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The Foreign Corrupt Practices Act and Progeny: Morally Unassailable

Bill Shaw*

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Introduction

While opponents avow that the Foreign Corrupt Practices Act\(^1\) is morally assailable, a growing number of supporters believe that the U.S.-led effort to reduce corruption in the global economic arena is a positive initiative, not a candidate for indictment as "moral imperialism."\(^2\) At worst, it amounts to a unilateral disarmament,\(^3\) specifically, a commercial unilateral disarmament by economic leaders who project a long-term vision, undaunted by the consequences of competing against cheaters. These cheaters are corrupt corporate executives, afraid to compete on an even playing field.\(^4\) Bribe-paying corporate officers represent the personifica-

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* Woodson Centennial Professor, Legal Studies in Business, University of Texas.
4. The U.S. effort to create a level playing field is not acclaimed in all quarters of the globe. "Adopting such laws [as the FCPA] would result in a loss of lucrative con-
tion of Oliver Williamson's "opportunist," who pursues self-interest with guile. 5

This Article endeavors to show that the FCPA has provided much-needed leadership in international economics and through its perseverance, the United States has gained strong multinational support. Undoubtedly, the United States and its supporters would have received criticism from many quarters if they had not assumed leadership in confronting an issue that is devastating to the development of the global economy. 6 The FCPA has not crippled U.S. firms in global trade, though well-documented evidence of lost contracts exists. 7 The FCPA pays dividends both domestically, through more efficient firms and more responsible management, 8 and transnationally, especially in emergent economies. 9 General Obasanjo, former president of Nigeria and co-chairman of Transparency International's advisory council, stated that bribery may be disguised as gifts and laws forbidding bribery may be culturally intrusive. 10


Market share and profitability stayed up and even increased and, after a year or two of tenacious effort, we were able to shorten our long, long overdue collection period on government receivables in one of the more notorious problem countries. Those early experiences taught me that the only way to run our business is with the most rigorous and demanding standards of compliance with law and regulations.


9. See Philip M. Nichols, A Legal Theory of Emerging Economies, 39 VA. J. INT'L L. 229, 233 (1999) (discussing the significance of "emerging economies" to the global economy and presenting a theory of emerging economies, which attempts to address the phrase "emergent economy," distinguishing it from "emerging markets," "transition economies," and "developing countries").

This paper advances the position that the FCPA and progeny—conventions generated by the Organization for Economic Co-operation and Development (OECD)\textsuperscript{11} and the Organization of American States (OAS)\textsuperscript{12}—promote the efforts of economies entering the world market; reinforce the industrial, financial, and political institutions of emerging and transitional regimes; and restrain the conduct of firms from the United States and other signatory nations that may be tempted to erode the limits of responsible market principles. The FCPA and progeny will play a significant role as components of an on-going effort to expand the global free market and bring stable democracies to the forefront.

Part I identifies the devastating effects of bribery on emerging nations and the proposed substantial benefits that these countries might reap from international efforts to reduce corrupt practices. Part II discusses the Foreign Corrupt Practices Act and recent international efforts to address the problem of international bribery, specifically emphasizing that the United States is no longer the lone adversary of corrupt practices. Part III addresses the arguments advanced by critics that describe these efforts as “moral imperialism” and advance the idea that market efficiency will remedy the problem without legal efforts. Part IV highlights recent cases involving prosecution under the FCPA and how these cases augment the transparency of the FCPA. Part V addresses justifications for anti-corruption measures.

I. Effects of International Bribery on Emerging Nations

In purely economic terms, corruption is not cost-effective or profitable; it costs emerging economies, developed economies, and private concerns a great deal of money.\textsuperscript{13} For emergent economies unable to absorb many of the costs and consequences of distorted markets, corruption is an especially pressing problem.\textsuperscript{14} For example, in 1997, the International Monetary Fund (IMF) and the World Bank together suspended over $250 million

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\textsuperscript{11} See OECD Convention, supra note 3.

\textsuperscript{12} See Inter-American Corruption Convention, supra note 3.

\textsuperscript{13} See Paolo Mauro, Corruption and Growth, 110 Q.J. Econ. 681, 700-04 (1995) (showing a significant negative relationship between corruption and investment, as well as growth, in both a statistical and economic sense).

in loans to Kenya because of the country's inability and refusal to address bribery issues within its government. Further, since "emerging economies have become among the most dynamic, most influential, and therefore among the most watched components of the global economy, fluctuations in [their] fortunes . . . measurably affect the global economy."16

Efforts against transnational and international bribery are not a product of moral imperialism, but rather a product of economic forces. The force behind the U.S. push for international efforts to curb bribery was a need to level the playing field between American bidders who were subject to the FCPA, and their foreign counterparts, who were not bound by any laws forbidding illicit payments. Yet whether U.S. efforts were spurred by "moral imperialism" or the simple need to improve business opportunities, bribery's effects on emerging nations are numerous, and current international efforts greatly alleviate some of those problems.

As the marketplace becomes increasingly global, the relationships between participants become more important, and bribery affects those relationships on an intergovernmental, commercial, and democratic level.17 For instance, bribery undermines and corrodes governments by hampering the decision-making process because bribed government officials will not make contract decisions based on price and work quality, but on unrelated financial gain.18 Furthermore, a government overrun with corruption tends to drive out the honest officials, leaving only the dishonest.19 This decision-making process distorts prices because it channels more money to the government than the government actually spends on public good. Therefore, corruption reduces incentives to complete projects because more resources are utilized to pay bribes, and it reduces outside investment because investors are unwilling to participate where corrupt governments exist.20 Bribery also undermines democracies by effectively relating to the public that the government is for sale.21 Corruption further undermines governments by suggesting that bribes will undo attempts to accomplish societal goals.22

More specifically, transnational corruption and bribery unnecessarily increase prices, reward bad management,23 and result in self-serving gov-

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16. Nichols, supra note 9, at 231.
18. See id. at 464.
19. See id.
20. See id. at 465-66.
21. See id. at 468.
22. See id. at 469.
ernment policies. Corruption usurps resources, leaving emergent economies incapable of achieving optimal growth. Even more troubling in the developing world, bribery's distributional ill-effects tend to lower income on a national scale, increase debt, and augment the inequality between the rich and the poor.

