A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery

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A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery

Steven R. Salbu*

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Introduction

Bribery and corruption are age-old problems that are receiving more attention today than ever before. During the past few years, international scandals have reduced tolerance for corruption and increased receptiveness to legal solutions that, until recently, commentators viewed suspiciously. This trend extends around the world, even reaching nations presumably resistant to Western capitalist initiatives—developing communist or formerly-communist countries, such as China and Russia. The

1. Michael Philips formulated a good working definition of bribery as "payment (or promise of payment) for a service." Michael Philips, Bribery, 94 ETHICS 621, 622 (1984). John Macrae provides a consistent but more detailed definition of bribery in the form of what he calls an "arrangement": "An arrangement is a private exchange between two parties . . . which: (1) has an influence on the allocation of resources either immediately or in the future, and (2) involves the use or abuse of public or collective responsibility for private ends." John Macrae, Underdevelopment and the Economics of Corruption: A Game Theory Approach, 10 WORLD DEV. 677, 678 (1982) (suggesting arrangement as a substitute for corruption).

2. Corruption can be a broader category than bribery, potentially including "[pol]itical pressures . . . social influences, physical force or blackmail or other extortion." Lawrence W. Newman, The New OECD Convention and Bribery, N.Y. L.J., Mar. 29, 1999, at 3. This article will use the term "corruption" in its narrower sense, as manifested in the Foreign Corrupt Practices Act, to focus on bribery-related aspects.

3. Not surprisingly, condemnation is virtually universal. See THOMAS DONALDSON & THOMAS W. DUNN, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 222-33 (1999) (describing bribery as a practice that violates hypernorms, which are values held across cultures). While exceptions are rare, some commentators present contrary arguments. See, e.g., Llewellyn H. Rockwell, Jr., The Right to Pay Bribes, J. COM., May 23, 1997, at 6A (contending, inter alia, that bribery can be "an institutional bulwark of prosperity . . . a beneficial practice for everyone involved" and morally defensible).

4. Recent heightened attention in the United States has been precipitated by the Salt Lake City Olympics 2002 scandal, as well as concern that U.S. companies suffer a strategic disadvantage due to the nation's historic hard line against bribery. For discussion of the Salt Lake City scandal, see Jim Byers, A Year Later, IOC Struggles to Find Balance, TORONTO STAR, Dec. 9, 1999, available in LEXIS, News Library, Allnews File. For discussion of concerns regarding U.S. competitiveness, see Kari Lynn Diersen, Foreign Corrupt Practices Act, 36 Am. CRIM. L. REV. 753, 764-65 (1999).

5. See John Brademas & Fritz Heimann, Tackling International Corruption: No Longer Taboo, 77 FOREIGN AFF., Sept.-Oct. 1998, at 17, 18 (discussing recent bribery scandals that have shaken or toppled governments, including those in Indonesia, Pakistan, South Korea, Japan, Spain, Brazil, Venezuela, Ecuador, Mexico, Columbia, Italy, Zaire, and China).

6. Suspicion has only been reduced, not eliminated. See Gary M. Wederspahn, Exporting Corporate Ethics, GLOBAL WORKFORCE SUPPLEMENT TO WORKFORCE, Jan. 1997, available in Westlaw, BAMP Database (observing resistance to the Foreign Corrupt Practices Act because "ethical rules governing business practices are subject to cultural practices and beliefs").


8. See James Harding & James Kynge, Tentacles of Corruption May Threaten the State, FIN. TIMES, Mar. 5, 1999, at 4 (discussing the "Ningbo scam" and the pervasive corruption that arguably is weakening Chinese rule).

Chinese government, for example, sees recent bribery and financial fraud scandals as a threat to its authority. As a result, corruption took a prominent position in the National People's Congress's discussions during the 1999 sessions. Through growing international openness, pressures to cooperate with global anti-bribery initiatives are escalating.

The battle against corruption can be mounted in two different ways: legislation and institutional change. Legislative solutions, such as domestic anti-bribery laws, the Foreign Corrupt Practices Act (FCPA), and the Organization of Economic Cooperation and Development Convention (OECD Convention), attempt to modify undesirable behavior, primarily by imposing criminal fines, incarceration, or other penalties. Yet bribery that is caused or exacerbated by socio-structural problems may be best addressed by extra-legal solutions.

The order imposed by legal mandate may be ineffectual if the prohibited behaviors are firmly grounded in pernicious political, social, or economic institutions such as patronage, nepotism, unaccountability, low government wages, poverty, and generally weak economic conditions. To the extent that these causes of corruption are compelling, legislative efforts to eliminate bribes may be futile, akin to pulling a weed without removing its roots. Statutes like the FCPA may be doomed to failure because they order behavior rather than trying to fix the systematic problems that instigate the behavior. This reasoning could explain why corruption remains a serious problem despite ubiquitous domestic laws that prohibit bribery.

10. See Harding & Kynge, supra note 8, at 4.
11. The National People's Congress is China's parliament.
13. While this article focuses on openness as transparency of business activities and transactions, openness fits more broadly into a global social movement toward increasing corporate accountability. For discussion of this trend, see generally Robin Broad & John Cavanagh, The Corporate Accountability Movement: Lessons & Opportunities, 23 FLETCHER F. WoRLD An. 151 (1999).
14. For example, Leslie Holmes suggests that glasnost has allowed Russians to become informed about failings in their system and living standards in other countries, perhaps leading to "regime delegitimation" and increased corruption. Leslie Holmes, The End of Communist Power: Anti-Corruption Campaigns and Legitimation Crisis 217-18 (1993). Increased corruption and public awareness of the problem are likely to place pressure for reform on the governing regime.
Institutional reform\textsuperscript{19} may be more effective.\textsuperscript{20} Such reform seeks to reduce or eliminate corrupt behavior by understanding the underlying causes and altering social realities to attack those causes.\textsuperscript{21} For example, if poverty exacerbates corruption,\textsuperscript{22} then the war against poverty, intentionally or inadvertently, provides an institutional outlet to combat corruption.

While institutional changes may have greater potential than legislative mechanisms in the battle against bribery, they can be difficult to achieve. A particular source of trouble lies in the cyclical nature of some structural causes of corruption, where the causes of bribery are also its effects. In those cases, corruption is self-perpetuating.

Poverty, for example, is both a structural cause of bribery and a structural effect.\textsuperscript{23} Corruption diverts a nation's resources away from the citizenry and into the pockets of the corrupt elite, contributing to poverty.\textsuperscript{24} In developing nations, corruption also diverts scarce government resources to sub-optimal projects.\textsuperscript{25} These phenomena deplete public treasuries,\textsuperscript{26} making it harder to pay civil servants subsistence wages.\textsuperscript{27} Poor civil servants are more tempted to seek bribes and to view the practice as morally justifiable.\textsuperscript{28} The process reinforces itself—poverty causes bribery, which

\begin{itemize}
  \item 19. "Structural change" and "institutional reform" are used interchangeably in this article.
  \item 20. Even proponents of serious legal reform recognize both (a) perceptions that laws have been ineffectual to date and (b) the need for what the Managing Director of Transparency International, USA calls "complementary reforms" in areas such as civil service and the media. See Nancy Zucker Boswell, \textit{The Law, Expectation, and Reality in the Marketplace: The Problems of and Responses to Corruption}, 30 \textit{Law & Pol'y Int’l Bus.} 139, 139 (Supp. 1999) (acknowledging "widely-held public belief that, despite a plethora of anti-bribery and anti-corruption laws already on the books, little has changed to date" and recommending complementary institutional reforms).
  \item 23. See Nancy Zucker Boswell, \textit{Combating Corruption: Focus on Latin America}, 3 Sw. J. L. & TRADE AM. 179, 180 (1996) (observing that bribery causes a variety of political, social, and economic problems, including protracted poverty and the undermining of democracy).
  \item 24. See Frank Vogl, \ldots \textit{And New Corruption}, \textit{WASH. POS'T}, May 25, 1997, at C7 (describing corruption in Zaire, where Mobutu Sese Seko allegedly received billions of dollars in bribes while much of the population "languished in absolute poverty").
  \item 26. See Rafael X. Zahra, \textit{Chile and Singapore: The Individual and the Collective, a Comparison}, 12 \textit{Emory Int’l L. Rev.} 739, 755 (1998) (referring to this process as "‘plunder’ of the country").
  \item 27. See Hershman, \textit{supra} note 25, at 14.
  \item 28. See \textit{On the Take}, \textit{ECONOMIST}, Nov. 19, 1988, at 21, 22 (arguing that weak states and associated poverty breed disrespect and disloyalty, so that "corruption seems eminently sensible, since it involves robbing from the state in order to give to relatives and friends who provide the security that the state is too feeble to deliver").
\end{itemize}
exacerbates existing structural problems, including increased poverty, that lead to more bribery. 29 Like any vicious circle, poverty-aggravated corruption tenaciously resists reform.

Of course, legislative mechanisms and structural change need not be discrete categories. 30 Laws can modify institutions and social structures that support or encourage bribery. While some legislative approaches have sought to effectuate at least a partial structural change, 31 others have been purely legal edict aimed at criminalizing offending activities. 32

Commentators have criticized extraterritorial legal edicts of the latter variety as heavy-handed, given their dubious efficacy to date 33 and their potential for legal and cultural 34 and cultural 35 invasiveness. On the other hand, these concerns are countered by an increasingly recognized need to campaign

29. This problem is a specific example of the general inefficiency of departing from open, free markets characterized by high levels of honest dealings. See Scott D. Syfert, Capitalism or Corruption? Corporate Structure, Western Investment and Commercial Crime in the Russian Federation, 18 N.Y.L. SCH. J. INT'L & COMP. L. 357, 385 (1999) ("Generally, corruption misallocates resources, drains national treasuries of tax revenue, and allows incompetent and inefficient industries to escape the chastening rigors of the free market.")

