American territory are also covered by the act, even if they are not issuers.

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[1] 15 U.S.C. § 78dd *et seq*.

[2] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, available at http://www.oecd.org/dataoecd/4/18/38028044.pdf.

[3] Samuel Huntington, Political Order in Changing Societies 386 (1968).

[4] Daniel Kaufman & Shan-Jin Wei, Does "Grease" Money Speed Up the Wheels of Commerce? 1 (Nat'l Bureau of Econ. Research, Working Paper No. 7093, 1999) [Hereinafter, *Kaufman & Wei*].

The passage of the FCPA was a reaction to the Watergate scandal of the mid-1970s.[5] Working off tips from Watergate-related investigations, the Securities and Exchange Commission ("SEC") investigated the public filings of eighty-nine corporations, and the private documents of a further thirteen firms on suspicion of bribery. The resulting report detailed routine "questionable and illegal payments" from US corporations to foreign government officials.[6] While such payments had been an open secret, their formal, public disclosure in the run-up to the 1976 election sufficiently riled public opinion to secure a unanimous Congressional vote in favor of the FCPA.[7] Thus, political scientists have described the passage of the FCPA as resulting from a "mobilization of values."[8]

However, American values and American interests were not necessarily aligned. Many corrupt governments preferred changing business partners to reforming their ways.[9] After the FCPA, American firms risked being shut out of government contracts around the world. A 1981 Government Accountability Office survey of corporations with major foreign operations found that that 30% of respondent firms reported losing business to foreign competitors who paid bribes; 25% of the Fortune 500 reported a decrease in their international business.[10] Additionally, FCPA enforcement risked roiling American relations with key allies.[11]

Despite its impact on the business community, the FCPA was an irrevocable political commitment. Few politicians would risk being branded pro-corruption by spearheading a repeal effort.[12] FCPA enforcement flagged during the Reagan administration, however the statute remained a source of concern to the business community because of the potential for a change in administration or independent prosecutions by prosecutors attempting to make headlines. By the late 1980s, many major American corporations had abandoned attempts to repeal the statute.

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[5] Kenneth W. Abbot & Duncan Snidal, Values and Interests: International Legalization in the Fight Against Corruption, 31 J. Legal Stud. S141, 161 (2002). [Hereinafter, *Abbot & Snidal*]

[6] S. Rep. No. 95-114, at 1–2 (1977), as reprinted in 1977 U.S.C.C.A.N. 4098, 4099.

[7] Abbot & Snidal, *supra*, at S161. A small number of particularly dramatic cases garnered concentrated public attention. Admissions by the Lockheed Corporation (now a part of Lockheed Martin) that their foreign offices had paid $24 million in bribes (to officials of fifteen different countries reverberated around the world, and resulted in the arrest of a former Japanese prime minister. Kimberly Ann Elliott, Corruption and the Global Economy 17 (1997). Lockheed and its peers were portrayed in the press as asserting a "right to bribe." Lockheed's Defiance: A Right to Bribe?, Time, Aug. 18, 1975.

[8] Id.

[9] This claim is intuitive, but contested. Kaufman & Wei, *supra*, argue that regulations like the FCPA allow regulated firms to credibly commit not to bribe, and that firms willing to pay bribes spend more time caught in red tape because they attract corrupt officials, and face higher costs of capital.

[10] U.S. Govt. Accountability Office, AFMD-81-34 Impact of Foreign Corrupt Practices Act on U.S. Business (1981).

[11] An anecdotal illustration of the tension is provided through the prosecution of General Electric executive Herbert Steindler. To prove its case, the prosecution was required to interview current and former Israeli officials. The Israeli government only agreed to these interviews when a U.S. Congressman pointed out that US military aid to Israel had been conditioned on access to records and officials related to the execution of contracts funded through US aid, and threatened to impose procedural roadblocks to future provision of aid under Congressional programs. Israel was eventually agreed to permit questioning through a rather convoluted intermediary process, but this may never have occurred. *See* Congress Begins Dotan Hearings, Jerusalem Post, Jul. 30, 1992; Israeli Military Aid Scandal Jolts GE, Washington Post, Jul. 20, 1992.

[12] Two attempts at 'hidden repeals' through amendments were made in the 1980s. The first failed, the second was ineffective. Abbot & Snidal, *supra*, 162.