Indeed, by increasing prices and encouraging bad behavior and poor management, "corruption can endanger the use of economic choices, increase the costs of transactions, reduce state revenue, increase public expenditure, penalize law abiders and produce adverse distributional effects." Companies then pass these "unofficial" costs onto already burdened consumers. As the bribe demand rises in relation to the expected earnings of the goods or services to be produced, certain consequences follow. "To avoid losing the valuable foreign contract, the supplier may have to increase the product's price, accept a lower gross profit margin, and reduce the quality of his product to achieve cost savings."

An increase in the rate charged in transnational bribes over the last several years also provides an incentive for the suppliers of bribes to curb corruption. As a spokesman for Transparency International noted, what once was a 10% rate has now mushroomed into a 30% rate in many countries. During the past three years, the U.S. Department of Commerce concluded that foreign companies have illicitly influenced almost 180 commercial contracts worth nearly $80 billion. The World Bank surveyed 3600 companies in sixty-nine countries and found that about forty percent pay bribes. Ultimately, an economic system that condones corruption suffers from impoverished decision-making, and the misallocation of scarce government resources results in a host of political and social problems irrespective of ideology.

24. See id. at 1275.
25. See id.
26. See id.
27. See id. at 1290.
28. See id. at 1292-93.
29. See id. at 1279.
31. See id. at 457, 461, 463.
32. Nesbit, supra note 23, at 1280.
33. See id. at 1278.
34. See id. at 1276.
35. See id. at 1278 (quoting Michael Wiehen of Transparency International).
36. See id. at 1278-79.
38. See Jay Bryan, Corruption Clogs the Gears of Industry, GAZETTE (Montreal), Apr. 15, 1999, at D1. Bryan refers to the work of Vito Tani at the International Monetary Fund. Tani contributed to a book edited by Arvind Jain, Professor of Finance at Concordia University, Economics of Corruption. Referring to Jain's work, Bryan wrote:

[The truly hurtful form of corruption, in his view, is the policy corruption that occurs when governments distort major economic policies for the benefit of a few political and business leaders . . . . If there is one key lesson to be drawn
Moreover, allowing companies to deduct illicit payments as business expenses reduces essential, and often already modest, national treasuries, thereby undercutting public services and forcing the tax burden onto individual citizens who cannot afford it and resent paying more than their “fair share.” This process degrades the public trust in the nation’s tax system and the government generally. Social structures are eroded, as their foundations—loyalty and trust—erode.

The political and human costs of corruption are also staggering. Research over the past six years demonstrates that corrupt systems are not only unjust, but inherently unstable. This instability is especially problematic for governments and economies transitioning to democracy or market economies or both. "Because bribes must be paid in secret, normal systems of checks and balances do not function." Systems without accountability or stability are unpredictable, so prudent investors often reject them in favor of more predictable, sound systems.

In this context, the FCPA’s extraterritorial reach in no way constitutes moral imperialism or breach of sovereignty. Although the criminalization of transnational bribery will reach conduct outside U.S. territory, it only proscribes the illegal conduct of “domestic concerns,” U.S. citizens and permanent residents, and U.S. corporations and officers, directors, employees, agents, and stockholders. FCPA case law demonstrates that the United States has narrowly and rigorously prosecuted FCPA violations. The FCPA comports with accepted principles of international law while also improving the global business culture and facilitating the entrance of emerging economies into the world market.

II. FCPA and Progeny: International Efforts to Curb Bribery

Watergate and the eclipse of the Nixon administration sparked the Foreign Corrupt Practices Act’s passage in 1977. The crises of legitimacy and illegality emanating from the White House led investigators down an evidentiary trail of extensive political corruption. As a result, the Securities and Exchange Commission (SEC) discovered a number of corporate slush

from the research, Jain suggests, it is that it is a mistake to focus on the widespread problem of bribery that attracts the most attention from business and the media.

Id.

39. See id.
40. Nesbit, supra note 23, at 1281.
41. See id.
42. See id. at 1292-94.
44. Id. at 21.
45. See Nichols, supra note 9, at 290.
47. See id.
funds, many of which were used to bribe foreign officials.\textsuperscript{48}

The extent of the corporate and political corruption was much more expansive than anticipated, a true crisis in the American system. Recognizing the need to curb corporate and political corruption, Congress unanimously and virtually without debate passed the FCPA.\textsuperscript{49} The Act placed

\begin{itemize}
\item FCPA 1977—The FCPA is divided into two parts: the anti-bribery provisions, which the Department of Justice enforces, and the accounting requirements, which the Securities and Exchange Commission enforces.
\end{itemize}

The anti-bribery section prohibits direct and indirect bribery of foreign officials by issuers, firms, and domestic concerns, including business entities and U.S. residents. The basic anti-bribery prohibition criminalizes attempts to influence an official to assist the individual or business in maintaining or acquiring business. The FCPA also covers payments to intermediaries when the individual knows that the payment will be given to a foreign official. The knowing intent requirement has been interpreted to include “conscious disregard.”