30. For example, extraterritorial legislation prohibiting bribery could be viewed as structural. Laws establish constraints for the environment within which actors operate. Thus, laws combine with social and economic factors to influence actor behavior. For present purposes, legislation will be differentiated because it does not address the "underlying" structural problems that permit or encourage bribery. These problems, such as poverty and low public-sector salaries, are extra-legal in nature. Structural solutions erode these foundations of bribery, instead of simply prohibiting bribery itself.

At least two dynamics justify this distinction. First, eliminating the causes of a behavior may be a more potent solution than criminalizing the behavior. Second, since extraterritorial legislation bears significant costs in terms of respect for international issues and cultural heterogeneity, alternatives to extraterritorial statutes should be considered a separate and distinct option.


34. Like any extraterritorial statute, the FCPA cannot avoid some degree of legal reaching. Lucinda Low and Timothy Trenkle note, however, that the FCPA has been less aggressive in this regard than other extraterritorial U.S. statutes. See Lucinda A. Low & Timothy P. Trenkle, U.S. Antibribery Law Goes Global, Bus. L. TODAY, July-Aug. 1999, at 14, 17 ("Although enacted in an era of aggressive U.S. extraterritoriality, the FCPA was less aggressive than some of its contemporary statutes.").

aggressively against the serious problem of bribery. The tension between these two concerns leaves a tough challenge: to determine how easy, sub-optimal legislative solutions and difficult, potentially effective structural solutions should be balanced to reduce corruption, while giving due consideration to comity and appropriate respect to sovereignty, autonomy, and culture.

This article, examining ways that structural solutions can complement or supplant extraterritorial anti-bribery legislation, is part of that enterprise.

To propose sensible structural changes to fight corruption, it helps to understand corruption's causes and characteristics. Accordingly, Section I explores how bribery and corruption are affected by transaction variables, such as payment size and the motivation for payment. Section II discusses and examines the supply and demand sides of bribe transactions. Evaluating potential solutions, Section III examines the limitations of legislation in fighting bribery and corruption. Section IV makes policy recommendations, in particular noting the ways in which extraterritorial legal edict can be supplanted or reinforced by institutional change.

36. See, e.g., Philip M. Nichols, Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery, 20 Mich. J. Int'l L. 451, 454 (1999) (“The idea that transnational bribery must be controlled, and the legislation that could implement the idea, are in fact desirable policy choices. Transnational bribery constitutes a significant threat to global security. As such, its control is the right and the obligation of every polity that is able to do so.”).

37. Legislative solutions are relatively easy to implement because an official legislative body exists especially for the purpose of enacting solutions. Legislative solutions are sub-optimal because they fail to address the causes of corruption and have yet to extirpate bribery around the world.

38. Structural solutions are difficult to implement because they require sustained efforts to effect social change, a process that can consume massive resources, including but not limited to time, effort, and money. Structural solutions are potentially effective because they attempt to address the causes of corruption. In this sense, they provide the potential for more sweeping and sustainable reform.


40. This respect is largely a function of the degree to which extraterritorially applied laws are considered legitimate. For discussion of the importance of legitimacy in contemporary conceptions of international law, see generally Paul B. Stephan, The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order, 70 U. Colo. L. Rev. 1555 (1999).


42. The discussion herein will refer to both options for two reasons. First, objections to extraterritorial legislation are declining and will continue to decline in the future. See Steven R. Salbu, Battling Global Corruption in the New Millennium, 31 Law & Pol'y Int'l Bus. 47, 75 (1999). Second, even if extraterritorial legislation may not yet be appropriate and advisable, it appears to be a reality in the new millennium.
I. Transaction Variables that Affect the Nature of Bribery and Corruption

Structural solutions are predicated on the following axiom: to expunge corruption, institutions must understand its causes. A critical role for scholarship in this area is to describe, explicate, and analyze the structures that support bribery. This Section examines two critical transaction-specific factors, or micro-level variables, that determine when and why bribes are paid: the size of a bribe and the motives for a bribe.

A. Size

The following discussion suggests that the causes and effects of grand and petty bribery are not identical. While the structural foundations that support grand and petty bribery sometimes overlap, they differ in important ways. In Section IV, the differences between grand and petty bribery will be used to support an argument for limiting extraterritorial prohibitions of bribery, if adopted, to instances of grand bribery.

1. How Do Grand and Petty Bribery Differ in Cause and Effect?

The most obvious difference between grand and petty bribery is definitional—the dimension of size. While any line drawn will be arbitrary, there is a buffer zone around which grand and petty bribery diverge. A bribe valued above $1000 is relatively large; a bribe valued below $100 is relatively small. A demarcation point in the buffer zone is rationally impossible to choose, but pragmatically necessary for the purposes of this discussion. Accordingly, grand bribery will be defined as bribes valued in excess of $1000, and petty bribery will be defined as bribes valued up to and through $1000. Although imprecise, these categories parallel the prosecutorial discretion exercised to date.

Size indicates why a bribe may be sought, as well as the bribe’s social effects. Bribe scale directly influences bribe impact; the greater any bribe’s magnitude, the greater its potential negative effect. A bribe of thousands or millions of dollars is likely to entail greater economic, political, and social

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43. See Edgardo Buscaglia & Maria Dakolias, An Analysis of the Causes of Corruption in the Judiciary, 30 Law & Pol'y Int’l Bus. 95, 96 (Supp. 1999) (“It is important to identify the causes of corruption in order to design measures ... to prevent and control corrupt behavior.”).

44. “Micro-level variables” refer to aspects of bribery peculiar to any given transaction or category of transactions. Size falls in this category because any single transaction can be classified by size; moreover, transactions can be grouped by size. Motive also satisfies this definition. “Macro-level variables” refer to aspects of the government, economy, or society-at-large that affect all transactions. Globalization of free trade falls in this category because it influences all transactions.

45. Even if there are categories of bribery that can be differentiated on the basis of size or degree, the classifications must be crude, and the lines between them imprecise. This limitation exists throughout the law and must be viewed as a constraint on, not a bar to, the development of a taxonomy based on magnitude and severity.

46. See infra Part IV.A.

47. See infra notes 59-70 and accompanying text.
costs than a bribe of a few dollars or hundreds of dollars.\textsuperscript{48} The distinction, however, is not only quantitative; it is also qualitative. It is likely that there are fewer large-scale bribes paid in the world than small-scale bribes.\textsuperscript{49} If this assertion is true, it is possible that cumulative small-scale bribery—the total amount of small-scale bribes paid over a given period—could comprise a larger total payment amount than cumulative large-scale bribery.

Assume for the moment that small-scale bribery occurs more frequently than large-scale bribery and the cumulative amount of small-scale bribes equals or exceeds that of large-scale bribes. Observers still perceive large-scale bribery as more harmful than small-scale bribery,\textsuperscript{50} perhaps because of the specific nature of the transactions associated with large-scale bribery. Why does a corporate agent pay millions of dollars to a government official? Case studies consistently provide the answer: to gain a competitive advantage in contract bidding or exert some form of improper competitive influence.\textsuperscript{51} Why does a corporate agent pay a few dollars to a government official? While the motives for petty bribery are less consistent than the motives for grand bribery, it is unlikely that a motive for petty bribery is to seek illicit advantage in contract procurement. Insignificant amounts are unlikely to sway decision-makers in the granting of government contracts. The motives for petty bribery often will be as insignificant as the payments.

There are exceptions to the general rule that grand bribery has a grand impact and petty bribery has a petty impact. For example, small bribes paid to building inspectors may have significant impact. If an inspector receives a petty bribe and, as a result, approves a building despite code violations, the occupants’ safety may be compromised. Yet while grand

\textsuperscript{48} A large-scale bribe exacts greater social costs for a variety of reasons. If one considers bribery a waste of corporate resources, then a large bribe wastes more resources than a small bribe. If one views bribery as an enticement toward sub-optimal decision-making, then a large bribe provides greater enticement and is more likely to have a subversive effect. The largest, most enticing bribes encourage the most deplorable abdications of responsible decision-making.

Since a bribe, like any transaction, is subject to some level of negotiation, a larger bribe is likely to buy a larger concession. A public official probably will not divert a contract from bidder A to bidder B, potentially sacrificing the safety and quality of an important public works project, for a nominal bribe. A sizeable concession and the concomitant risk demand sizeable compensation. Therefore, the concessions granted for small bribes are more likely to be relatively unimportant, while the concessions granted for large bribes are more likely to be relatively serious.


\textsuperscript{50} See id. at 167 (finding in a survey of Australian international marketing managers that large-scale bribery is considered a more important problem than small-scale bribery).

bribes are consistently associated with major motives and consequences, petty bribes are distinct because they lack any consistently significant motive or impact.52

Cumulatively, petty bribes have a relatively insignificant impact. Because the stakes of petty bribery tend to be small, the social ramifications also tend to be small. Compare this impact to the consequences of a large-scale bribe. When a government awards a contract to build a bridge based on the biggest bribe rather than the soundest engineering plans, it is more likely the bridge will collapse and injure or kill people.53 Furthermore, when governments consistently award industry contracts to bribe-paying firms at the expense of bribe-eschewing firms, the latter are more likely to be driven from the market, despite their superior ethical stance and any other superior business attributes.54 From this perspective, grand bribery may have an undesirable "business selection" impact, where the quality of surviving firms decreases because of unbridled predation and avarice.55

The amalgamation of thousands of petty bribes is unlikely to bear such onerous consequences. Lives are less likely to be lost and superior businesses are less likely to fail as a result of petty bribery. These conclusions do not suggest support for petty bribery, establish that petty bribery is ethical, or deny that petty bribery may have serious ramifications. On the other hand, the cumulative impact of petty bribery probably does not compare to the cumulative impact of grand bribery, and given this and

52. Given these distinctions, it should be noted that "grand" and "petty" are not respectively synonymous with payments prohibited by the FCPA and payments permitted by the FCPA because tendered for "routine governmental action." See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) (Supp. 1999). Although there may be a correlation between small payment size and a motivation to receive routine government action, the two categories sometimes diverge. For example, a bidder could tender a payment of one hundred dollars, a petty amount, for tax concessions that are not "routine governmental actions," but nonetheless may be morally difficult to classify across cultures. See, e.g., Arthur L. Kelly, Italian Tax Mores, in CASE STUDIES IN BUSINESS, SOCIETY, AND ETHICS 272 (Tom L. Beauchamp ed., 4th ed. 1998).