Instead, they began to lobby the government to pressure other countries to institute parallel regulation that would level the playing field.[13]

B: THE PASSAGE OF THE OECD CONVENTION

This lobbying effort coincided with the post-cold war 'democracy wave' of the 1990s. The end of the cold war marked a change in academic attitudes toward corruption. Contesting the Huntingtonian view, newly-flourishing human rights groups and opposition movements in democratizing states contended that corruption "helped maintain authoritarian governments in power and allowed them to carry out policies harmful to vulnerable groups."[14] By the end of that decade, a new academic consensus coalesced on the view that corruption entrenches inequality between states by compromising a country's economic competitiveness, and that it entrenches inequality within states by encouraging a favor-trading culture among a country's elite. Summarizing this position in 1998, two senior World Bank officials argued that:[15]

- Bribery raises transaction costs and uncertainty in an economy.
- Bribery usually leads to inefficient economic outcomes. It impedes long-term foreign and domestic investment, misallocates talent to rent-seeking activities, and distorts sectoral priorities and technology choices (by, for example, creating incentives to contract for large defense projects rather than rural health clinics specializing in preventive care). It pushes firms underground (outside the formal sector), undercuts the state's ability to raise revenues, and leads to ever-higher tax rates being levied on fewer and fewer taxpayers. This, in turn, reduces the state's ability to provide essential public goods, including the rule of law. . . .
- Bribery is unfair. It imposes a regressive tax that falls particularly heavily on trade and service activities undertaken by small enterprises.
- Corruption undermines the state's legitimacy.

> Some observers have argued that bribery can have positive effects . . . [as] a means of avoiding burdensome regulations and ineffective legal systems. But this argument ignores the enormous discretion that many politicians and bureaucrats have . . . over the creation and interpretation of counterproductive regulations. [Corruption] fuels the growth of excessive and discretionary regulations [which create opportunities for bribe-taking] . . . . [B]ribery may be what causes the process to slow down in the first place.
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> In any society, there should also be a core of laws and regulations that serve productive social objectives . . . . The grease argument is particularly troublesome in this context, since bribes can override such regulations and cause serious social harm, such as illegal logging of tropical rain forests or failure to observe building codes designed to ensure public safety. Bribers can also purchase monopoly rights to markets—as, for example, in the energy sectors in some formerly communist countries, where unprecedented amounts of grease payments buttress gigantic monopolistic structures. Finally, the obscure insider lending practices and improper financial schemes inherent in poorly supervised financial systems have contributed to macroeconomic crises in Albania, Bulgaria, and—very recently—in some countries in [the East Asian financial crisis of 1997].

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[13] Interestingly, this push was led by one of the companies that had been most severely impacted by FCPA enforcement under the first Bush administration, General Electric. The company paid $70 million in fines, and saw a senior executive sentenced to seven years in prison.

[14] Id. at S159.

[15] Cheryl W. Gray & Daniel Kaufman, Corruption and Development, Finance & Development, March 1998, at 7, 8.

Responding to the congruence of 'values based' arguments from academics and activists, and 'interest-based' arguments from American corporations, Congress directed the first Bush administration to open negotiations on a multilateral anti-corruption convention through the Organization on Economic Cooperation and Development, a grouping of twenty-nine mainly Western countries.[16] Negotiations began slowly. Because other nations were aware that repeal of the FCPA would be difficult politically, the U.S. had limited leverage. It could not threaten to re-legalize international bribery by American corporations should foreign countries fail to cooperate.[17]

Through the mid-1990s, however, a series of mini-Watergate moments gave corruption increased visibility in the European public eye.[18] The Clinton state department leverage Europe's domestic corruption controversies as a means of forcing European leaders to support OECD action on corruption. Daniel Tartullo, an Assistant Secretary of State, repeatedly told the press that he carried with him a list of the ten largest bribe-paying companies in the world, implying that he could make the list public if talks failed.[19] His efforts got a significant boost from Transparency International, which lobbied firms and governments, and organized press campaigns that kept public attention focused on the OECD negotiations.[20]

The negotiation process faced significant hurdles. First, Tartullo regarded political incentives to support national champions as creating a prisoner's dilemma.[21] Without an international enforcement mechanism, countries would refuse to lose competitive ground by enacting anti-bribery legislation against their own firms. Second, activist groups had begun to push for domestic criminalization of bribery, instead of a disclosure or administrative sanction regime. This created an assurance problem.[22] Each government feared that its prosecutors would enforce criminal laws on the books, while other countries shirked enforcement.

Nonetheless, sustained public pressure proved hard to resist. European attempts to limit the scope of a convention to bribery of officials of OECD member governments prompted American condemnations of moral hypocrisy.[23] By early 1997, an OECD working group had recommended that OECD members adopt a convention criminalizing international bribery. By the end of the year, OECD states had agreed on a text.