The accounting provisions apply only to issuers under the SEC's jurisdiction. The provisions originated as Amendments to the SEC Act of 1934. They require record-keeping practices to reflect honestly and transparently the actual accounts of the business entity.

\begin{itemize}
\item 1988 Amendments—In 1988, Congress amended the FCPA. Under the Amendments, Congress tightened the intent requirement so that a defendant could be convicted only for actual knowledge of the payment's or gift's intended results. The intent requirement could be satisfied where there was “conscious purpose to avoid learning the truth.”
\end{itemize}

Congress also included a better definition of facilitating payments, viewed as exceptions to the FCPA. Facilitating payments are those payments made for “routine governmental actions.” Congress provided affirmative defenses for defendants. If a defendant could prove that the payment was lawful under the written laws or regulations of the country or that the payment was a reasonable and bona fide expenditure, their actions were not subject to conviction.

Penalties for the anti-bribery provisions depend on the type of defendant and range from $1,000,000 for firms to $100,000 for individuals. The imprisonment term is five years.

Congress also tightened the accounting provisions with a stricter intent requirement of actual knowledge. Congress added a better definition of corporate responsibilities, involving the record-keeping of subsidiaries, and better clarification of record-keeping standards overall.

Civil penalties for violating the FCPA's accounting provisions depend on the “egregiousness of the violation.” Fines can range from $5000 to $500,000. Other remedies include actions in equity such as injunctions, cease and desist orders, and fines imposed under other federal regulations.

\begin{itemize}
\item 1998 Amendments—The 1998 Amendments came in response to the United States adoption of the OECD Convention. On November 10, 1998, President Clinton signed the International Antibribery and Fair Competition Act. The Act expanded some of the FCPA's basic definitions. For instance, Congress broadened the definition of bribery to include any payment made to secure "any improper advantage"—language from the OECD Convention. The definition of public official now includes officials of "public international organizations," such as the World Bank and International Monetary Fund.
\end{itemize}

The jurisdictional provision was also changed to comply with worldwide efforts. Jurisdiction is no longer based on interstate commerce, but on the nationality principle. This expansion now means that U.S. nationals acting entirely outside the United
the United States at the forefront of the nascent effort to stamp out corruption.  

Recent initiatives worldwide have increased the pace of efforts to address bribery and corruption across the globe. The two most important acts in this area have been the conventions created by the OECD and the OAS.

A. Organization for Economic Co-operation and Development Initiatives

In November 1997, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The member countries and five non-member states signed the Convention, obligating themselves to implement and ratify the Convention as national legislation by December 31, 1998. After a complex ratification process, the Convention became effective on February 15, 1999.

In addition, the OECD established working groups to investigate and propose steps to deal with bribery. Another working group deals with the few States that still allow a tax deduction for bribery payments.

The OECD Convention obligates signatory countries to follow its recommendations and implement its guidelines into their own statutes and laws. Under Article I, each member state must take all measures necessary to criminalize bribes given, offered, or promised, either directly or indirectly, to a foreign public official to obtain any "improper advantage." However, much like the FCPA, the Convention has an exception for States can still be convicted for violations of the FCPA. Jurisdiction over any person acting "in whole or in part" within the territory of the United States is also subject to the FCPA provisions regardless of their nationality.

For full treatment of the FCPA, see George, supra note 46, at 6-13; see also Gary Eisenberg, Foreign Corrupt Practices Act, 37 Am. Crim. L. Rev. 595 (2000).

50. See Johnson, supra note 37, at 981; see also Salbu, supra note 2, at 231.

51. See George, supra note 46, at 36. The OECD Convention came on the heels of a 1994 Recommendation of the Council of the OECD on Bribery in International Transactions. The twenty-nine OECD members are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. See OECD Online, Membership (visited Nov. 10, 2000) <http://www.oecd.org/about/general/member_countries.htm>. The five non-member countries that signed the Convention were Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic. See OECD Online, Anti-Corruption Unit, Combating Bribery of Foreign Public Officials in International Business Transactions – Text of the Convention (visited Nov. 10, 2000) <http://www.oecd.org/daf/nocorruption/20nov1e.htm>.

52. See Alejandro Posadas, Combating Corruption Under International Law, 10 Duke J. Comp. & Int'l L. 345, 380 (2000). The ratification process required ratification by five of the ten OECD countries with the greatest volume of exports, representing at least 60% of the total exports of the top ten countries for the Convention to take effect. As contingency, the Convention would become effective when at least two signatory countries submitted their instruments of ratification. See id.

53. See George, supra note 46, at 35-36.

“grease” or facilitating payments. The Convention not only addresses the crime of bribery but also other crimes related to its commission, including attempt and conspiracy. It covers a broad range of “foreign officials” to include any person holding a legislative, administrative, or judicial office in a foreign country, appointed or elected; any person exercising a public function in a foreign country; and any official or agent of a public international organization.

The Convention provides alternate provisions for the exercise of jurisdiction on the basis of either territoriality or nationality. Under the Convention, a signatory must exercise jurisdiction over an individual when the offence is committed in whole or in part within its territory or the offence is committed by one of its nationals regardless of territory. To further aid in the conviction of offenders, the Convention obligates mutual legal assistance including answering requests for documents (sometimes regardless of national bank secrecy laws), making individuals available for investigation, and transferring custody without formal extradition proceedings. In fact, the Convention makes bribery an extraditable offense and requires those countries that do not extradite to prosecute the individual under their own laws.

Article VIII of the OECD Convention also provides for accounting transparency by requiring signatories to create regulations for the maintenance of business records and accounts to prevent hidden payments. One concern for the Convention’s success, however, is the fact that it does not obligate member countries to eliminate tax deductions for foreign bribery payments. As noted earlier, a working group has been established to address this concern, and it is likely that all of the member countries will soon enact legislation prohibiting such tax deductions.