54. See Inghie Kwik, Potential Exporters Ripped Off, JAKARTA POST, Jan. 26, 1999, available in LEXIS, News Library, JKPOST File (observing that in a corrupt system, "[i]t is simply not possible to prosper in business without compromising . . . ethics and business integrity").

55. Philip Nichols observed that in corrupt systems, suppliers get contracts because of the bribes paid, rather than product quality or reasonable costs. See Philip M. Nichols, Outlawing Transnational Bribery Through the World Trade Organization, 28 LAW & POL'Y Int'l Bus. 305, 338 (1997). From this observation, it is plausible that bribe-eschewing firms will tend to be selected out, as the loss of contracts reduces their profitability and increases the risk of an operating loss and eventual dissolution.
other dynamics discussed herein, a legitimate basis exists for treating the two classes differently. Section IV explores how this classification might affect the policies adopted to fight global corruption.\(^5\)

2. Differentiated Enforcement Rigor, Based on Bribe Magnitude

The U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC or the Commission) enforce the FCPA.\(^6\) Historically, agency enforcement activity has been very limited;\(^7\) more recently, it has been expanding.\(^8\) The DOJ and SEC seem to exercise prosecutorial discretion based on magnitudes of bribery. Although nothing in the statute's language limits the FCPA to large-scale corruption, enforcement over the life of the statute has been selective,\(^9\) focusing on substantial bribes tendered by high-ranking officers of the paying organization.\(^10\) This prosecutorial discretion suggests that law enforcement officials recognize qualitative distinctions between grand and petty bribery.

Consider a sampling of cases pursued in the 1990s. The history of implementation\(^11\) reveals that the agencies have applied the FCPA sporadically,\(^12\) with a moderate recent upsurge in investigations.\(^13\) As of 1995, U.S. agencies had prosecuted only monetary bribes, covering a wide range—from $22,000 to $9.9 million.\(^14\) Despite this broad variation, the lowest amounts still qualify as grand bribery. Prosecutorial discretion may have already established a de facto prohibition limited to instances of

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56. See infra Part IV.A.
60. See Steven Barth, An Ounce of Prevention, WORLD TRADE, Sept. 1998, at 40, 43 (observing only 16 FCPA prosecutions for bribery through 1995 and approximately 75 DOJ cases open in 1998).
61. See Marianne Lavelle, Nations Try to Match U.S. on Biz Bribe Law, NAT'L J., Jan. 20, 1997, at B1, B2 ("The law does not say but, as a practical matter, attorneys agree that big payoffs raise red flags.").
64. See James K. Lehman, Foreign Corrupt Practices Act, 7 S.C. L.J., Mar.-Apr. 1996, at 38, 38 (noting recent increased prominence of the FCPA due in part to "increased emphasis on white collar corporate investigations" by the DOJ and the SEC).
grand bribery.\[66\]

Most cases involved hundreds of thousands or millions of dollars in illicit payments. In 1994, the U.S. government charged Lockheed Corporation with FCPA violations.\[67\] In 1995, Lockheed admitted paying an Egyptian official $1 million to facilitate the sale of aircraft.\[68\] A 1996 SEC civil action against Montedison under the FCPA's accounting provisions alleged illegal payments of approximately $400 million to Italian officials.\[69\] In SEC v. Triton Energy Corp., the Commission charged Triton with making hundreds of thousands of dollars of illegal payments to improperly influence Indonesian auditors and tax officials.\[70\]

Recall that the FCPA prohibits any corrupt "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to foreign officials by designated parties.\[71\] Despite this broad language, selective enforcement to date suggests that the U.S. government focuses exclusively on infractions involving at least tens of thousands of dollars. This U.S. emphasis raises important policy questions.

First, do enforcement agencies make a principled distinction between large-scale and small-scale corruption in their exercise of prosecutorial discretion, or do they simply lack the resources to identify and pursue all violations, choosing to maximize impact by focusing on the most egregious and newsworthy cases? Second, if there is a de facto, enforcement-based limitation of the FCPA to large-scale bribery, will the enforcement agencies continue to operate under this limitation? Third, if the FCPA continues to be exclusively applied to large-scale bribes, does media coverage reflect this trend, or do the media also highlight smaller-scale bribery, providing the public with the potentially mistaken impression that small bribes are a significant statutory target?\[72\]

These issues explore one overarching question: is there any principled and widely understood policy under which the FCPA is applied exclusively to large-scale bribes? If so, concern regarding the moral imperialism of

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66. See supra notes 59-65 and accompanying text.
72. These questions are important because the potential for moral imperialism increases in cases of petty bribery. See generally Salbu, supra note 35 (discussing moral imperialism). The dangers of moral imperialism are most compelling when situations involve cultural differences—for example, the propriety of varying degrees of elaborateness of entertainment. Salient cultural differences vanish when a multi-million dollar bribe is paid to achieve a concession in the grant of a government contract.
extraterritorial legislation\textsuperscript{73} may be exaggerated, given the relatively unambiguous moral position of grand bribery.\textsuperscript{74} If there is no principled, publicized, and widely understood basis for excluding petty bribery from prosecution, then international businesspersons lack assurance that their petty transactions will be exempt from extraterritorial legislation.

This ambiguity is troublesome for international businesspersons because petty bribery is difficult to classify as corrupt or non-corrupt across cultures, compared to most large-scale bribes. First, it is not as easy to identify or ascribe a motive for many small-scale bribes.\textsuperscript{75} Second, petty bribes often take the form of gifts, hospitality, and entertainment, the appropriateness of which frequently is contingent on culture.\textsuperscript{76} Enforcement agencies are far more likely to err in ascribing motives to small foreign tributes and gratuities, which may serve legitimate local social functions not contemplated by law enforcement.\textsuperscript{77}

The risk of moral imperialism arises if businesspersons are in legal jeopardy or believe they are in legal jeopardy when they comply with relatively innocuous or socially beneficial local customs regarding petty payments or gifts.\textsuperscript{78} If a natural and rational risk-aversion causes businesspersons to reject such customs, they may offend local officials and lose valuable business\textsuperscript{79} due to an overreaching, rigid law.\textsuperscript{80} If businesspersons proceed and are prosecuted or worried about prosecution, they are penalized for exercising reasonable judgment under conditions where their behavior would be harmless under any analysis, or even acceptable or desirable in a given locale.\textsuperscript{81} Section IV explores this problem in greater

\textsuperscript{73} See supra note 72.

\textsuperscript{74} See Armstrong, supra note 49, at 167 (finding, in a survey of Australian international marketing managers, that large-scale bribery, while relatively infrequent, was considered more important than small-scale bribery and conferral of gifts, entertainment, and favors).

\textsuperscript{75} See infra Part I.B.

\textsuperscript{76} See Salbu, supra note 35, at 232-40.

\textsuperscript{77} See id. at 243-51.

\textsuperscript{78} See Alan Gersten, Ignorance is Not Excused, GLOBAL COM., Jan 15, 1997, at 1C ("For U.S. Companies—particularly smaller and new-to-market firms just venturing abroad—navigating between local customs and U.S. anti-corruption laws can be troublesome.").


\textsuperscript{80} This hypothesis grounds claims that the once-unilateral FCPA reduced the international competitiveness of U.S. companies. See Lisa Harriman Randall, Note, Multilateralization of the Foreign Corrupt Practices Act, 6 MINN. J. GLOBAL TRADE 657, 674-75 (1997) (observing, but also noting challenges to, the idea that the FCPA hurt U.S. firms due to the loss of business to foreign competitors).

\textsuperscript{81} One categorization of bribes reflects the variety of complex, ambiguous motives behind bribes generally and small bribes especially. Classifications include security payments, expediting payments, unsupported non-government payments, lawful foreign political contributions, and the catch-all category of "questionable payments." Mark Bader and Bill Shaw discuss these categories, derived from a 1970s report to the Securities and Exchange Commission. See Mark B. Bader & Bill Shaw, Amendment of the Foreign Corrupt Practices Act, 15 N.Y.U. J. INT'L L. & POL. 627, 640-41 (1983).
detail and proposes a legislative policy solution.\textsuperscript{82}

B. Motive (Greed vs. Need)

Public officials’ motivation for taking or soliciting bribes is a complex issue.\textsuperscript{83} Like other forms of human behavior, bribery can be actuated by mixed motives.\textsuperscript{84} Notwithstanding this complexity, the motivation for bribery must be explored to understand corruption and forge promising solutions.\textsuperscript{85} By identifying the functions that bribes serve, governments can structure better laws and policies to curb corruption.\textsuperscript{86}

This Section will not examine all possible dimensions of bribe-taking motivation. Instead, it illustrates a single, important motivational dichotomy: greed vs. need. Although the generalization is imperfect, greed ordinarily motivates large-scale bribe-seeking, while need frequently motivates small-scale bribe-seeking.\textsuperscript{87}

The first part of this proposition is more robust than the second. A public official who seeks a bribe of millions of dollars is not motivated by the need to feed, clothe, and house a family.\textsuperscript{88} In contrast, low-ranking public officials may be so poorly paid in some countries\textsuperscript{89} that bribes are not only tempting inducements,\textsuperscript{90} but also necessary for survival.\textsuperscript{91} This fact does not eliminate the likelihood that other public officials may be

\textsuperscript{82} See infra Part IV.A.