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[16] Abbot & Snidal, *supra*, S162.
[17] Id. at S164.
[18] In fact, in a year end editorial the *Financial Times* dubbed 1995 the "Year of Corruption." Id. (mistakenly dating the piece to 1994). It is not clear whether the added attention resulted from increased levels of corruption, or merely marked the success of awareness campaigns led by groups like Tansparency International. For a discussion, see Vito Tanzi, Corruption Around the World, in Governance, Corruption & Economic Performance 19, 20–24 (2002) ("interest in corruption probably reflects an increase in the scope of the phenomenon over the years").
[19] Abbot & Snidal, *supra*, S164.
[20] One noted, and continuing, aspect of Transparency International's publicity strategy is its publication of an annual Corruption Perceptions Index ranking each country's level of corruption. The index was first published in 1995. Id. at 165. The 2009 Corruption Perceptions Index is available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009.
[21] Id. at 164.
[22] Id. at 167.
[23] Id.

The OECD Convention compels member states to adopt anti-corruption legislation. Legislation must (1) criminalize the act of bribing a foreign official, (2) mandate that domestic companies keep records similar to those kept under the FCPA's book and records provisions, (3) restrict laundering of corrupt money, and (4) commit states to assist one another in investigations of international corruption. In Article 5 of the Convention, signatory states pledge to enforce implementing legislation without regard to "considerations of national interest." Article 12 envisions a program of "systematic follow-up" through which the parties can monitor the implementation and enforcement of the Convention. However, despite this language quick passage of the convention seemed to come at the expense of the enforcement mechanism Tartullo had identified as necessary to solve the prisoner's dilemma.

II: THE FCPA AND THE OECD CONVENTION TODAY

A: COMPARATIVE ENFORCEMENT OF THE OECD CONVENTION

For some states, the convention has proved a costless commitment. Italy, Brazil and Mexico, for example, are perceived by the anti-corruption community as the three OECD members whose companies are most likely to engage in bribery while doing business abroad.[24] Italy engaged in "moderate enforcement" of the OECD convention, while Brazil and Mexico engaged in "little or no enforcement."[25] Twenty-nine of the OECD's thirty-six members reported fewer than ten cases or investigations in both 2007 and 2008, with many of these cases yielding no penalties.[26] By contrast, the United States reported 120 active investigations in 2008.[27] The only country in the same order of magnitude was Germany, spurred by local headlines over the Siemens scandal.[28] Summarizing the conclusions drawn from its 2009 OECD Convention Progress Report, Transparency International cautioned that:[29]

- The Convention is still far from achieving the goal of ending bribery in international business transactions . . . . Germany and the United States each have more than one hundred cases, while the United Kingdom has four and Japan and Italy have two each. The disparity in levels of enforcement shows how far there is to go.
- Enforcement in the 11 countries with moderate enforcement has not reached a high enough level to provide effective deterrence against foreign bribery. Companies in the 21 countries with little or no enforcement will feel even less constrained, and many are not even aware of the Convention.
- The present situation is dangerously unstable. Unless enforcement is sharply increased, existing support will erode and the Convention will fail. Danger signals include the United Kingdom's termination of the BAE case, claiming that national security concerns overrode the commitment to stop foreign bribery . . . . Other examples include efforts to eliminate the role of anti-corruption commissions and investigative magistrates.
- This risk of backsliding has grown more acute during a time of worldwide recession when competition for decreasing numbers of orders has intensified greatly.
- . . . . Proponents of the Convention must press hard for greater enforcement. Otherwise, proponents

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[24] Transparency International, Emerging Economic Giants Show High Levels of Corporate Bribery Overseas (2008), available at http://www.transparency.org/news_room/latest_news/press_releases/2008/bpi_2008_en.
[25] Transparency International USA, OECD Anti-Bribery Convention Progress Report 2009 10, available at http://www.transparency-usa.org/news/documents/FinalOECDProgressReport2009.pdf.
[26] Id. at 11–12.
[27] Id. at 12.
[28] Id. at 12.
[29] Id. at 8.

of corruption will prevail and the Convention will go into reverse.

Disparate enforcement levels seem driven by two variables.[30] The first is the political independence of a country's prosecutors. In countries like the United States, with professional prosecutorial services, and France, with independent magistrates, political leaders cannot easily influence prosecutorial decisions based on concerns for trade or jobs. The second is the existence of a specialized anti-corruption enforcement apparatus. Corruption cases are complex and expensive to prosecute, leading law enforcement officials with general jurisdiction to prioritize cases that give them more headlines for the buck.