As of late October 1999, all but sixteen of the member countries had

55. See Corr & Lawler, supra note 54, at 1304 (describing grease payments as those made simply to "induce government officials to perform their routine governmental functions").
56. See OECD Convention, supra note 3, art. I; Corr & Lawler, supra note 54, at 1305.
57. See OECD Convention, supra note 3, art. I, § 4.
59. See Gantz, supra note 58, at 487.
60. See Corr & Lawler, supra note 54, at 1308.
61. See id.
62. See OECD Convention, supra note 3; see also Corr & Lawler, supra note 54, at 1308.
63. See OECD Convention, supra note 3, arts. XI, X.
64. See Gantz, supra note 58, at 493. In addition, most of the countries including Germany, Belgium, and Canada, have enacted legislation prohibiting the deduction of bribes as business expenses. See OECD Online, Anti-Corruption Ring Online, Law Regulation of Corrupt Practices: OECD Member Countries (visited Nov. 30, 2000) <http://www.oecd.org/daf/nocorruptionweb/law/oecd.htm>.
ratified the Convention. As part of its efforts to ensure that the intent and actions of the Convention are carried out, the OECD investigates each signatory country to check adherence and publish progress reports. Also, the OECD has enacted monitoring procedures to evaluate whether signatory countries enacted legislation in compliance with the Convention.

B. Organization of American States

The OAS Convention, entered into force on March 6, 1997, was the first international agreement designed to address international corruption. All thirty-five members of the OAS have signed the Convention, but only twenty have ratified the agreement.

The Inter-American Convention is similar to the OECD in several respects, but most important is how the OAS Convention differs from the OECD Convention. Unlike the OECD Convention, the OAS Convention addresses the demand side as well as the supply side of international bribery by requiring member states to criminalize the solicitation and acceptance of illicit payments. The OAS Convention also prohibits "illicit enrichment," which means that unexplainable significant increases in a government official's wealth are considered corruption.

In addition, unlike the OECD Convention, the OAS Convention provides no explicit exception for "grease payments." In fact, OAS Convention's language suggests that the Convention's scope may be much broader than that of the OECD Convention. For example, while the OECD Convention prohibits payments to secure "any improper advantage," Article 6, § 1(a) and (b) limit the prohibition to anything of value given in exchange for "any act or omission in the performance of the official's public func-

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66. See OECD Convention, supra note 3, art. XII.
67. All countries to the Convention are to have been evaluated by Spring of 2000. For a complete schedule of evaluations and monitoring procedures, see OECD Online, The Monitoring Procedure (visited Nov. 30, 2000) <http://www.oecd.org/daf/noncorruption>.
68. See Gantz, supra note 58, at 476.
70. See Gantz, supra note 58, at 478.
71. See Inter-American Corruption Convention, supra note 3, art. VI, § 1(a), IX; see also Gantz, supra note 58, at 479.
72. Gantz, supra note 58, at 480.
73. OECD Convention, supra note 3, art. 1, § 1.
tion.\textsuperscript{74} Without an explicit exception for facilitating payments, it would seem that the OAS Convention's language prohibits even those payments. This expansive definition of bribery might seem too intrusive, possibly explaining why the United States has not ratified this Convention.

C. Other International Efforts

Both the World Bank and the International Monetary Fund have taken efforts to address corruption and bribery in the international market. For instance, the World Bank, in an effort to reduce the use of bank funds for illicit payments, revised its Procurement and Consultant Guidelines to include a specific section on fraud and corruption. This section requires borrowers and other parties to World Bank contracts to adhere to the "highest degree of ethics" in carrying out the contract.\textsuperscript{75}

In addition, the Guidelines' revisions include specific instances where the World Bank will reject or cancel all or part of a contract if it finds that corruption was involved at any point in the contract.\textsuperscript{76} The World Bank has stated that loan proposals and applications will be rejected if it finds that the borrower or the beneficiary is or has engaged in corrupt practices.\textsuperscript{77} The World Bank has also expressed an intention to investigate, using its own auditors, the contractors' and suppliers' records in connection with the fulfillment of contracts funded by World Bank money. In fact, the World Bank now requires procurement contracts to have specific provisions giving the World Bank the authority to inspect parties' contract-related records.\textsuperscript{78} If the World Bank finds corrupt activity, the transgressor may be barred from future World Bank contracts.\textsuperscript{79}

Aside from the agencies' regulatory practices, the IMF and the World Bank have also offered voluntary recommendations for inclusion in contracts that they draft. For instance, the World Bank's Procurement and Consultant Guidelines provide a pledge against bribery. However, the borrowing government must request the pledge, and the World Bank must also feel that the government will take "robust measures to address the domestic causes of bribery."\textsuperscript{80} Also, both agencies have adopted formal procedures for reducing economic assistance to developing countries if "government corruption is found to have an adverse effect on economic development."\textsuperscript{81}

Although the IMF and the World Bank base their decisions on economic, not political, needs, they now consider corruption levels in their decisions concerning aid to developing countries and aid packages they

\textsuperscript{74} Id. art. VI, § 1(a), (b).
\textsuperscript{75} See Wesberry, supra note 15, at 510.
\textsuperscript{76} See id.; see also Gantz, supra note 58, at 469.
\textsuperscript{77} See Gantz, supra note 58, at 469.
\textsuperscript{78} See Wesberry, supra note 15, at 510.
\textsuperscript{79} See Gantz, supra note 58, at 470.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
Other organizations, such as the European Union, the United Nations, the World Trade Organization and the International Chamber of Commerce, also have taken steps to combat international bribery.  