\textsuperscript{83} This Section focuses on bribe-taking rather than bribe-giving because the demand side of bribery has been largely ignored by transnational policy. See infra Part II. Since the FCPA and the OECD Convention are supply-side solutions, the interesting issues and untapped enforcement potential involve the demand side.

\textsuperscript{84} See Salbu, supra note 35, at 248-51.

\textsuperscript{85} See Buscaglia & Dakolias, supra note 43, at 96.

\textsuperscript{86} Bribe-taking motivation may be more complicated than bribe-giving motivation. When a payment or gratuity is corrupt, rather than a form of etiquette or protocol, the motive is usually simple; the recipient demanded the bribe, or the giver believes it will yield some advantage. As explained in this Section, motivations for bribe-taking often are more complex.

\textsuperscript{87} See Ernest Harsch, Accumulators and Democrats: Challenging State Corruption in Africa, 31 J. MOD. AFR. STUD. 31, 36 (1993) (noting that petty corruption—corruption at lower bureaucratic levels—feeds consumption and survival, not the amassing of wealth).

\textsuperscript{88} Large-scale bribes are paid for major dispensations, the prerogative of high-level public officials. Even in the poorest nations, high-level officials receive pay above subsistence levels.

\textsuperscript{89} One frequently cited example is the police in Mexico. Moskos reports that “[t]he yearly salary of a police officer in Mexico City is about $4,500, low not simply by American standards but even by Mexico’s, where the average blue-collar income is $7,900.” Charles Moskos, How to Clean Up Foreign Militaries: Subsidize and Control Their Pay and Pensions, U.S. NEWS & WORLD REP., Dec. 29, 1997-Jan. 5, 1998, at 51, 52.


\textsuperscript{91} The logical connection between poor pay for public officials and government graft has been borne out over centuries and may be an outgrowth of systems where official positions were purchased from the state or crown. See Felipe Fernandez-Armesto, So is Corruption Really Just a Vice of the Latin Nations?, INDEF. (London), Mar. 19, 1999, at 3 (observing that where public positions were purchased, office holders “had to exploit [their positions] for all they could get”).
motivated by greed in seeking relatively small-scale payments. These latter cases may be attributable to a cumulative effect; an adequately paid public official may amass a sizable discretionary income by collecting numerous small bribes.\textsuperscript{92} For present purposes, if public officials are paid a subsistence salary or higher, their motivation should be classified as greed, not need.

Corruption based on need reflects a socio-structural problem, arguably better addressed by fixing the problem than by criminalizing its effects.\textsuperscript{93} Because the motives of food, shelter, and survival are basic and compelling,\textsuperscript{94} problems of need will likely prove resistant to legal solutions that ignore the underlying exigencies. Although paying all public officials subsistence wages or better may be a daunting goal in some developing nations, achieving that goal would eliminate officials' economic need and the entire corresponding class of bribes motivated by that need.\textsuperscript{95} Indeed, Singapore's campaign to pay public officials adequate wages may contribute in part to the nation's low levels of bribery.\textsuperscript{96}

Flanders accurately classifies poverty-induced bribery as a structural problem, describing its historical context:

>[A] corrupting influence of some structural adjustment policies concerns public sector pay. Governments have often been pressed . . . to reduce borrowing by cutting the public sector wage bill. Since severance and other conditions make it hard to cut employee numbers quickly, this has often meant sharp declines in real public sector pay.\textsuperscript{97}

\textsuperscript{92} Consider, for example, Karichi, Pakistan's police chiefs, estimated by a senior official to receive an average $10,000 a month in bribes and extortion. See John Stackhouse, Pakistan Limps from Bad to Worse: Debt, Feudal Conditions Keep Country in Crisis, GLOBE & MAIL (Toronto), Nov. 9, 1996, at A1. Although police chiefs do not receive the large-scale bribes garnered by high-level government officials who have control over government contracts, they make substantial sums—amounts beyond the range of subsistence—and, therefore, are motivated by greed.

\textsuperscript{93} Corruption motivated by greed arguably may also have socio-cultural foundations. For example, one could argue that the deterioration of morals and secularization of society are systemic forces that support corruption among the greedy. Corruption motivated by greed cannot be rectified, however, by socio-economic policies that address corruption motivated by need.

\textsuperscript{94} See A. H. Maslow, Motivation and Personality 82-83 (1954) (explaining how unsatisfied physiological needs eclipse the operation of higher levels of human development, including "[f]reedom, love, community feeling, respect, [and] philosophy").


\textsuperscript{96} See Zahralddin-Aravena, supra note 26, at 755-56 (observing that in Asia, "[o]nly Singapore, having established a government agency to stop corruption and actually enforce the laws it passes, as well as adequately paying its officials, has remained free from scandal").

\textsuperscript{97} Stephanie Flanders, Clear Thinking on Corruption: Rich Countries Cannot Solve the Problem by Mere Decree, FIN. TIMES, June 23, 1997, at 10.
As noted earlier, the FCPA makes no express distinctions between grand and petty bribery. Likewise, it does not distinguish bribery motivated by greed and bribery motivated by need. The statute's prohibitions and penalties are not affected in any formal way by the size or motive of a bribe. This indifference to significant variables creates sub-optimal policy. While motive should not be distinguished formally, bribe size, a correlate of motive, should be expressly classified by legislation.

The preceding Section presented two critiques of extraterritorial legislation as applied to petty bribery: (1) the potential for moral imperialism is higher in cases of petty bribery; and (2) petty bribery is less pernicious than grand bribery, not only quantitatively, but also qualitatively. A third critique emerges from the present analysis: motivated by need, much petty bribery will resist legal controls and is better addressed by socio-structural change. In short, legislation against petty bribery risks substantial cross-cultural and transnational overreaching, while yielding few, if any, social benefits. Accordingly, U.S. laws and the multilateral arrangements patterned after those laws should be modified to distinguish between grand and petty bribery. Section IV further explains and justifies this recommendation.

II. The Supply and Demand Sides of Corruption

Corruption has a supply side and a demand side. Accordingly, there are supply-side solutions and demand-side solutions. The supply side of bribery concerns the offer or payment of a bribe. A supply-side solution discourages a prospective bribe-giver from offering or paying a bribe. The demand side of bribery concerns the acceptance of or request for a bribe. A demand-side solution discourages a prospective bribe-taker from accepting or requesting a bribe. Traditionally, legislation has focused on the supply side, perhaps in response to the difficulty of manag-

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98. Express distinctions differ from any implied distinctions that may be used unofficially by the DOJ and the SEC in enforcement of the statute. See supra notes 59-72 and accompanying text.
99. See supra Part I.A.
100. See 15 U.S.C. §§ 78dd-1 to -2 (Supp. 1999) (prohibiting any “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value”).
101. As law does not formally excuse theft actuated by need, it should not formally excuse bribery actuated by need.
104. See id.
105. See Brademas & Heimann, supra note 5, at 21 (defining the demand side as "extortion and other forms of corruption by public officials" and noting the difficulty of demand-side reforms).
ing the “country-specific” demand side of bribery.\textsuperscript{106}

The proliferation of open markets naturally correlates with increased concern regarding corruption. Free markets, transactional transparency, and anti-bribery initiatives combine into a powerful tool for fighting both the supply and demand sides of bribery.\textsuperscript{107} Historically, however, extraterritorial legislation has focused exclusively on the supply side.\textsuperscript{108} Examining supply-side and demand-side solutions to transnational bribery, this Section argues that increasing emphasis to the demand side may prove both desirable and effective.

A. Free Markets, Increased Openness, and Anti-Bribery Initiatives

The reality of globalized free trade\textsuperscript{109} takes several forms. Previously socialist or communist nations are embracing free markets, albeit gradually.\textsuperscript{110} Regional clusters of nations are making commitments to reduce impediments and national barriers to trade.\textsuperscript{111} Examples include the North American Free Trade Agreement (NAFTA)\textsuperscript{112} and the European Union’s currency convergence efforts, embodied in the euro.\textsuperscript{113}

\textsuperscript{106} See \textsc{Jeffrey P. Bialos} \& \textsc{Gregory Husisian}, \textit{The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies} 157 (1997).

\textsuperscript{107} \textsc{Bill Emmott} aptly summarizes the nexus among these modern dynamics:

\begin{quote}
If you open your country up, and choose to bind yourself closer to others, this increases your citizens' freedom of choice and of movement. Increased access to information inevitably exposes your remaining economic, social or political inequalities to scrutiny. Once people know what they are being deprived of, they start to care more about it. That brings change, and openness brings change more rapidly across your borders, wave after wave.
\end{quote}


\textsuperscript{109} \textsc{see generally Sherrill Tapsell}, \textit{One World—Ready or Not, New Zealand Mgmt.}, Feb. 1999, at 40.

\textsuperscript{110} \textsc{see Blanka Kalinova}, \textit{Trade Liberalisation in the Transition Economies, OECD Observer}, Apr.-May 1998, at 15 (observing “[t]he adoption of market-led and outward-oriented economic systems in the formerly communist countries of central and eastern Europe”).

\textsuperscript{111} These commitments include generic economic programs, as well as criminal sanctions for bribery. The European Union has been particularly effective in shaping regional and global economic policies and was influential in setting the “critical policy issues” for the OECD Convention. \textsc{see Bruce Zagaris \& Shaila Lakhani Ohri, The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas, 30 L\textsc{aw} \& Pol’y Int’l Bus. 53, 77 (Supp. 1999).}

\textsuperscript{112} \textsc{see Marc Selinger}, \textit{Briton Urges NAFTA Expansion to Eastern Europe, Knight-Rider/Trib. Bus. News}, Oct. 22, 1998, available in INFOTRAC (noting the importance of NAFTA as an adjunct to free trade and reporting British Parliament member David Davis’s recommendation that it be extended to cover newly emerging markets in Eastern Europe).

