EFFICIENCY V. MORALITY: THE CODIFICATION OF CULTURAL NORMS IN THE FOREIGN CORRUPT PRACTICES ACT

MARIE M. DALTON*

Transnational corruption, specifically the bribery of foreign government officials by foreign commercial entities, results in considerable economic harm for developing and developed nations alike. Bribery distorts market competition, instills inefficiency into economic transactions, impedes the development of international commercial relationships, and undermines public confidence in democratic governance. However, when not derived from economic principles but from moral disapprobation, regulation proscribing bribery of foreign officials may have unintended economic consequences.

The anti-bribery provisions incorporated in the Foreign Corrupt Practices Act ("FCPA" or "the Act")[1] distinguish prohibited from permissible payments not on the basis of the economic efficiencies of the regulated action but rather proscribe all payments that could be inherently classified as "corrupt." The notion of corruption embodied in the Act is defined utilizing ethical, as opposed to economic, criteria and is based upon the belief that payments designed to influence government officials to perform services outside their prescribed duties are morally wrong.

The morally based prohibitions incorporated in the FCPA are extraterritorially applicable to the citizens and entities of foreign nations. As cultural pluralism predominates despite a rapidly globalizing world, the values and norms incorporated in the Act may conflict with divergent cultural standards or

---

* Recipient of the Flora S. and Jacob L. Newman Prize. The author would like to thank Professor Jennifer Arlen for her insightful guidance during the composition of this piece. Special thanks to Brian Glennon, Aaron Murphy, and Matthew Miller for their encouragement and support, and to the staff of the *New York University Journal of Law & Business* for their consummate dedication and professionalism.

1. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (1994 & Supp. IV 1998).

conceptions of permissible conduct abroad. The application of the Act in foreign jurisdictions may intrude upon the prescriptive jurisdiction of foreign nations to develop regulation aligned with their local values and economic policy objectives.

While there is ethical desirability in a universal prohibition against corruption, the adoption of morally based, as opposed to economically based, anti-bribery laws results in negative consequences that may include: loss of efficient and value maximizing transactions, due to the over-inclusive nature of the FCPA prohibition; diplomatic tensions with foreign nations, negatively impacting U.S. international relations; and foregone business opportunities, as foreigners have declined to subject themselves to U.S. legal standards and liabilities and companies have avoided transacting business in countries where bribery may be prevalent.

Considering the gravity of harms resulting from bribery and the powerful positions of multinational corporations in the global economy, the adoption of some anti-bribery regulation may be economically defensible, and indeed, necessary. However, although some level of legislation appears prudent, in discussing the harms to be avoided in adopting anti-bribery regulation, legislators may be better served by focusing on harms resulting from inefficient practices, rather than moral prohibitions. In serving this end, the Foreign Corrupt Practices Act should incorporate an statutory based de minimis exemption precluding prosecution for payments falling under set monetary limits, established pecuniary ceilings or percentages of the recipient country's per capita income. In formulating this exception, by limiting permissible payment thresholds to sufficiently low levels, respect for local culture and foreign conceptions of proscribed conduct can be accorded while market distorting and economically harmful effects of bribery are mitigated.

I.
HARM RESULTING FROM BRIBERY AND CORRUPTION

Bribery and corruption are universally condemned on both economic and moral grounds. Bribery not only violates the tenets of nearly every major religion in the world, it also imposes severe economic costs in any nation where it is practiced, with particularly acute effects being felt in developing

economies. Although both moralists and economists denounce the practice and effects of bribery and corruption, their underlying justifications for doing so profoundly differ.

A. *Economic Arguments Against Bribery and Corruption*

Corruption, including most prevalently the bribery of political officials, creates negative economic ramifications for all polities, but its acute effects are particularly harmful in emerging and developing economies. Corruption is extensively perceived to be the most formidable impediment to development and economic growth in developing nations.[2] Corruption and bribery distort economic judgments, impede the development of cross-border commercial relationships, debase governmental and bureaucratic systems, and erode the foundations of social structures.[3]

Bribery and corruption undermine public confidence in the integrity of the capitalistic free market system.[4] In corrupt regimes economic decisions are not made on the basis of competition in terms of superior price, service, quality, or salesmanship. Rather purchases and contracts are made according to the size and value of the bribe, rewarding and preserving the survival of inefficient entities producing marginal products.[5] Corruption provides incentives for sellers to divert re-

---

2. Cheryl W. Gray & Daniel Kaufman, *Corruption and Development*, FIN. & DEV., Mar. 1998, at 7

> In a recent survey of more than 150 high-ranking public officials and key members of civil society from more than 60 developing countries, the respondents ranked public sector corruption as the most severe impediment to development and growth in their countries.