Multilateral negotiation hardly seems a plausible path to reforming national criminal justice systems. Thus, anti-corruption activists have concentrated on amending the OECD convention to (1) explicitly preclude a national security exception and to (2) set up a monitoring process with the well-funded public relations teams necessary to name and shame countries shirking their enforcement responsibilities.[31] They hope these amendments will result from "peer pressure" from states that actively enforce the convention, as well as lobbying from "clean companies" in states that do not enforce the convention.[32] Yet, as these same activists have noted, the anti-corruption agenda has taken on the air of a "technocratic effort" rather than the "political crusade," backed by prominent leaders, that would be necessary to realize proposed reforms.[33]

B: ENFORCEMENT AGAINST FOREIGN CORPORATIONS

As a result of American frustration with disparate enforcement of the Convention between states, the Department of Justice's (DoJ) has grown increasingly willing to prosecute foreign firms under the FCPA. While implementing the OECD Convention, Congress significantly increased the FCPA's potential extraterritorial reach. The implementing legislation amended the FCPA (1) to cover foreign non-issuers who commit any act in furtherance of a bribe within the United States, (2) to cover illegal payments made by foreign issuers even where the corrupt transaction is accomplished without conduct in American territory, and (3) to cover foreign resident non-American employees of U.S. businesses.[34]

The DoJ has used these new powers to target corrupt transactions with only tenuous connections to the United States.[35] Additionally, the DoJ has begun to step up international technical

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[30] Benjamin W. Heineman, Jr. & Fritz Heimann, Arrested Development: The Fight Against International Corporate Bribery, The National Interest, Nov.-Dec. 2007, at 80, 84.
[31] Id. at 85.
[32] Id.
[33] Benjamin W. Heineman, Jr., Where Are the Global Anti-Corruption Leaders, The Atlantic Correspondents Blog, Feb. 10, 2010, available at http://correspondents.theatlantic.com/ben_heineman/2010/02. Note that a 2009 "Reccomendation" from the OECD's anti-bribery working group, available at http://www.oecd.org/dataoecd/11/40/44176910.pdf, recommends several steps that countries can take to enhance the convention's effectiveness. These range from tightening taxation and disclosure laws, to following enumerated 'good practices' in prosecutorial enforcement.
[34] The International Bribery and Fair Competition Act of 1998, Pub. L. 105 – 366, 112 Stat. 3304 (1998). The act also changed the FCPA's business nexus requirement to criminalize payments made to secure "any improper advantage" in obtaining or retaining business, and included officials of public international organizations as "foreign officials." Id.
[35] Foreign Affairs, National Law Journal, Apr. 27, 2009.

assistance programs to build prosecutorial capacity abroad.[36] Two prominent transnational investigations of foreign corporations are discussed below:

Siemens A.G.
"Issuer" liability in transactions without a U.S. nexus under 18 U.S.C. §§ 78dd-1(g), 78dd-2(i).

In December of 2008, Siemens A.G. agreed to pay a combined total of $1.6bn in fines to American and German officials. The DoJ sentencing memorandum described the investigation:

> On March 12, 2001, Siemens became listed on the New York Stock Exchange, subjecting itself as an "issuer" to the United States' securities laws, including the Foreign Corrupt Practices Act ("FCPA").
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> In November 2006, the Munich Public Prosecutor's Office conducted raids on multiple Siemens offices and the homes of Siemens employees in and around Munich, Germany, as part of an investigation of possible bribery of foreign public officials and falsification of corporate books and records. Shortly after these raids, Siemens disclosed to the Department and to the Securities and Exchange Commission ("SEC") . . . potential violations of the FCPA in multiple countries and initiated a sweeping global internal investigation. Siemens engaged Davis Polk & Wardwell to represent the Company, and engaged Debevoise & Plimpton LLP ("Debevoise") to conduct an independent investigation for the Audit Committee. Debevoise, in turn, hired Deloitte & Touche GmbH ("Deloitte"), translators, computer experts, litigation support firms, and other third parties to assist in the investigation. The scope of Siemens' internal investigation was unprecedented and included virtually all aspects of its worldwide operations, including headquarters components, subsidiaries, and regional operating companies. Compliance, legal, internal audit, and corporate finance departments were a significant focus of the investigation and were discovered to be areas of the company that played a significant role in the violations. Finally, the role and awareness of Siemens' Managing Board and Supervisory Board in serious compliance failures were the subject of particular scrutiny of the Audit Committee and the Department. Debevoise and Deloitte, at the direction of Siemens, provided frequent and extensive reports to the Department and the SEC in face-to-face presentations and conference calls that assisted the Department's investigation enormously.

The Debevoise investigation revealed a wide-ranging, systemic system of bribery across Siemens subsidiaries across the world. An extract from a December 21, 2008 New York Times feature described Siemens' practices:

> Mr. Siekaczek . . . says that from 2002 to 2006 he oversaw an annual bribery budget of about $40 million to $50 million at Siemens. Company managers and sales staff used the slush fund to cozy up to corrupt government officials worldwide . . . ."It was about keeping the business unit alive and not jeopardizing thousands of jobs overnight," he said in an interview.
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[36] Id.