Free markets form part of a dynamic process of global transformation. They function both as causes of change and effects of larger worldwide trends. Specifically within the context of the war against corruption, growing freedom, openness, and development of markets play a natural, positive reformatory role.\textsuperscript{114}

Michael Almond and Scott Syfert discuss the interdependence of free trade, open markets, and increased concern regarding the costs of bribery.\textsuperscript{115} They explain the relationship between these trends by observing that "honesty, transparency, and fair-dealing," the hallmarks of anti-corruption efforts, are also essential to free markets.\textsuperscript{116} Governments and coalitions support openness and battle corruption because they consider these efforts essential to their own economic interests.\textsuperscript{117} Regional openness confers strategic advantage, creating competitive pressure toward global openness.\textsuperscript{118} As this Section explains, the openness and transparency of increasingly free global markets encourage rectitude on both the supply side and the demand side of the bribery equation.

B. Supply-Side Reform

Openness illuminates corrupt transactions. As Lucinda Low and Kathryn Atkinson observe, "Increasingly open markets and societies . . . invite[ ] unprecedented media coverage of corruption—be it perceived or real—that is hampering their progress."\textsuperscript{119} Within this climate, firms that embrace transparency and integrity develop a valuable asset.\textsuperscript{120} Stated most simply, these virtues attract business.\textsuperscript{121} Companies that have high standards of conduct and embrace transparency and accountability draw more international business transactions.\textsuperscript{122} Conversely, bribe-payers are more likely

\begin{itemize}
  \item \textsuperscript{114} See, e.g., Barbara Crutchfield George et al., The 1998 OECD Convention: An Imper- 
  tus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions, 37 Am. 
  organization's broader goals of "sound economic expansion and development").
  \item \textsuperscript{115} See Michael A. Almond & Scott D. Syfert, Beyond Compliance: Corruption, Corpo- 
  rate Responsibility and Ethical Standards in the New Global Economy, 22 N.C. J. Int'l L. & 
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} See, e.g., supra notes 7-14 and accompanying text.
  \item \textsuperscript{118} See Isaac Cohen, The Road to Integration, Latin Fin., Sept. 1997, (Supp.), at 7, 8 
  (relating regional liberalization of trade to the development of increasingly open world 
  trading).
  \item \textsuperscript{119} Lucinda A. Low & Kathryn Cameron Atkinson, Led by the U.S., the World Wages 
  \item \textsuperscript{120} See Skip Kaltenheuser, The Real Cost of Doing Business, World Trade, June 1997, 
  at 80 ("[C]ompanies that believe strongly in integrity and transparency build credibility 
  and reputations of excellence that ultimately attract new business and opportunities 
  worldwide."). (quoting Frank Vogl, a vice president of Transparency International).
  \item \textsuperscript{121} See Paul Blustein, Pass. Here's a Little Something That Seems to Slow Growth, 
  Wash. Post, July 17, 1996, at D1 (noting relatively high rates of investment in countries 
  with little corruption).
  \item \textsuperscript{122} See Im Hong-jae, Convention on Combating Bribery, Korea Herald, Dec. 24, 
  1998, at 6 (noting the increasing importance of transparency and accountability in the 
  global economy and observing that companies increasingly demand a "level playing field" 
  before making an international investment).
\end{itemize}
to be identified as corrupt, and therefore more likely to be shunned than ever before. The growing role of reputation in increasingly open world markets will encourage self-monitoring by businesses in information-rich cultures.

These dynamics have serious social ramifications. Individuals and firms that pay bribes in an open society eventually may be exposed, suffering reputational injury. Public disgust over corruption is escalating around the world and technology is driving rapid, widespread dissemination of information, fueling public ire. From a public policy standpoint, reputational harm to individuals or companies is becoming an increasingly potent incentive to conduct global business with integrity.

These long-term dynamics discourage companies from offering and paying bribes and help counteract the competitive advantages of bribe-paying in individual transactions. Moreover, the weight of extant extra-territorial laws reinforces naturally occurring open-market incentives, at

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123. See Jayne W. Barnard, Reintegrative Shaming in Corporate Sentencing, 72 S. Cal. L. Rev. 959, 968 & n.34 (1999) (noting the effect of shame and reputational harm in business contexts where bribes are given). Once openness and transparency facilitate identification of corrupt transactions, the bribe-payer's reputation for rectitude suffers, and other firms incorporate this factor into their decision-making when they evaluate partners for collaboration, trading, and other business transactions.


127. See A. Timothy Martin, The Development of International Bribery Law, 14 Nat. Resources & Env't 95, 102 (1999) ("The increasing speed and availability of global communication (e.g., CNN and the Internet) have resulted in growing dissatisfaction in many countries with . . . corruption."); Gary Andrew Poole, Despots Find Dissidents on Internet Hard to Muzzle, USA Today, Jan. 26, 1999, at 15A (reporting Internet grassroots protest movements against corruption in various countries).

128. See Montagnon, supra note 125, at 7 (noting "an upsurge of public revulsion against corruption," as well as the negative effect that Internet campaigns can have on a corporation's image).

129. While reputational dynamics are an effective market force discouraging bribery, there are other market factors; for example, bribe-givers risk the possibility that courts will refuse to honor bribery-corrupted contracts. See Harald Schützer, The Risks of Bribery in Business: A Brief Overview of the Judicial Effects of Bribery on the Main-Contract in Germany, England and Spain (Transparency Int'l Working Paper, Mar. 18, 1999) <http://www.transparency.de/documents/work-papers/validitycontracts.html>.

130. In addition to receiving individual contracts, bribe-payers may also benefit in individual transactions by purchasing entry barriers to be imposed on competitors. See Pinaki Bose, Industrial Licensing, Bribery and Allocation Efficiency, 47 Bull. Econ. Res. 85, 85 (1995) ("In less developed countries where an individual licensing policy governs the entry of new firms, and when government officials awarding these licenses are corrupt, an incumbent firm may deter entry by bribing the official to deny the license.").
least on the supply side. On the supply side, law harmonizes with structural change, providing a mutually supportive public-policy web that combats corruption. As discussed in the following Section, open-market dynamics also discourage demand-side bribery, but no complementary legal sanctions exist.

C. Demand-Side Reform

As with the supply side of bribery, the proliferation of free markets worldwide is also likely to have a healthy preventive effect on the demand side of bribery—the public officials who may be tempted to request or accept illicit payments. Companies engaged in bribery are not the only victims of campaigns against corruption. Countries where corrupt officials thrive also are likely to suffer reputational harm. Foreign investors avoid opportunities in nations like China, where bribery of public officials flourishes. Accordingly, countries seeking to encourage investment have an incentive to explore openness reforms. Each iteration of market freedom operates as an agent of change, encouraging others to join the trend. At the same time, each iteration of market freedom results from the existing, freely-competitive forces. Consequently, a cycle of ever-growing reforms moves toward greater freedom, openness, and transactional rectitude worldwide.

131. See, e.g., The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78 dd-1 to -2 (Supp. 1999) (prohibiting the payment, but not the receipt, of bribes); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (operating against supplying bribes, not against demanding bribes). For the reasoning behind the OECD's supply-side orientation, see OECD Bribery Convention, MIDDLE E. EXECUTIVE REP., Dec. 1998, at 9 ("The OECD said that it seemed logical to start with the 'supply' side of bribery because OECD multinationals are the largest exporters of trade and investment in the world, representing by far the greatest potential source of bribe money.").


134. See James Cox, Asia Shakes Up Cozy, Corrupt Business Practices, USA TODAY, Jan. 28, 1998, at 4B (reporting that financial markets have punished governments that cannot demonstrate transparency and fairness in transactions).


136. While this process makes sense in theory, its practical realization will take time. Cynthia Kemper notes, for example, "Democracy and economic reform were supposed to have catalyzed the elimination and temptation of bribery worldwide. But new reports over the last year show corruption is far from dead." Cynthia Kemper, Old-Fashioned Bribery is Alive and Well in New Global Businesses, DENVER POST, Apr. 20, 1997, at H5. This lag is hardly surprising; it is highly implausible that natural market incentives toward open, honest dealing would have an immediate universal effect.
This result stems from the axiom that free and open markets are inter-
dependent and mutually reinforcing.137 Reducing border impediments
and permitting capitalists to operate without restriction ultimately will
unify market economies around the world.138 When this happens, market
forces will become global factors, less regional or national in scope.139
Barry O'Keefe accurately describes the effects of this change on the per-
spective of companies and countries regarding bribery:

Many governments are recognising that if they want their countries to
develop and secure long term economic growth by attracting foreign invest-
ment, accessing loans for government projects and the expansion of their
own local industries so that they can compete on the international market,
they need to be able to demonstrate that they are making significant efforts
to fight against corruption at all levels, and to develop an environment in
which a high standard of ethics and bureaucratic efficiency can be
expected.140

Systemic anti-corruption efforts are thriving due to these competitive
dynamics. These efforts are evident in the recent transparency initiatives
that support demand-side reform.141 Imposing transactional candor on
public officials creates a powerful tool with enormous potential to promote
change. This potential derives from the nature of public posts. Public offi-
cials work in arenas subject to influence by public opinion.142 Accord-
ingly, when institutions are transparent and public accountability thrives,
public officials are susceptible to threats and incentives.143

137. This interdependence has serious ramifications. President Clinton remarked
that "as the world grows more interdependent, it is unrealistic to think that there will be
an international economic policy with rules unrelated to an emerging international consen-
sus on the environment and an international consensus on labor." Clinton Says Fail-
ure to Launch Trade Round Due to 'Real Differences', AFX EUR. FOCUS, Dec. 9, 1999,
available in LEXIS, World Library, ALLWLD File.

138. For example, Roy MacLaren notes that "transatlantic free trade could revitalize
the totality of the global system—and begin the critical process of bridging potentially
exclusionary blocks." Roy MacLaren, Canada Calls for a Giant Transatlantic Free Trade
Bloc, 9 CAN. SPEECHES No. 3, June 1995, at 29, 30.