See also Parthapratim Cha, *The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties*, 32 DENV. J. INT'L L. & POL'Y 315, 315 (2004).

3. Philip M. Nichols et. al, *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT'L L.J. 215, 217-18 (2004).

4. *Prohibiting Bribes to Foreign Officials: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong. 11 (1976). *See also* Kevin Done, *High Levels of Bribes Harm Rate of Growth*, FIN. TIMES, June 28, 1996, at 4 (citing a report by the World Bank that finds that corruption is among the largest factors creating popular resistance to market reform).

5. Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983).

sources from production to the provision of bribes, and to impose the cost of bribes in the form of a surcharge on vulnerable consumers, resulting in price and quality distortions within markets.[6] Corruption not only raises the cost of commercial transactions and penalizes law abiding competitors operating ethically in the market, it also has the potential to increase inflation, endanger macro-economic stability, and thrust businesses into the informal sector.[7] As one official succinctly stated, "In short, [bribery] rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards to risk losing business."[8]

Corruption and bribery also impede the development of transnational commercial relationships not only by excluding potential competitors from the market and constructing inefficient monopolies,[9] but also by creating market conditions that are inimical to foreign investment and economic growth. Corruption and bribery engender uncertainty in business relationships and prevent companies from evaluating or predicting market competition.[10] Bribery embeds a degree of arbitrari-

---

6. Franklin E. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 390-91 (1987)

> An inefficient firm may pay off a purchasing agent or government official because it cannot obtain the business based upon the price or quality of its product. Even if the firm is efficient and could therefore compete on the basis of price or quality, it may still engage in bribery due to one of two motivations. It may be a defensive effort to respond to the extortion of the agent or to respond to bribery by other firms. Alternatively, the firm may give the payoff in lieu of lowering prices or increasing quality in order to reap monopoly profits. In each case, classic commercial bribery has the effect of raising prices above competitive levels.

7. Ibrahim F.I. Shihata, *Corruption – A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 460-61 (1997).

8. *Prohibiting Bribes to Foreign Officials: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong. 11 (1976).

9. M. Shahid Alam, *Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment*, 48 AM. J. ECON. & SOC. 441, 449 (1989)

> [W]here risks of detection arise from the complaints of unsuccessful bidders (i.e., bribers), the official will regulate entry into the auction only to those he can trust. And since trust is unrelated to the production efficiency of aspirants, such entry restrictions may be enough to prevent favors from going to the most efficient producers.

10. *See* Ibrahim F.I. Shihata, *Corruption – A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 457 n.27 (1997)

ness and uncertainty into commercial relationships, exalting secrecy over transparency.[11] As one commentator found, endemic bribery decreases foreign investment; there exists a "negative association between corruption and investment, as well as growth, [that] is significant in both a statistical and an economic sense."[12] In accordance with orthodox economic theory, low investment rates in turn impede growth of gross domestic product.[13] As such, the degree of economic development is said to be inversely proportional to the rate of corruption in a nation.[14]

> In its 1977 and 1996 Rules of Conduct, the International Chamber of Commerce (ICC), an international non-governmental organization having 7,000 member companies and business associations in more than 130 countries, condemns corrupt practices by member enterprises in connection with international commercial transactions because of their negative impact on international trade and international competition.

11. Shang-Jin Wei, *Why Is Corruption so Much More Taxing than Tax? Arbitrariness Kills* 2 (Nat'l Bureau Econ. Research, Working Paper No. W6255, 1997).

12. Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 705 (1995) (determining that a decrease in corruption, equivalent to one standard deviation, would raise a country's investment rate by almost five percent and annual GDP growth rate by almost one half of a percent). *See also* Shang-Jin Wei, *Why Is Corruption so Much More Taxing than Tax? Arbitrariness Kills* 2 (Nat'l Bureau Econ. Research, Working Paper No. W6255, 1997) ("corruption in host country has a negative effect on inward foreign direct investment from all source countries in a way that is statistically significant and quantitatively large.").

13. Philip M. Nicols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 348 (1997) ("Under orthodox economic theory, lower investment rates should lead to lower rates of growth").