D. Transparency International

In other efforts against international corruption, Transparency International, a non-governmental organization whose members include former government officials and businesspeople, is "dedicated to increasing government accountability and curbing both international and national corruption." Transparency International's most important actions concern information gathering and raising public awareness. For instance, it publishes a Corruption Perceptions Index that scores companies on a ten-point scale, a score of ten indicating a highly clean country and zero indicating a highly corrupt country. Transparency International also publishes a Bribery Index of Leading Exporting Nations to uncover the sources of bribery by scoring countries on a ten-point scale with a score of ten indicating negligible bribery and zero indicating very high levels of bribery.

III. Critics of the FCPA

While actions across the globe indicate that the majority of the global community supports efforts to curb international bribery, the FCPA and other international efforts are not without their critics. Critics suggest that bribery is common in many world markets and will not disappear anytime soon; thus, any effort to stamp out corruption in those areas would prove unsuccessful. Furthermore, one critic argues that even if FCPA-like legislation were adopted by some countries, the FCPA itself is inherently flawed,


83. European Union—On May 26, 1997, the EU passed the EU Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union.


World Trade Organization—In 1996 the WTO Ministerial Declaration established a working group to study transparency in government procurement practices. Non-governmental organizations that have followed suit include the following: Hong Kong based Independent Commission Against Corruption; Anti-Corruption Agency of Malaysia; National Whistleblower Center; the International Chamber of Commerce; the Institute for International Economics; and the World Economic Forum.

For a detailed treatment of each, see George, supra note 46, at 39-46.


85. See id.


87. See Salbu, supra note 2, at 262.
making enforcement difficult. More importantly, the critic contends that any suggestion of a law, even one perfectly-written, designed to attack bribery on a global level is inappropriate considering the structure of today’s global market.

The most commonly used argument, however, against the FCPA-led efforts to combat international bribery is that it constitutes moral imperialism and overreaches into the sovereignty of individual countries. In effect, the FCPA acts as a Western legal construct that superimposes its moral identity and values on the rest of the world without recognizing the subtle differences among the world’s various cultures. As such, anti-bribery efforts are offensive to other governments in that they presuppose a moral highroad in comparison to the governments’ actions. Furthermore, the global community has not reached a state where it can adhere to one set of laws designed to combat bribery without cultural differences raising concerns about moral consensus, which could lead to resentment and insur- 

Another criticism of the FCPA and its global influence comes from Kenneth Surjadinata of Emory University. In his article, Revisiting Corrupt Practices from a Market Perspective, Mr. Surjadinata argues that morally derived laws, such as the FCPA, should not govern domestic firms’ foreign activities inasmuch as they have to do with corrupt practices. As he explains, the FCPA has two fundamental flaws: (1) its anti-bribery provisions encounter difficulty in determining the contours of corrupt practices and (2) its assertion of Western cultural values is intrusive to the sovereignty of foreign states.

Mr. Surjadinata asserts that rather than using a value-based definition of corrupt practices or corruption which is not universally applicable, laws that deal with this subject matter should be governed by principles of efficiency. In addition, the FCPA could be repealed in favor of a more reliable approach—the market itself. The author advances the notion that the global market itself will be able to govern corruption through its regulation of inefficient practices. Most would agree that corrupt practices are inefficient and, therefore, not welcome in the marketplace. Given basic market principles, investors will choose the most efficient means to carry out their goals and, if given the option, will not engage in bribery or other corrupt

88. See id. at 264-71. Salbu argues that, under the original Act and the 1988 Amendments, the FCPA is ambiguous in its classification of payments as bribes and the definition of grease payments. In addition, the question whether a person is a public official and whether a payment constitutes a bribe blurs as one changes cultures.
90. See Salbu, supra note 2, at 276.
91. See Salbu, supra note 89, at 231.
92. See Surjadinata, supra note 2, at 1023.
93. See id.
94. See id. at 1024.
95. See id. at 1027.
practices.96

IV. The FCPA in Court: Augmenting the Act's Transparency

The best example of the FCPA in action SEC v. Triton Energy Corporation.97 Filed in February 1997, Triton was the first FCPA civil enforcement action the SEC brought in over a decade.98 The case involved payments to a foreign agent in Indonesia for an oil and gas concession operated and developed by Triton Indonesia, a wholly-owned subsidiary of Triton Energy Corporation, a Texas-based multinational corporation, and an Indonesian governmental agency.

The SEC alleged that Triton illegally made payments to Indonesian government officials and concealed these payments by misstating the records, books, and accounts of Triton Indonesia.99 The case involved two different proceedings. It was both a civil enforcement action against Triton Energy and two former senior officers of Triton Indonesia and an administrative cease-and-desist proceeding against two former executives of Triton Energy and two former managers of Triton Indonesia.

The case presents a paradigmatic example of the FCPA's applicability to U.S. companies "utilizing the services of third party foreign agents."100 Several Indonesian government agencies received payments, which were made through an intermediary. Not only were illegal and misreported payments involved, projects repeatedly failed to generate sufficient oil production for the costs incurred.101 Triton, therefore, highlights not only the illegal nature of the payments, but also the economic inefficiencies of the arrangement. Indeed, the fact that the case settled suggests that the FCPA provides benefits of both an economic and legal nature.

This case emphasizes the "renewed prosecutorial interest in civil and criminal enforcement of the foreign bribery/corrupt foreign payments provisions of the Foreign Corrupt Practices Act" by the Securities and Exchange Commission and the Department of Justice.102 These recent prosecutions show that the problem of corrupt foreign payments is not an exaggeration. They involve payments by large U.S. firms that cannot be mistaken for gifts.