139. See, e.g., Alex Brummer, Hey, Big Spender, Guardian (London), Jan. 21, 1998, at
15 (noting interdependence of nations in a global economy, such that Asia's problems
become Britain's problems).

140. Barry O'Keefe, Under the Table or Above-Board?: Responding to International Cor-

141. See infra notes 146-47 and accompanying text.

142. The extent to which public opinion influences officials varies substantially. In
free-market economies supported by democratic political institutions, public opinion
significantly influences officials. In contrast, public opinion has less influence over
public officials in dictatorships and totalitarian states. If public officials' behavior in
dictatorships is open and transparent, however, the threats of political instability and
uprising can have some effect on how public officials behave. Accordingly, if post-Cold
War trends continue to move toward more open and democratic markets, more nations
will fall under the influence of meaningful rather than ineffectual courts of public
opinion.

143. See A Global War Against Bribery, Economist, Jan. 16, 1999, at 22 ("[T]o the
extent that corruption is the abuse of public office for private gain, its perpetrators have
one foot in the legitimate world; they are thus within reach of incentives or threats—such
as removal from office—that may persuade them to change their ways.").
Consider, for example, Transparency International's drive to establish so-called "bribe-free zones," or "islands of integrity"—places where public commitments are made to eschew paying or receiving bribes. Ancillary commitments to maintain open transactional records, potentially scrutinized by journalists, help preserve integrity and expose violators. Transparency discourages bribe-giving because exposure imperils future participation in public contracting processes with any country demanding transactional transparency. Perhaps more importantly, public exposure discourages bribe-taking because revelation of corruption threatens government officials with removal from office and criminal prosecution under domestic laws.

These observations suggest three propositions. First, natural economic forces in free, interdependent global markets create a strong incentive for countries and companies to address internally the problem of transnational bribery. Accordingly, the movement toward globalized free trade effects a structural change that fosters anti-corruption reforms, even without legislation. Second, growing interdependence, particularly in regional or affinity-based free-market alliances, will weaken objections to global anti-corruption initiatives, even legislative solutions. Free markets encourage cross-fertilization of national and cultural ideas, attitudes, norms, beliefs, and value systems. As this trend leads gradually to

144. Transparency International is an anti-corruption coalition with chapters worldwide. Supported by corporations, government, and academics, it engages in research to understand and eliminate bribery globally. See Michael Kantor, Remarks (July 25, 1996), in Remarks of Secretary of Commerce Michael Kantor, FDCH Fed. Dep't & Agency Documents, available in LEXIS, News Library, FEDDOC file, at 8-9.


147. See Who Will Listen, supra note 145, at 52.

148. See TRANSPARENCY INT'L, supra note 146, at 81 (describing effective public information programs, built on transparency, as sending the message that corrupt officials will be dismissed).


150. Internal action refers to domestic transparency procedures, and perhaps also domestic sanctions for corrupt practices. Focus on internal reform implies that market pressures provide countries with substantial incentives to monitor domestic activities, making extraterritorial legislation unnecessary.

151. See Paul Blustein, IMF, World Bank Target Third-World Bribery, WASH. POST, Oct. 4, 1996, at D3 ("A growing number of political leaders, scholars and activists—in both industrialized and poor countries—are condemning bribery, not only as morally wrong but as a severe impediment to economic progress.").

152. This cross-fertilization may be especially important in the areas of corruption and anti-corruption norms. Claire Moore Dickerson states, "Corrupt behavior... takes on a life of its own, and can infect and destroy an existing honesty norm." Claire Moore Dickerson, Political Corruption: Free-Flowing Opportunism, 14 CONN. J. INT'L L. 393, 393 (1999). Given this relationship, the effect of free markets on corruption could
global convergence,\textsuperscript{153} anti-corruption initiatives will incorporate transnational concessions forged by global interdependence and alliance. Finally, legislative reforms can and should reinforce the structural reforms occurring worldwide in response to open markets. If multilateral laws such as the OECD Convention become advisable,\textsuperscript{154} legislators should adopt demand-side prohibitions of bribe-taking to complement extant supply-side prohibitions of bribe-giving.

III. Limitations of Legal Edict in Combating International Bribery and Corruption

A. Conceptual Problems with Fighting Bribery by Legal Decree

If corruption is firmly rooted in institutional foundations, fighting it by legal decree is naive. Legal sanctions for corrupt behavior do not address the entrenched political, social, and economic causes of corruption.\textsuperscript{155} Where the causes of bribery remain intact, some bribe-payers and bribe-takers will consider criminal prosecution a necessary risk—for example, to avoid poverty.\textsuperscript{156} Moreover, the risk may be minimal because law enforcement agencies worldwide are unlikely to have the resources to identify and effectively prosecute even a fraction of the typically covert violations.\textsuperscript{157} Logistical difficulties peculiar to investigating violations of U.S. law abroad\textsuperscript{158} exacerbate this constraint on prosecution.\textsuperscript{159} It is not surpris-
Individual prosecution is a scattershot solution in comparison to social change. In contrast, institutional reform uniformly alters behavior throughout society. While social change will not expunge all corruption, behavior eliminated by social reforms is removed systematically, both root and branch.

In short, extraterritorial legislative solutions have proven ineffectual and unwieldy. While some legal sanctions may have a limited positive effect, meaningful reform will more likely result from "structural adjustments." Laws cannot completely address corruption embedded in a nation, its institutions, and its social systems.

B. Experiences Affirming the Conceptual Limitations of Legal Decree

To this point, it has been posited that legislation cannot effectively curb bribery. Anecdote and experience support the speculation that the FCPA and other domestic forms of legislation have been ineffectual. Consider

160. See, e.g., Kimberley Music, Proposal Being Readied to Help Firms Compete Overseas While Obeying U.S. Anti-Bribery Laws, OIL DAILY, Sept. 10, 1996, at 1 (noting the belief of an oil industry source that the FCPA "doesn't reduce corruption in the foreign countries").

161. Consider, for example, a recent report that 594 corruption cases are presently pending in Indonesia. See Government Steps Up Anticorruption Drive, JAKARTA POST, July 7, 1999, available in LEXIS, News Library, JKPOST File. Criminal bribery laws are applied on a case-by-case basis—an expensive process that likely misses many prosecutable infractions.

162. See Jacoby et al., supra note 159, at 218-19 ("If the United States seriously intended to enforce a criminal statute outlawing foreign political payments, it would need to establish a massive surveillance of the foreign activities of U.S. citizens as well as of foreign politicians and government officials."). As an illustration of the unwieldy, imprecise, and potentially abusive nature of legislation's implementation in the courts, consider this description of Hong Kong practice:

The authority to prosecute is reserved to the attorney general, and only a court can determine guilt. Yet this protection is incomplete. ICAC literature boasts that many persons have been punished even when there has been inadequate evidence to prosecute. "What are the corrupt like in Hong Kong?" it asks. "Over the years the ICAC has uncovered thousands, with the majority of them eventually brought to justice in the courts. Those who could not be prosecuted for reasons such as insufficient evidence were quickly flushed out of the public service by disciplinary action to prevent them from doing more damage to society."

Max J. Skidmore, Promise and Peril in Combating Corruption: Hong Kong's ICAC, ANNALS AM. ACAD. POL. & SCI., Sept. 1996, at 118, 126 (alteration in original). The author further observes, "ICAC's power to search, seize, and compel suspects and witnesses to divulge information are far in excess of what is customary in liberal democracies." Id. at 125.

163. See Bruce L. Barker, Back Doors to Profit, WASH. POST, Oct. 4, 1999, at A22 (stating that the FCPA has "failed in its mission" and observing that expatriate executives "routinely flout" it).

164. See Flanders, supra note 97.

the following colorful description of Indonesia's business environment, where observers view corruption as entrenched:

The business environment in Indonesia can be described as a giant jelly that traps wealthy businesspeople but sucks out any business ethics, integrity, honesty and morality that they possess. Once they get in the jelly, life becomes very convenient. But the problem is, the longer they stay in, the more contaminated they become.

... Even blue chip U.S. companies that are supposedly regulated by the strict code of the Foreign Corrupt Practices Act cannot overpower the force of the jelly.166

While domestic anti-bribery laws167 are ubiquitous,168 the practice of bribery has obstinately remained.169

A sample of research findings170 confirms the ineffectiveness of anti-bribery legislation.171 Only a minority of companies surveyed by Mary Jane Sheffet instituted formal changes in response to the FCPA and subsequent amendments.172 Moreover, according to a recent survey by London risk consultant Control Risks, "[m]ore than 90 per cent of US company directors believe their competitors occasionally or regularly use middlemen to circumvent anti-corruption legislation in competing for contracts in developing countries."173

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166. Kwik, supra note 54.
170. In addition to research documenting the general ineffectiveness of the FCPA, research exists documenting factors associated with noncompliance. See, e.g., Pekin Ogan, Predicting Noncompliance with the Foreign Corrupt Practices Act, 14 Bus. & Prof. Ethics J. 65 (1995).
171. But see Philip M. Nichols, Regulating Transnational Bribery in Times of Globalization and Fragmentation, 24 YALE J. INT'L L. 257, 289 n.171 ("The argument that the Foreign Corrupt Practices Act is ineffective because it has not curtailed bribery worldwide merits almost no response. The majority of transnational transactions do not involve the United States or U.S. businesses. The Foreign Corrupt Practices Act cannot be expected to reach those transactions."). Nichols's contention does not address, however, the high incidence of bribe payments by U.S. firms, see infra notes 174-79 and accompanying text, or the ineffectuality of legislation generally, as suggested by the proliferation of corruption worldwide despite universal domestic anti-bribery laws.
173. Montagnon, supra note 125, at 7. Use of middlemen does not exonerate a firm from liability under the FCPA, which extends to acts perpetrated by the firm's agents. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. 1999). Presumably, using middlemen may still help companies circumvent the law by making violations more difficult to trace.
If both the FCPA and domestic laws in foreign countries have failed to have any serious impact on bribery, is there any reason to assume that additional legislation would have a greater effect? The possibility exists that corruption's robust structural underpinnings render the problem, at least under certain conditions, resistant to legal controls. This assertion does not suggest that laws are entirely ineffectual in combating bribery. Rather, law serves a very limited role and the limitations of statutes need to be understood and incorporated into public policy. The most likely benefit of legislation is convincing the world that bribery and corruption are serious problems. The FCPA and the OECD Convention probably have symbolic value: they heighten global awareness of corruption. Otherwise, their role in effecting social change is questionable.