> MR. SIEKACZEK . . . paid $5 million in bribes to win a mobile phone contract in Bangladesh, to the son of the prime minister at the time and other senior officials, according to court documents. Mr. Siekaczek's group also made $12.7 million in payments to senior officials in Nigeria for government contracts. In Argentina, a different Siemens subsidiary paid at least $40 million in bribes to win a $1 billion contract to produce national identity cards. In Israel, the company provided $20 million to senior government officials to build power plants. In Venezuela, it was $16 million for urban rail lines. In China, $14 million for medical equipment. And in Iraq, $1.7 million to Saddam Hussein and his cronies.
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> Because government contracting is an opaque process and losers don't typically file formal protests, it's difficult to know the identity of competitors who lost out to Siemens. Companies in the United States have long complained, however, that they face an uneven playing field competing overseas.

As a result of the above activities, Siemens and four of its subsidiaries agreed to plead guilty to the following charges:

> [The information against the Siemens parent company charges] (a) a violation of the FCPA's internal controls provisions . . . and (b) a violation of the FCPA's books and records provisions under [15 U.S.C. §§ 78m] (Count Two). The Siemens Argentina information charges a single count of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371, with a single object - to violate the books and records provisions of the FCPA. The proposed informations against Siemens Bangladesh and Siemens Venezuela each charge a single count of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371, with two objects - to violate the FCPA's antibribery provisions and to violate the FCPA's books and records provisions.

The Siemens investigation was instigated by German officials in the State Prosecutor's Office at Munich, who shared information with the American counterparts. In recent years, Germany has been the second most active enforcer of the OECD convention after the United States. As recently as 1999, Bribes were tax-deductible under the German tax code. However, Germany's FCPA implementing legislation vested prosecutorial jurisdiction in a politically-insulated Anti-Corruption Special Task Force.

BAE Systems Plc.

Liability against foreign corporations who take an act in furtherance of a corrupt payment within the territory of the United States, pursuant to 18 U.S.C. § 78dd-3(a), (f)(1).

In contrast, while Britain's Serious Frauds Office usually runs investigations independently of political appointees, it does so subject to the political authority of the Prime Minister and his cabinet. In December of 2006, Attorney General Lord Goldsmith announced that the Serious Frauds Office would discontinue an investigation into corrupt payments by employees of BAE Systems Plc in Saudi Arabia. Prime Minister Tony Blair took responsibility for the decision, saying that Britain's "relationship with Saudi Arabia is vitally important . . . strategic interest comes first."

Shortly after the British House of Lords upheld the cabinet's decision to abandon the

BAE probe, the DoJ announced that they would investigate BAE payments to Saudi officials. Although BAE Systems Plc was not an "issuer" under U.S. securities laws – BAE structures its American operations through a subsidiary, BAE Systems, Inc., control over which is insulated from the parent for national security reasons – some payments to Saudi officials were routed through American bank accounts, providing the DoJ with its jurisdictional hook.

On February 5, 2010, BAE Systems Plc pled guilty to a one-count criminal information charging the firm with falsely assuring American officials of the effectiveness of its FCPA compliance program, constituting conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The information alleged that

> BAES agreed to and did knowingly and willfully make certain false, inaccurate and incomplete statements to the U.S. government and failed to honor certain undertakings given to the U.S. government. These statements and undertakings included that BAES would . . . create and implement policies and procedures to ensure compliance with [the FCPA] and [the OECD convention]. Certain of the statements were false because they were inaccurate or incomplete. BAES also failed to comply with certain of the undertakings in some material respects and failed to inform properly the U.S. government of those failures. BAES's failures to comply and inform the U.S. government constituted breaches of the representations and constituted a knowing and willful misleading of U.S. government that impaired and impeded the activities and lawful functions of the U.S. government. BAES also made certain false, inaccurate and incomplete statements and failed to make required disclosures to the U.S. government in connection with the administration of certain regulatory functions [under the Arms Export Control Act and the International Traffic in Arms Regulations],

As evidence of the falsity of statements made by BAE officials, the information stated that BAE had paid nearly $30 million in bribes to Czech officials, as well as significant sums to Hungarian and Saudi officials, to secure contracts to manufacture fighter jets. Because BAE pled to lying about its corrupt activities, rather than to the corrupt transactions themselves, it avoided being barred from its American government contract work under federal contracting regulations.

BAE's American plea was part of a $500 million global settlement with American and British authorities. While the DoJ took $400 million for BAE, the UK's Serious Fraud Office settled for a $100 million. On February 7, 2010, British daily *The Guardian* wrote that:

> The Serious Fraud Office's settlement with BAE is a travesty of justice. As recently as Friday morning, the SFO team was still taking formal witness statements in relation to a multibillion-pound deal in which BAE sold jets to South Africa that its air force didn't want and are hardly used. Over £100m in bribes was allegedly paid to agents, senior politicians, officials and political parties. The SFO felt it had a strong case . . . . Then out of the blue the SFO allowed BAE to plead guilty to a minor accounting offence . . . .