Corporations have the option of forgoing corrupt practices by adhering to market forces of inequality. They choose instead to engage in corrupt practices regardless of the cost to their projects. These cases show that the corrupt practices the FCPA prohibits have been around for a long

96. See id.
99. See id. at 306.
100. Id. at 307.
101. See id.
102. Id. at 305.
time. The FCPA aimed to prevent and redress the ills caused by corrupt practices, which the market was unable to address.

U.S. courts have made an effort to rigorously define the FCPA's scope and ensure a focused and effective weapon against corruption, a weapon that champions transparency and economic efficiency. In *United States v. Leibo*, for example, the court addressed what constitutes a gift or a bribe and what is meant by "corruptly." In *Leibo*, a German company under contract with the Nigerian government approached NAPCO International, Inc. (NAPCO), requesting parts and maintenance for cargo planes at a time when the Nigerian government began to have financial difficulties. To salvage the Nigerian project through its U.S. connection, NAPCO sought financial assistance under the Foreign Military Sales Program. To obtain approval from the Nigerian President, Richard Leibo, Vice President of NAPCO, and a representative of the West German company met in Niger with the chief of maintenance for the Nigerian Air Force. As a consequence of the meeting, the chief of maintenance agreed to approach the President of Niger.

After the Nigerian President approved the contract, Leibo contacted the chief's cousin, an embassy official in Washington, D.C., and offered to make a "gesture." Soon after that meeting, the cousin set up a bank account, in which NAPCO deposited thirty thousand dollars. Also, using a NAPCO credit card, Leibo paid part of the cousin's honeymoon airline tickets, amounting to more than two thousand dollars. Eventually, NAPCO received two additional contracts from the Nigerian government, totaling approximately three million dollars.

In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, the United States Supreme Court addressed the issue of whether the act of state doctrine barred actions brought by a competitor against a company that pled guilty to making payments in violation of the FCPA in order to gain a contract. The Supreme Court found that where the allegations involved no act of the foreign government, the Act of State Doctrine applied; whether the contract was valid under Nigerian law was not an issue in the case.

The FCPA's intrusive scope was further limited in the Sixth Circuit...

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103. 923 F.2d 1308 (8th Cir. 1991); see Johnson, *supra* note 37, at 988.
104. See *Johnson, supra* note 37, at 988.
105. See id.
106. See id.
107. See id.
108. See id.
109. See id.
110. See id.
113. See *Johnson, supra* note 37, at 991.
case *Lamb v. Phillip Morris, Inc.*,114 where the court rejected the contention that the FCPA created a private right of action.115 As a result, the case operates as another limitation on the FCPA's intrusion into the customs and traditions of foreign countries. In 1982, Phillip Morris subsidiaries donated $12.5 million to The Children's Foundation of Venezuela, an organization chaired by the Venezuelan president's wife. In return, Phillip Morris gained price controls on Venezuelan tobacco, assurances that existing tax rates applicable to tobacco companies would not be raised, and other benefits.

The Sixth Circuit dismissed FCPA action in *Lamb* because the Act does not permit private causes of action. The plaintiffs argued that although none was expressly created, "congressional intent [to allow a private cause of action] can be inferred from the language of the statute."116 However, the court could find no foundation for the plaintiffs' argument. By limiting prosecution under the FCPA to the Justice Department, Congress made a deliberate judgment to respect political sensitivities, preserve the goodwill of foreign governments, and reserve action for more willful and blatant offenses.

Both *Kirkpatrick* and *Lamb* provide examples of actual limitations on the FCPA's coverage. Both cases addressed whether a private cause of action exists for FCPA violations. Rejecting a private cause of action for FCPA violations places a limit on the Act's effect, so that it may not be overly intrusive toward foreign practices. The cases also serve another function in that they publicize otherwise private actions. The mere fact that a third party would bring an action against a company that violated the FCPA evidences the discontent and frustration of honest companies regarding corrupt practices. The plaintiffs in these cases likely did not consider the practices as just "gifts" or believe that the market had adequately addressed problems associated with corrupt practices. In fact, the plaintiffs were so unsatisfied with the governance of the market that they turned to legal remedies to right the situation.

*Bolton v. Tesoro*117 provides another perspective on the application of the FCPA, but only tangentially. Tesoro was under investigation for illegal payments made to Trinidad government officials who could enhance Tesoro's interests in Trinidad's oil resources. Tesoro fully cooperated in the SEC investigation. This case did not involve an SEC inquiry or racketeering activity that would link FCPA violations with other corrupt activities, such as insider trading, commercial bribery, obstruction of justice, and wire and mail fraud, to establish a pattern of illegality under the Racketeering Influenced and Corrupt Organization Act.118 Rather, the *Tesoro* court considered the concerns of shareholders in a derivative action led by Bol-

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114. 915 F.2d 1024 (6th Cir. 1990).
ton that claimed the Tesoro board was attempting to take the company private. By going private, the Board would eliminate inconvenient shareholders, such as Bolton's group; lessen the scrutiny of federal watchdogs; and enhance its financial position. Therefore, the FCPA was not central to the suit.

Accordingly, it is difficult to see how Tesoro supports the contention that the FCPA, though well-intentioned, is an inappropriate way of combating bribery in the international marketplace. In an ideal world, local officials would deal with bribery, and nations of the world would pressure others to action with high profile suits against offenders in their own jurisdictions. In that world, there would be no imperialism, no disrespect for customary ways of doing business, and “free” trade would progress as it has for thousands of years. That would be the course of least resistance, but it is a scenario for the ideal world, not the real one.

Recent cases document the new transparency available under the FCPA. Without the Act and other international efforts, private under-the-table activities would continue without consequences. For example, Petroleos Mexicanos v. Crawford involved a criminal action against Crawford and Crawford's unsuccessful efforts to force Petroleos Mexicanos (Pemex) to comply with a subpoena. Although not the centerpiece of this case, the FCPA revealed this transaction, making it more likely that those involved would be punished; that outcome would not occur absent the Act.