174. Timothy Martin describes domestic laws as “often confusing and sometimes even contradictory” and applied “arbitrarily and inconsistently.” Martin, supra note 127, at 102. The effectiveness of legislation such as the FCPA can never be proven because controlled experimentation cannot be done. Any experiment would need to compare global corruption in the world with and without anti-bribery legislation. In reality, these worlds are mutually exclusive, so no controlled context exists for comparison. Accordingly, declines in corruption during the life of legislation could not be attributed to the statutes because any comparison cannot control for extraneous variables, such as pressure from private watchdogs and increased effectiveness of reputational pressure. Similarly, if corruption levels remain constant or grow after the enactment of legislation, no conclusion can be extrapolated that the legislation is ineffective. Once a state passes legislation, no one will ever know what the trends in bribery would have been absent the law.

175. One can argue that the FCPA yielded relatively poor results because it has been only a unilateral effort until recently. Under this theory, U.S. companies resisted the legislation because of the competitive dynamic created by unrestricted foreign companies. If this premise is true, then the multilateralization of the FCPA will reduce those competitive pressures, thereby improving legislative compliance. This result would render the concept of extraterritorial legislation potentially more effective.

While this alternative theory is not only plausible but also somewhat appealing, it is limited. Logically, at least some of the resistance to legislation is due to the structural inadequacies of legal solutions. Furthermore, even if full multilateralization of the FCPA would improve compliance, universal adoption is unrealistic in the foreseeable future.

176. See George C. Greannas & Duane Windsor, The Foreign Corrupt Practices Act: Anatomy of a Statute 53 (1982) (noting conclusion of the Ford Administration task force that a criminal anti-bribery law would play the limited role of “policy assertion” because it would be difficult or impossible to enforce).

177. For a good, detailed discussion of these limitations, see Jacoby et al., supra note 159, at 215-20.

178. See Nigel Page, Consensus for Zero Tolerance, Fin. Times, June 25, 1999, at 8 (acknowledging the dearth of prosecutions under the FCPA and suggesting that the OECD Convention may at least have the benefit of prompting companies to monitor employees).

IV. Policy Implications and Recommendations

The preceding Section suggested that legal sanctions for bribery have been largely ineffectual in the war against corruption. This failure may not be the only shortcoming of using legal edict. Extraterritorial criminalization of bribery also exacts significant social costs, including moral imperialism and transnational friction. While the world is approaching the day when legislation may be desirable, that day has not arrived.

Although a multilateral FCPA may not currently be advisable, it is a political reality. Accordingly, some of the following policy recommendations seek to reduce the negative by-products of anti-bribery legislation by refining or otherwise improving the laws. Building on observations from Section I, one important refinement of existing legislation would mitigate moral imperialism: restricting the scope of extraterritorial criminal legislation to grand bribery. Building on Section II’s analysis, a further improvement would modify legislation and public policies to address the demand side of the corruption equation.

A. If Adopted Globally, Extraterritorial Legislation Should Apply to Grand Bribery, But Not Petty Bribery

On its face, the FCPA does not distinguish between grand and petty bribery. The cases prosecuted to date, however, are all relatively large-scale bribes, ranging from tens of thousands to millions of dollars. Enforcement for lesser violations is almost non-existent.

This history of prosecutorial discretion, however, is not binding; it is simply past practice. The legislation remains facially enforceable against all magnitudes of bribery, and it has potential effects on actors making or considering making small payments, or tendering small gifts, gratuities, meals, and entertainment. Theoretically, the FCPA can be applied to those small-scale items that are most difficult to categorize as either legit-

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182. See Salbu, supra note 42, at 75-78.
183. See Hotchkiss, supra note 126, at 108 (noting that, despite criticism, more countries are likely to enact FCPA-style restrictions); Nichols, supra note 171, at 259 (“[T]he prevailing climate favors the criminalization of transnational bribery.”).
184. See supra Part I.A.2. As noted earlier, the line between grand and petty bribery must ultimately be arbitrary, but is fixed for discussion purposes at $1000. See id.
185. See supra notes 59-70 and accompanying text.
186. The effect on actors who tender payment is possible prosecution.
187. The effect on actors who consider but ultimately reject tendering payment is complex. It includes a chilling effect on legitimate behavior, potential loss of business, potential alienation of public officials, and potential injury to international relations via the systematic alienation of public officials.
188. See Joongi Kim & Jong Bum Kim, Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act, 6 Pac. Rim L. & Pol’y J. 549, 578 (1997) (observing that “given the expansive nature of the FCPA,” gifts or payments of tokkap—traditional Korean gifts of hospitality or gratitude—to Korean officials are likely to be actionable).
In the world of international business, where pluralism is touted and prized as a key to success, transnational anti-bribery legislation can place a businessperson in an untenable position. Risking violation of the criminal laws in their own country, businesspersons must correctly assess the legitimacy of apparently reasonable, or at least plausible, fees demanded or requested by a public official in a host country. This conflict will cause the risk-averse to act conservatively, moderating their behavior to ensure compliance with legislation. The conservative actor may reject the tendering of legitimate payments because of differences in culture and customs and difficulties categorizing payments under the relevant legislation. Unfortunately, the overreaching of extraterritorial laws creates moral and political hazards for international businesspersons.

The hazard of moral imperialism is more pertinent to petty bribery than grand bribery. Extreme cases of grand bribery illustrate this proposition. It is not controversial to identify as corrupt the highest payment prosecuted through 1995 under the FCPA, a $9.9 million kickback; opinions around the world are unlikely to differ. That lavish payment could not serve any of the potentially legitimate social functions that justify smaller payments, such as expression of gratitude and loyalty, symbolic expression of transactional compatibility, entertainment, hospitality, etiquette, and protocol. A grand bribe payer, regardless of country or culture, knows that the payment is illegal and violates universal norms.

Compare the recent practice in China where thirty-eight Beijing McDonald's outlets were subject to minor "fees for . . . river dredging, flower displays on public holidays, and the spiritual well-being programme of President Jiang Zemin." Like many smaller-scale assessments, the fees' legitimacy is more ambiguous to a prospective payer than more blatant large-scale bribes. While a multi-million dollar bribe cannot reasonably serve many legitimate government or social functions, the opposite holds true for lesser bribes—the smaller the bribe, the greater the array of legitimate purposes it may serve.

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189. See supra text accompanying note 72.

190. See Anil Gupta & Vijay Govindaranjan, Mastering Global Business—Success is All in the Mindset, Bus. Day (S. Afr.), May 17, 1999, at 2 ("Companies that want to operate globally must . . . open themselves to cultural diversity . . .").

191. George Greanias and Duane Windsor explain that this assessment is so difficult because what constitutes an acceptable, customary payment in one culture may be considered corrupt in another culture. See GREANIAS & WINDSOR, supra note 176, at 129-30.

192. See Martin, supra note 65, at 425.

193. For discussion of these legitimate functions, see Salbu, supra note 35, at 235-40.


195. Montagnon, supra note 125, at 7.

196. See JACOBY ET AL., supra note 159, at 221 (discussing early rejections of multilateral anti-bribery agreements because of the difficulty distinguishing criminal payments and proper fees).
The situation is even more complicated because legitimate functions may be mixed with illicit purposes\textsuperscript{197} and the two may be virtually impossible to distinguish.\textsuperscript{198} Rather than untangle a complex alien socio-economic structure, a businessperson may err on the side of caution, in situations where payment would have ultimately proved legal and ethically defensible. At the extreme, the individual may decline to conduct business in the country. From a policy perspective, either behavior pattern is undesirable.

The size of the payment demanded is a critical factor in deciding when governments should regulate a particular behavior. In the China example, it would be reasonable for an outsider to believe that nominal or even moderate fees for river dredging are imposed legitimately via franchise assessments. As the fees grow, however, the plausibility of public approval for the scheme diminishes.

In this context of uncertainty, applying extraterritorial criminal sanctions against petty bribery is troublesome. Does a U.S. business have to second-guess how China raises revenue for the dredging of rivers?\textsuperscript{199} How does a U.S. businessperson evaluate whether government-sponsored spiritual well-being programmes are an officially sanctioned, lingering vestige of China's Cultural Revolution?\textsuperscript{200} World leaders are demanding recognition that legitimate government functions need not be identical across cultures.\textsuperscript{201} Yet by demanding extraterritorial exercise of power, current multilateral anti-bribery conventions undermine this end.

In sum, ethical ambiguity regarding payments is disproportionately the domain of petty bribery. This conclusion suggests that initiatives such as the OECD Convention, modeled after the Foreign Corrupt Practices Act, are less objectionable when applied only to large-scale bribery. Since smaller-scale payments, tokens, gratuities, and hospitalities are difficult to characterize with certainty as either corrupt or innocuous across cultures,\textsuperscript{202} prosecution of petty bribery substantially heightens the risk of moral imperialism.

\textsuperscript{197} For example, commissions may be legitimate, but if excessive, they can also be tainted. See Basche, supra note 79, at 12.

\textsuperscript{198} See John T. Noonan, Jr., Bribes 687 (1984) (noting the absence of satisfactory criteria for distinguishing bribes from the many reciprocal exchanges that are accepted as legitimate).