14. Ibrahim F.I. Shihata, *Corruption – A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 462 (1997)

> [C]orruption . . . retards the overall development of societies and their systems of government. Historically, it declined with the rise of civilizations and increased with their fall. Its level and pace of growth may thus have an inverse relationship with the degree of development.

See Press Release, Transparency International, 1998 Corruption Perceptions Index (Sept. 22, 1998), *available at* http://ww1.transparency.org/pressreleases_archive/1998/1998.09.22.cpi.html (statement of Chairman Peter Eigen) ("Many of the world's poorest nations are perceived to be among the most corrupt.").

Additionally, corruption delegitimizes governments, undermines respect for the rule of law, and frustrates democratic reform. Corruption and bribery blur distinctions between legal and illegal behavior, sanction conduct on the basis of willingness and ability to pay, and transform the rule of law into the "rule of individuals pursuing their private interests."[15] Corruption undermines public confidence in government and permits vested interests to circumvent processes of debate, representation and choice in order to allocate resources on the basis of compensation.[16] As one author notes, in corrupt regimes "[c]itizens may come to believe that government is simply for sale to the highest bidder. Corruption undermines claims that the government is substituting democratic values for decisions based on ability to pay."[17] As such, corruption generates an atmosphere of distrust of government officials, erodes public confidence in public institutions, and undermines the foundations of democracy.[18]

Lastly, bribery and corruption deepen inequities, exacerbate social and political tensions, and disproportionately harm impoverished members of society.[19] Deteriorating social conditions, national health, and social welfare are prevalent in corrupt regimes.[20] As such, the casualties of corrupt regimes are most prevalently the vulnerable members of society, who remain dependent upon government services while also re-

---

15. Ibrahim F.I. Shihata, *Corruption – A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 460 (1997).

16. *See generally* D. Thompson, *Mediated Corruption – The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369 (1993).

17. Susan Rose Ackerman, *The Political Economy of Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY 31, 44 (Kimberly Ann Elliott ed., 1997). *See also* Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. 179, 184 (1996) ("Perhaps the greatest causality of . . . corruption has been the erosion of public trust in public institutions and leaders, the foundation of democracy."). *See also* Karl M. Meessen, *Fighting Corruption Across the Border*, 18 FORDAM INT'L L.J. 1647, 1647 (1995) ("Corruption both in government and private business has no little role in discrediting freshly installed democratic procedures.").

18. Herbert H. Werlin, *The Consequences of Corruption: The Ghanaian Experience*, 88 POL. SCI. Q. 71, 79 (1973).

19. *See* Susan Rose Ackerman, *The Political Economy of Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY 31, 44 (Kimberly Ann Elliott ed., 1997).

20. Tord Kjellstrom et al., *Current and Future Determinants of Adult Ill-Health, in* THE HEALTH OF ADULTS IN THE DEVELOPING WORLD 209, 211-13 (Richard G.A. Feachem et al., eds., 1992).

maining the least capable of paying bribes. As one author forcefully states, "we delude ourselves if we think bribery to be purely economic conduct incapable of leading to fear, cruelty, and humiliation."[21]

B. *Moral Arguments Against Bribery and Corruption*

Corruption, of which bribery is a prevalent manifestation, is condemned and proscribed by all major schools of religious and moral thought. The theology of Buddhism,[22] Christianity,[23] Confucianism,[24] Hinduism,[25] Islam,[26] Judaism,[27] Sikh-

---

21. Martin Davies, *Just (Don't) Do It: Ethics and International Trade*, 21 MELBOURNE U. L. REV. 601, 614 (1997).

22. U. Dhammaratana, *The Social Philosophy of Buddhism*, in THE SOCIAL PHILOSOPHY OF BUDDHISM 1, 17- 18 (Samdhong Rinpoche ed., 1972)

> Sila [morality] as prescribed by the Buddha may be said to be the widest [moral principle] in scope . . . The second moral precept of refraining from taking what is not given . . . involves abstinence from all deceptive practices such as bribery that lead to social disintegration.

23. *See* DEUTERONOMY 16:19 ("you must take no bribes"); EXODUS 23:8 ("you must not accept a bribe, for a bribe blinds clear-sighted men"); *see also* David Neff, *When Economists Pray*, CHRISTIANITY TODAY, Apr. 9, 1990, at 13 ("corruption so undermines society that there is a virtual breakdown of legitimate order.") (quoting Oxford Declaration on Christian Faith and Economics).