These transactions diminish freedom and fairness in international trade. While criminal activities may be rampant in Mexico, there is little reason to believe that Mexican citizens are at ease with the fact that certain officials fatten their pocketbooks at the working people's expense. The FCPA plays a positive role in bringing transparency to the bargaining table and exposing corruption. Otherwise, illicit transactions would pass unnoticed, and the informational requirements of a free market would be further diminished.

Since the passage of the 1998 Amendments, few new actions have been brought under the FCPA, evidencing the need for the Amendments and additional transparency. One scholar concluded that national regulation of transnational bribery is not immoral: “Criminalization of transnational bribery simply involves a country prohibiting its citizens and their employees from engaging in conduct in another country that is illegal, destructive, and socially condemned” at home. This criminalization

120. Id. at 394. Crawford and six other individuals were indicted for multiple FCPA violations.
122. See id.
123. Id.
does not constitute moral imperialism. Indeed, to allow such conduct is morally questionable.

V. Justification for Anti-Corruption Measures

Literature critiquing the FCPA and progeny focuses on several points, including the intrusiveness of these measures on local traditions, in particular on gift-giving, and their detrimental effects on efficiency. Some urge that Congress repeal the FCPA because "assuming, arguendo, that ninety percent of all corrupt practices are inefficient, the [FCPA] would still include ten percent of practices that are efficient." These are not dismissive concerns. The FCPA's framers never intended to criminalize legitimate gift-giving—public tokens of esteem; gifts offered as symbols of friendship, not demanded in return for special favors; and gestures of appreciation such as those frequently described by Professor Salbu. No one has been prosecuted under the FCPA for these innocent behaviors. Only a tortured reading of successful prosecutions could result in that determination.

Market-oriented critics of the FCPA, and presumably the OAS, OECD, IMF, and World Bank initiatives, insist that the inefficiencies of corrupt practices will effect the needed social and legal reform. Yet, if the market is so effective in eliminating every inefficiency, why has the market not done this already? International trade and the force of efficient investment in the global marketplace have existed for a long time. The FCPA is a relatively new addition, and the OECD and OAS counterparts are even more recent. It is unlikely that unilateral and cooperative action can and will facilitate sufficient market pressure to eliminate, or at least substantially reduce, corrupt practices and their drag on the world economy.

The aspirations of anti-corruption measures find strong support in the work of an influential philosopher, Jürgen Habermas. Habermas wrote of the crisis that may ensue from a possible disjunction between or among two or more "systems" that are experienced in every country and corner of the globe. These systems are recognized as the state, the economy, and the socio-cultural complex in which the citizens of that nation live and work. Corruption, such as bribing public officials with special favors to gain contracts, results in a crisis for each of the three principal systems.

Bribery threatens the state’s credibility and stability. It undermines the economy’s productivity, and every religious and moral code discourages it. Most legal codes prohibit bribery because it assaults the worth

124. See Surjadinata, supra note 2, at 1027, 1085.
125. Id. at 1024-25.
126. Habermas was a German philosopher who is the most prominent heir of Critical Theory associated with the Frankfurt School. He is widely acclaimed in the United States for his contributions to Critical Legal Theory. See Jürgen Habermas, Legitimation Crisis (Thomas McCarthy trans., 1975).
127. See generally id.
128. See id.
129. See id.
and integrity of the bribe-giver and the bribe-taker.\textsuperscript{130} If a characterization as "shameful" is not self-evident, one must wonder why bribery, without exception, is secretive and private and conducted in clandestine ways.\textsuperscript{131}

The coercive impact of the FCPA and the OAS, OECD, IMF, and World Bank efforts is an undeniable reality, but this feature appears in every other public measure designed to combat harmful behavior. Habermas and other members of the Frankfurt school patterned these cooperative projects on the work of Immanuel Kant. Kant formulated the concept of a "categorical imperative,"\textsuperscript{132} which, in many ways, is a secularized version of the "Golden Rule."\textsuperscript{133} In Kant's view, everyone labors to act in ways prompted by a "good will."\textsuperscript{134} This formulation of moral conduct relies heavily on good intent.\textsuperscript{135} Not all moral or religious codes build on this foundation, but many are anchored in a concept of intent that is deeply respected, if not acted on, globally.\textsuperscript{136}

Habermas seeks to elevate the notion of a General Will\textsuperscript{137}—a universal, rationally justified concept of the "good" to a level comparable to Kant's categorical imperative.\textsuperscript{138} Habermas' General Will, however, has no metaphysical status;\textsuperscript{139} it would not resemble Plato's world of "forms."\textsuperscript{134} To the contrary, the General Will is simply a rationally-determined, human fabrication with numerous frailties and miscues, but where the creative process is central. The General Will is the product of multiple inputs voiced voluntarily and absent coercion.\textsuperscript{141}