Despite the OECD convention, it was the U.S. government that took the lead in prosecuting a crime committed by a British company in its dealing with Eastern

European, African and Middle Eastern officials.

The successful completion of two major investigations against foreign companies will likely lead to lead to further efforts to enforce anti-corruption laws extraterritorially. Reportedly, the DoJ is pursuing two additional, major investigations against foreign corporations, including a joint investigation with German officials against DaimlerChrystler.[37] Moreover, while the FCPA does not directly allow for prosecutions against foreign government officials who accept bribes, the DoJ recently indicted a former Thai tourism chief on corruption-related conspiracy charges.[38]

C: ENFORCEMENT AGAINST INDIVIDUALS

As the DoJ's decision to prosecute a former foreign government official suggests, the Department has been extremely aggressive in its FCPA enforcement program. The BAE and Siemens cases were only two of several highlights to a banner year for FCPA convictions in 2009. The government secured a $579 million plea deal against Halliburton KBR, along with several other multi-million dollar deals against American corporations, including Blackwater LLC (now Xe Services), a major private security contractor.

Reasoning, however, that corporate executives were more likely to be deterred by jail time than by paying out their shareholders' money, the DoJ has begun to target individuals for prosecution.[39] Between January 2008 and October 2009, the DoJ charged twenty-three executives with violations of the FCPA. The Department also secured a conviction at trial former Representative William Jefferson (D-La) for funneling bribes from an American defense technology firm to Nigerian government officials. Corporate compliance officers attest that the DoJ's deterrence strategy has worked. Prosecutions of individual executives have resonated in boardrooms, and corporate boards, in turn, have used the threat of individual prosecutions to keep far-flung divisions, subsidiaries, and sales agents in line.[40]

However, the prosecution of individuals raises two disturbing issues. The first is the risk that employees' procedural rights will be compromised by collusion between governments and corporations. The second is the appropriateness of holding corporate executives criminally liable for the illegal acts of their business partners or line employees.

In *United States v. Stein*,[41] the Second Circuit affirmed the Southern District of New York's decision to dismiss an indictment against thirteen former partners and employees of KPMG, LLP, the accounting firm. KPMG had a company-wide policy of paying for defense attorneys for employees investigated or prosecuted in relation to their work. After the Enron collapse, prosecutors had threatened to indict, and thus destroy,[42] KPMG unless it conditioned payment of

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[37] US sends a message by stepping up crackdown on foreign business bribes, Washington Post, Feb. 8, 2010.
[38] Id. The official in question was already being prosecuted in a Thai court. Juthamas' fate hangs in balance, The Nation (Bangkok), Jan. 23, 2010.
[39] Law Journal: To Combat Overseas Bribery, Authorities Make it Personal, Wall Street Journal, Oct. 8, 2009.
[40] GE, for exampled, opened a session with a slideshow of executives from other corporations who were being investigated by the DoJ. Id.
[41] 541 F.3d 130 (2008).
[42] KPMG was fairly certain that it would go under if it were indicted. A similar indictment had brought Arthur Andersen to its knees – turning the "big five" accounting firms into the "big four." A conviction would have

its employees' attorneys fees on those employees' cooperation with DoJ investigations. The Second Circuit concluded that this threat violated the employees' Sixth Amendment right to counsel.

Stein is an extreme case, representing the aggressive atmosphere of corporate criminal investigations in the immediate aftermath of Enron. However, the case illustrates two major risks in prosecuting individuals. First, absent a reimbursement clause in the executive's employment contract, defense costs can be financially ruinous. Discovery in white collar criminal investigations is likely to involve box after box of technical, financial documents that lawyers sift through at high hourly rates. Second, corporations faced with bribery investigations often decide the best path is cooperation. They conduct internal investigations through lawyers who owe attorney-client duties to the corporation. They then use information from the investigations to plead out to fines, which may be reduced if they cooperate in prosecutions of their employees. Thus, information that an employee provide an employer's attorneys, on pain of discharge, can be used against that employee at a later stage of an investigation. In sum, a corporation may benefit financially from an employee's FCPA violations, then pass the blame to that employee when faced with a federal investigation.

The second concern arises from prosecutors' willingness to recognize what amounts to an individualized form of *respondeat superior* liability:

> [In November of 2009, Frederic Bourke was sentenced to a year in prison for violating the FCPA as part of a deal for purchase of an interest in Azerbaijani oil fields]. Bourke had invested some $8 million in an effort set up by Victor Kozeny, a Czech entrepreneur known as the Pirate of Prague, to get in on the privatization of the Azeri national oil company. According to the U.S. government, *Kozeny* paid bribes to Azeri officials, ranging from cash to jewelry, and promised them future payments stemming from the oil deal. The Azeri government never ended up selling the oil company.[43] (emphasis added).