\textsuperscript{199} One might suggest that prudent businesspersons learn about the cultures in which they plan to conduct business. Despite the wisdom of this recommendation, even a careful, informed expatriate cannot avoid ambiguities in an unfamiliar culture. Since small fees may be demanded without warning and under threat of immediate action for noncompliance, research can never be sufficiently thorough.

\textsuperscript{200} See Mary Lynne Calkins, Censorship in Chinese Cinema, 21 Hastings COMM. & ENT. L.J. 239, 271 (1999) (noting that "spiritual clean-up campaigns" are associated with China's Cultural Revolution and are "characteristic of Chinese politics").

\textsuperscript{201} See Tyler Marshall & Jonathan Peterson, Clinton Enjoys Having Catbird Seat, L.A. Times, June 22, 1997, at A8 ("We are not holding a competition for the best [economic] model. . . . We define our own model." (quoting Jacques Santer, European Commission President)).

\textsuperscript{202} See Salbu, supra note 35, at 248-51.
In addition, recall earlier observations that (a) extraterritorial anti-
bribery legislation has failed to end or substantially curtail global corrup-
tion\textsuperscript{203} and (b) small bribes may be substantially less pernicious than
large-scale bribes.\textsuperscript{204} Considered in context with a heightened risk of
moral imperialism and international discord, these observations suggest
that extraterritorial legal sanctions against petty bribery yield few social
benefits while imposing potentially serious social costs.

B. Legislation and Public Policy Should Address the Demand Side of
Bribery

Bribery requires two people—a payer and a recipient. These parties respec-
tively form the supply and demand sides of corruption.\textsuperscript{205} The FCPA
imposes legal sanctions exclusively on the supply side.\textsuperscript{206} Modern vari-
ants of the FCPA, such as the OECD Convention, perpetuate this traditional
focus on supply instead of demand.\textsuperscript{207}

This emphasis on the supply side may reflect nothing more than prag-
matic concerns of implementation and enforcement,\textsuperscript{208} including the limi-
tations of jurisdiction and precepts of comity. While the United States has
the power to control the global behavior of U.S. firms and their agents,\textsuperscript{209}
ordinarily it lacks power over the behavior of foreign officials.\textsuperscript{210} As a
result, it is easier to control supply than demand through extraterritorial
legislation.\textsuperscript{211}

Unfortunately, the FCPA's exclusive focus on the supply side may
ignore the more pressing problems of the demand side of bribery transac-

\textsuperscript{203} See supra notes 176-79 and accompanying text.
\textsuperscript{204} See supra notes 46-55 and accompanying text.
\textsuperscript{205} See Daley, supra note 103, at 10 (referring to bribery in terms of supply and
demand sides).
\textsuperscript{206} The FCPA applies to groups of potential payers, such as issuers of securities;
domestic concerns; and officers, directors, employees, agents, and stockholders of issu-
ther, the statute only prescribes "an offer, payment, promise to pay, or authorization of
the payment of any money, or offer, gift, promise to give, or authorization of the giving
of anything of value" to enumerated recipients. Id.
\textsuperscript{207} Skip Kaltenheuser, Go As You Pay: An International Attack on the Business of Bri-
\textsuperscript{208} See Ben Richardson & David Murphy, Graft Battle Begins at Home, S. CHINA
MORN. Posr, Jan. 31, 1999, at 3 ("[The OECD] decided to do what we could do, which
is to tackle the supply side." (quoting Enery Quinones, lead counsel for the OECD's
anti-bribery unit)).
\textsuperscript{209} See Brown, supra note 39, at 417 (noting the extent of the U.S. government's
extraterritorial reach under the U.S. Constitution).
\textsuperscript{210} See JACOBY ET AL., supra note 159, at 242 (describing the lack of U.S. power and
influence over foreign governments' activities).
\textsuperscript{211} Transnational laws that attack the demand side of bribery are feasible, but juris-
dictional impediments create additional hurdles that are not applicable to supply-side
legislation regulating domestic firms. Outlawing foreign officials' acceptance of bribes
would require multilateral treaties that confer the necessary jurisdictional authority.
However, these efforts would prove frustrating. Those nations that would participate in
that kind of treaty arrangement would probably be committed to fighting corruption,
making extraterritorial intervention unnecessary. In contrast, those nations that refuse
to participate may lack a commitment to fight transnational corruption.
Many, if not most, instances of corruption may be initiated by public officials' demands, not offers by prospective payers. This possibility suggests that the recipient often is the more egregiously culpable party. It also suggests that focusing on the recipient may more effectively deter corruption because it addresses a direct cause of many violations.

Furthermore, recipients are the likely inventors of elaborate systems of subterfuge to mask the nature of illicit payments. In China, for example, the practice of "sign flipping" or "pocket swapping" consists of primary government agencies creating subsidiary agencies that charge clients facilitation fees for work with the primary agencies. It is difficult for foreign actors to ascertain when these schemes are legitimate and when they conceal garden-variety bribery. Therefore, placing a legal onus on bribe-takers may be the most promising legal approach to piercing transactional subterfuge and achieving meaningful reform.

Legislative focus on the supply side could change in the future, under the auspices of the Inter-American Convention Against Corruption (IACC or Convention) recently drafted by the Organization of American States (OAS). Signatories of the IACC commit to criminalizing transnational bribe-giving. Departing significantly from the FCPA model, the IACC also contains an "illicit enrichment" provision that would criminalize the demand side of bribery. However, the IACC permits signatory states to opt out of the illicit enrichment provision. The United States is expected to opt out, and it is currently unknown how many other signatory


213. While speculative, this statement is probably accurate. Bribery descriptions frequently refer to the demands of officials. See, e.g., Chinese Ponder Corruption Probe, Fin. Times, Oct. 31, 1985, at 4 (noting that "many potential partners or officials [in China] expect ] gifts and other kinds of kick-back as contracts are negotiated").

Moreover, since officials have the transactional power-advantage over contract bidders, it is likely they would be more comfortable broaching the sensitive subject of bribes. Since the person soliciting bids sets the formal bidding process, it also seems likely the solicitor would set the unofficial rules.

214. Bribery has both direct, immediate causes and systemic, underlying root-causes. The latter, which include poverty and underpaid public officials, are important factors that affect the proliferation of corruption in particular countries. A demand from a public official is not an underlying or systemic cause. Rather, it is a symptom of institutional problems. Nonetheless, in a legal system that primarily addresses these symptoms by criminalizing bribe payment, ignoring bribe-takers leaves a practical enforcement gap.


218. See Inter-American Convention Against Corruption, supra note 216, art. VII, 35 I.L.M. at 730.


220. See id. arts. VIII, IX, 35 I.L.M. at 730-31.
nations will follow suit.  

Although the demand side of bribery has proved resistant to extraterritorial legislative authority, it may be susceptible to less formalized reform of social structures and supporting institutions. Altering the business environment to discourage demands for bribes will not be easy. Part of the challenge derives from the intransigent nature of certain structural problems that underlie corruption. Low public-sector salaries, for example, bear some relation to increased corruption, especially with low-level officials. Yet low pay may be difficult to rectify, if symptomatic of prevailing poverty in a developing nation. Suggesting higher pay for officials would be tantamount to suggesting that the answer to bribery is the elimination of widespread poverty.

While challenging, raising salaries in poor nations is not an insurmountable goal. Theoretically, states could rechannel bribe funds into officials’ salaries, transforming the payments into sanctioned forms of compensation. In practice, the problem is not a lack of capital; after all, bribes cannot exist without the presence of discretionary resources. Even bribes that take non-monetary forms such as gifts, services, and entertainment must be financed by discretionary cash influx that could be diverted to legitimate channels. The problem is the informality and inequity of rules that govern distribution of bribes. Transactional fees levied fairly and equitably could increase public officials' salaries to acceptable levels without simultaneously replicating bribery's corrupt side-effects.


226. See JACOBY ET AL., supra note 159, at 246.

227. In countries where official salaries are low and bribery rampant, companies already pay illicit fees to gain some form of advantage. If fees were levied officially and distributed to government employees in bribe-sensitive positions, the officials’ poverty would diminish, with a corresponding reduction in need-based incentives to demand bribes.

228. The example of transactional fees is simply illustrative of the general point. Some people may object to new official transaction costs on transnational commerce.
Conclusion

FCPA-style legislation will spread globally in the coming decade, as nations enact laws to comply with multilateral accords such as the OECD Convention and IACC. These laws are imperfect at best and bear substantial costs. Applied to petty bribery, extraterritorial legislation is especially undesirable. In regard to small payments, three factors tarnish the legislation: it is ineffective, it is subject to moral imperialism, and it addresses a qualitatively less pernicious form of corruption. Accordingly, while extraterritorial legislation initiatives appear to be an unavoidable reality, their restrictions should be confined to grand bribery, however ultimately defined.

Furthermore, extant legislation has focused exclusively on the supply side of bribery. Yet a large segment of international bribery is likely spurred by public officials' demands, rather than spontaneous offers by executives bidding on public contracts. This situation suggests that legal solutions to international corruption will be more effective if they contain demand-side provisions, such as the optional provision included in the IACC.

Finally, although legislative solutions currently appear to be unavoidable, they may be inferior to institutional reforms that work to erode the foundations that support corrupt practices and regimes. Future research should emphasize this systemic change, particularly examining structural causes of corruption, including "weak political institutions, excessive use of patronage and nepotism, lack of accountability, low public sector salaries and general economic weakness" as well as "inadequate management controls and lack of adequate technology for monitoring, poor recruitment and selection procedures (including nepotism), poor working conditions and facilities, lack of public information, and generally inadequate capacity to meet the demand for government services." Ultimately, legislative solutions that ignore these fundamental underpinnings of corruption will be doomed to failure.

Yet those fees are better than bribes because they do not distort decision-maker judgment or create unfair playing fields.


230. See supra note 165 and accompanying text.

231. Bosworth-Davies, supra note 17, at 6.