The "ideal speech situation" is a product of Habermas' intellectual creativity.\textsuperscript{142} Habermas understands that this scenario is unattainable because the realities of the world intrude in numerous ways. There is the problem of coercion, which exists in Habermas' view whenever a more powerful or successful entity exerts pressure on the speaker. The pressure need not be physical threats; it could be far subtler, such as withholding or diminishing an offered, but never promised or committed, favor. Anything that detracts from speech that most people would regard as free and uninhibited, including anything that hinders a person's confidence or skill in

\begin{itemize}
\item \textsuperscript{130} See id.
\item \textsuperscript{131} See id.
\item \textsuperscript{132} Immanuel Kant, Groundwork of the Metaphysics of Morals 88 (H.J. Paton trans., 1964).
\item \textsuperscript{133} Matthew 7:12, Luke 6:31, Leviticus 19:18.
\item \textsuperscript{134} Kant, supra note 132, at 17.
\item \textsuperscript{135} See Habermas, supra note 126.
\item \textsuperscript{136} David Hume, a Scottish philosopher who was the polar opposite of Kant and a forerunner of consequentialism (utility), would regard harmful conduct as bribery with moral disapproval. See David Hume, An Enquiry Concerning the Principles of Morals (Tom L. Beauchamp ed., 1998) (1771).
\item \textsuperscript{137} See generally Habermas, supra note 126.
\item \textsuperscript{138} See id.
\item \textsuperscript{139} See id.
\item \textsuperscript{140} Plato, The Republic, Bk. vii, 514-18.
\item \textsuperscript{141} Habermas, supra note 126.
\item \textsuperscript{142} Id.
\end{itemize}
articulation—for example, a barrier to education through an inferior school system, produces a situation that is less than "ideal."

The ideal speech situation allows for a progressive fine-tuning of moral injunctions. Kant's categorical imperative was in effect "written in stone." The word categorical meant "no argument, no questions," and imperative meant "something you must do without exception." Habermas' scenario allows the free play of ideas and modification of the initial position over time. In the context of eliminating or at least diminishing corruption in international trade, the initial position could easily be "let the market do it." Over time, if that position seemed ineffectual, reasonable people might opt for change, such as tightening controls or some other means of dealing with the problem.

For international politics and international trade, the ideal speech situation is not likely to emerge in its pristine form. United Nations debate and action within its sphere of influence would be the closest thing to approximate it, and that context could in a sense be replicated in the OAS, the OECD, and the U.S. Congress. Keeping with Habermas' proposition, gifts—if an agreement delineated its components—could be an exception, but not an exception that swallows the rule. Efficiency, or the economic imperative to utilize public and private goods in the most productive way, would also be a prime consideration. The FCPA may be considered "coercive" on both of these grounds, but it remains to be seen whether spokespeople for those points of view can articulate their critiques persuasively.

From Habermas' perspective, speakers are not constrained in voicing a position or engaging in a political or legal movement until the "ideal" situation emerges. He does not advance a social contract built on a rock solid foundation. Habermas simply takes us as we are—in a real world with real problems and resources—and puts all his faith in the depth and creativity of human rationality. In this sense, his work is consistent with the long tradition of German idealism. It is not a foolproof scheme and it is not presented as foolproof. Trial and error are part of this approach, as they are in every effort of democratic regimes to eliminate harms to the body politic, economic productivity, and the cultural fabric of society on a global scale.

Conclusion

Bribery will disappear simply by putting new laws on the books. Also, if it is true that bribery is most prevalent in those quarters of the globe experiencing the greatest impoverishment, measures that produce an increase in global wealth—even if the wealth only trickles down—will contribute to a reduction in bribery and other forms of corruption. The FCPA and progeny are steps in that direction.

If poverty is the root cause of bribery, or a significant contributing factor, and if bribery and other forms of corruption are counterproductive

143. Id.
144. Id.
to economic growth, one has to ask what are the alternatives. A politically feasible redistribution of global wealth, or Western wealth, runs the gamut from "cultural exchange" to outright transfer payments. Yet wealth transfers are forever under political attack, which is not likely to change in the foreseeable future.

The FCPA, and the OECD and OAS counterparts, may be among the few politically feasible ways of dealing with a problem that is widely regarded as economically devastating. That Western firms still invest in countries widely acknowledged as corrupt suggests the potential for more foreign investment, much more in terms of a domestic product, than could be gained if bribery and corruption were eliminated or at least brought under control. It may be the case, though unlikely, that U.S. and related anti-corruption measures intrude on traditional notions of gift-giving in various parts of the world, but one cannot help notice that these occasions have not been so striking or intrusive as to prompt an official protest from foreign governments. Cases reviewed in this inquiry do no more than reveal illicit payments by U.S. firms and employees. If some cultures consider these payments mere gifts, the transparency that FCPA actions bring should cause no consternation.

Instead, the world has witnessed Prime Minister Tanaka's dismissal for accepting Lockheed's secret payments, which were partially financed by $250 million in U.S.-guaranteed loans in the early 1970s. Political repercussions were also documented in connection with Northrup's payments to highly placed Saudi Air Force officials; Gulf's contributions from a Bahaman subsidiary to a political party in the Republic of Korea and the President of Bolivia; Exxon's funneling of between $46 and $49 million from Esso Italiana to Italian officials for special favors; and Mobil Oil Italiana's, a Mobil Oil subsidiary, similar actions through the offices of a trade association, Unione Petrolifera.

For the United States to respect the laws and customs of other nations, these nations should grant the U.S. legal system equal regard. As review of cases illustrated, there is scarce resemblance between corrupt payment and anything approximating a gift. Moreover, no scholar assailing the U.S., OECD, and OAS efforts suggests a middle ground. Amendments to the FCPA do not come easily, but, recently, Congress considered a provision to exempt modest payments that might be termed gifts even if those payments were not positively or affirmatively endorsed by the written laws of the host nation. Congress will likely reconsider the provision, and it might look favorably on scholarly works that explore middle-ground positions.

Repeal of the FCPA is not a realistic proposition. If repeal were placed on the congressional agenda, one could only imagine opposition from all points of the globe. If the largest and most aggressive economic competitor in the world economy sanctioned bribery and "leveled the playing field" by allowing bribe payments to be deducted as legitimate business expenses, the protests would be unbridled; in fact, they would be heard in the halls of U.S. academia.