Bourke, then, went to jail because his business partner paid bribes of which he "should have known."

> One juror had told Bloomberg, "We thought he...definitely *could have known...It's his job to know* [emphasis ours]." Prosecutors never even suggested that Bourke formally approved any bribes but only, as the juror noted, there was the possibility he did.
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> Sentencing Judge Shira Scheindlin commented that it was "still not entirely clear to me whether Mr. Bourke is a victim, or a crook, or a little bit of both," but that prison time was necessary in any event to deter FCPA violators . . . . [I]n his role as CEO, he had a responsibility to know what was going on across the company and to have programs in place to prevent it.[44]

It is still unclear whether the fears raised by the Bourke and Stein prosecutions reflect any systemic abuse of prosecutorial discretion. Both cases reflected exceptional circumstances.

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prevented KPMG from auditing public companies, its primary business. *See* Elizabeth K. Ainslie, Indicting Corporations: Lessons of the Arthur Andersen Prosecution, 43 Am. Crim. L. Rev. 107 (2006).

[43] Founder of Dooney & Bourke Gets Jail in Bribery Case, Forbes, Nov. 10, 2009.

[44] Lead or Go to Jail: Opinion, The Street, Dec. 11, 2009.

Bourke had gone out of his way to pick a business partner well known for dirty business tactics – and for connections to the Eastern European underworld.

D: GLOBAL COMPETITION & THE CHINA PROBLEM

Bourke might have pointed out, however, that it is probably difficult to find savory business partners in Azerbaijan.[45] During America's unipolar moment, even kleptocracies may have found it strategically necessary to contract with American firms, particularly with regard to defense and other government contracts. Now, however, corrupt officials have alternatives. Comparing FCPA enforcement to sanctions against authoritarian states, Andrew Spalding suggests that

> [a]s investment opportunities continue to develop in higher risk countries, at least some capital-rich countries may neglect, or even refuse, to ratify and enforce anti-bribery legislation . . . . Companies from countries that either have not ratified the OECD convention or do not enforce it, such as China or Russia, may not hesitate to invest in these countries. Cuervo-Cazurro in 2006 found this precise dynamic to be occurring, observing that "corruption in the host country results in relatively less FDI from countries that signed the OECD Convention, but results in relatively more FDI from countries with high levels of corruption." More recently, China's systematic investment in Africa, Central Asia, and Latin America, where CPI corruption levels remain relatively high, provides further evidence in support of these findings.
> ***
> . . . nations of the developed world will begin to invest in each other, while the less-developed economies with less-developed anti- bribery regimes will likewise invest in each other. The world economy could slowly begin to bifurcate into two economies . . . . To see this scenario play out, even if only partially, would raise innumerable problems in the ethical, economic, and foreign policy spheres alike.[46]

Spalding's argument is one frequently voiced by FCPA critics. As he points out, the argument is circumstantially supported by the increasing share of government contracts won by Chinese firms in states prone to corruption.[47]

FCPA advocates would counter that the increasing competitiveness of Chinese companies in developing markets merely reflects the quick growth of the Chinese economy in general. Although non-American companies have greater freedom to engage in underhanded competition, American firms may gain commensurate competitive advantages from being held to a higher standard. They are forced to adopt strong compliance systems and to promote an ethical work culture within their corporation, potentially reducing agency costs and boosting employee morale. Additionally, even in countries with corruption problems, not every official is on the take. Firms with a credible sense of corporate ethics may endear themselves to technocrats and reformers, as well as to opposition parties that may one day come to power.

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[45] Azerbaijan is one of the eight states most affected by corruption. Transparency International, 2009 Global Corruption Barometer 3, available at http://www.transparency.org/policy_research/surveys_indices/gcb/2009.

[46] Andrew Brady Spalding, Unwitting Sanctions, 2009 University of Mumbai (Govt. Law College) Working Papers 17, *56–57 available at http://ssrn.com/abstract=1429207.

[47] Chinese activities in Africa have gotten the greatest share of attention. See generally, Raphael Kaplinsky & Mike Morris, Chinese FDI in Sub-Saharan Africa: Engaging with Large Dragons, 21 European J. of Development Research 551 (2009).

Nevertheless, the continued willingness of firms from fast-developing non-OECD nations to pay bribes frustrates America's goals in pushing for the OECD convention in at least two ways. First, it means that even if OECD states enforced the convention scrupulously, American firms would still be at a disadvantage with regard to a significant portion of their foreign competitors. Second, it makes it more difficult to convince OECD states to enforce the convention because of fears of competition from Chinese firms.

E: CULTURAL OBJECTIONS TO FCPA ENFORCEMENT

A final objection to FCPA enforcement is that "extreme cultural complexity" makes the FCPA too blunt a tool for the fight against global corruption:[48]

> When a daughter of Kim Jong-chang, South Korea's top financial regulator, got married last June, Mr. Kim did something unusual: He eliminated the cashier and the cash-filled envelopes. These are fixtures of a South Korean wedding, as much so as the wedding officiant. Before entering the wedding hall, guests line up in front of the cashier's table to hand over an envelope stuffed with cash . . . .
> ***
> Mr. Kim is one of a small but growing number of people . . . refusing to accept cash gifts and keeping their guest lists relatively short . . . . [T]hese low-key weddings were considered such oddities that they made the news . . . . [T]hese envelopes . . . reflect a culture in which giving cash is considered so natural that people sometimes call it a "greeting" — and, in some cases, use it as a cover for bribery.
> ***
> A provincial education chief was widely criticized in the media in April after he reportedly invited 2,000 people — including the principals of all 460 schools under his jurisdiction — to his son's wedding. . . . [S]ome younger couples are rebelling against what they call a "commercial" wedding culture controlled by parents.[49]

A corporate executive who gives a "sae bae ton" to a government official at his daughter's wedding may be attempting to bribe that official. Alternately, he may be demonstrating his cultural sensitivity, or offsetting his share of an expensive wedding banquet. Would an American prosecutor be able to read the cultural signs well enough to figure out which one of the two is going on? Even if she could, should American law insert itself to a fast-evolving area of Korean culture, one that pits reformists against cultural traditionalists; a younger generation against sometimes overbearing parents? The problem of cultural complexity is not limited to the Korean context:

> Thus, gift-giving in China [as part of *guanxi* networking] has been described as "very important in doing business," and still "very much a part of the competitive terrain."
> ***
> According to Chris Pash, CEO of Asia Pulse, "'great ceremonial significance is attached to the giving and receiving of gifts"' in Asia, such that "'it's extremely important to be familiar with the customs, nuances, and cultural taboos in various countries'" . . . . [T]he real difficulty . . . is not the general notion of anti-bribery legislation, but rather the variance among particularized ideas of what does and does not comprise corrupt, reprehensible behavior. If any worldwide consensus in

[48] Steven R. Salbu, Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village, 24 Yale J. Int'l L. 223 (1999).
[49] Questioning a Korean Wedding Tradition, N.Y. Times, Nov. 18, 2009.

> regard to these specifics is to be approached or achieved, it had best be through the kind of colloquy that convinces rather than outside legal pressures that enforce.

However, FCPA supporters contend that "gift-giving" is only a part of elite culture, and serves to keep power concentrated in a few:

> The story of a mutually beneficial harmless transaction told by the dynamic duo of elite North bribe givers and elite South bribe takers cannot be accepted without deeper examination.
> ***
> The empirical [surveys of three Central and East Asian states] disclosed some very important class differences within the citizenry of South nations . . . . The very top strata of South government officials appear to have a higher acceptance of bribery and corruption than the rest of the country . . . Members of this group . . . spoke somewhat contemptuously of the proclivity for Western businesses to offer bribes and expressed satisfaction that they were in a position to benefit from this Western behavior.
> ***
> It is not surprising, therefore, that top executives of MNCs believe that bribery is a normal and accepted part of life in, say, Kazakhstan. This is what they are told by their Kazakh business partners . . . .[50]

FCPA supporters have also emphasized that the statute contains an exception for payments legal under the written laws of a foreign state. While written laws on corruption are routinely ignored in developing markets, that a bribe-taker must violate local law for a bribe payer to run afoul of the FCPA might undermine the moral imperialism argument. Moreover, FCPA prosecutions have tended to concentrate on big-ticket bribes. It is the rare culture where accepting a million-dollar kickback on a deal for fighter jets is part of a timeless cultural tradition.

CONCLUSION

Although FCPA cases often make the headlines, it is important to remember that much of FCPA practice remains hidden in the shadows. Because the vast majority of FCPA cases are settled through corporate plea bargains "[c]ourts generally ha[ve] limited involvement in the [enforcement] process," and rarely get a chance to interpret the statute.[51] Many American companies have developed elaborate compliance systems to limit FCPA enforcement risk; others have doubtless developed elaborate ways of getting around the Act. Yet, these programs must work around open questions in statutory interpretation: Are officers of companies majority-owned by foreign governments officials of foreign governments? Are compliance programs only of relevance at sentencing, or might they defeat vicarious liability entirely? As long as these questions remain open, the FCPA will remain a significant area of legal play.

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[50] Elizabeth Spahn, International Bribery: The Moral Imperialism Critiques, 18 Minn. J. Int'l L. 155 (2009).
[51] U.S. Govt. Accountability Office, GAO-10-110 Corporate Crime 25 (2009).