24. *See* J.C. Cleary & Patrice Higonnet, *Plasticity into Power: Two Crises in the History of France and China*, 81 NW. U. L. REV. 664, 669 (1987) ("Principled Confucian officials often lamented that despite their best intentions, the entrenched corruption of the petty functionaries made it impossible to put into effect a truly moral administration.").

25. UPENDRA THAKUR, CORRUPTION IN ANCIENT INDIA 14 (1979)

> [A] perusal of the [Hindu] works makes it clear that the earlier [Hindu] writers prescribe a much more drastic punishment for the bribe-seeker [than for the bribe giver], who finds a graphic mention in one of the early inscriptions. Manu and Visnu also ordain that the entire property of a bribe-consuming official should be confiscated by the king. Yajnavalkya, however, provides banishment for such social offenders. Kautilya, the astute observer of men and affairs, gives a graphic description of measures to apprehend such an official, and like Yajnavalkya prescribes banishment for such officials.

26. *See* QORAN, Sura 2:184 ("Not to consume each others' wealth unjustly, nor offer it to judges as bribes, so that, with their aid, you might seize other men's property unjustly."); Sura 28:77 ("Allah loveth not corrupters.").

27. *See* 1 SEFER HAHINNUCH, THE BOOK OF [MITZVAH] EDUCATION 325 (1978) ("Among the laws of the precept, there is what our Sages of blessed

ism,[28] and Taoism[29] all condemn corruption and proscribe followers from engaging in the immoral practice of bribery. Influenced by these theological schools, a "moralist approach" has developed, under which the proscribed conduct of bribery is defined in accordance with the advancement of religious precepts.[30] Described utilizing terms such as "evil," "bad," "unethical," and "dishonest," bribery under this approach is viewed as inherently immoral and prohibited, but not on the basis of economic ramifications; rather, such conduct is thought to be deserving of regulation as it offends the fundamental moral values of man.[31]

Under the moralist perspective, bribery is contextually defined in accordance with the religious ideology adopted by the regulator. As such, no universal moral consensus exists demarcating corrupt from non-corrupt payments and proscribed conduct will vary depending upon the ethical viewpoint underlying the regulation. Moralist prohibitions against bribery utilize broad and value laden standards to identify proscribed conduct, and thereby base enforcement on *a priori* condemnation of bribery in terms of ethical principles.[32] As one business per-

---

memory said, that both the one who gives and the one who accepts [a bribe] violate a negative precept . . .").

28. HARBANS SINGH, DEGH, TEGH, FATEH: SOCIO-ECONOMIC & RELIGIO-POLITICAL FUNDAMENTALS OF SIKHISM 141 (1986)

> The main object of Sikh polity, it may again be emphasised, is 'righteous rule.' This can be achieved either by transforming the existing corrupt rulers on moral and ethical lines of religion through peaceful persuasions, or by replacing their corrupt rule by a 'just' regime — if necessary, with the help of arms.

29. LAO TZU, TE-TAO CHING 22 (Robert G. Hendricks trans., 1989) (168 B.C.)

> The courts are swept very clean; while the fields are full of weeds; and the granaries are all empty. Their clothing—richly embroidered and colored; while at their waists they carry sharp swords. They gorge themselves on food, and of possessions they have plenty. This is called thievery! And thievery certainly isn't the Way!

30. Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. 877, 894 (2000).

31. Gerald E. Caiden & Naomi J. Caiden, *Administrative Corruption*, 37 PUB. ADMIN. REV. 301 (1977).

32. *Id.* ("Studies of corruption [under the moralist approach] were vague as to definition, condemned it a priori, and looked for explanations in individual behavior.").

son described the moral opprobrium against bribery, "morality is the fundamental argument against corruption . . . [p]eople find corruption shameful and repugnant, and . . . invariably reject it;" the author labeled those abstaining from bribery as "pure and chaste."[33]

II.
ECONOMIC V. MORAL BASES OF ANTI-BRIBERY LAWS

Legal prohibitions of corruption are commonly expressed in terms of either economic principles, emphasizing inefficiencies derived from corrupt practices, or moral values, reflecting the inherent iniquity of committing the proscribed act. While specific regulations may incorporate aspects of both moralistic and economic perspectives, one form naturally predominates over the other.

Economically based anti-bribery laws commonly incorporate provisions relating to the fiscal impact of the illicit payment or provisions which demarcate culpable payments on the basis of the magnitude of the bribe. Such anti-bribery regulations may allow violators to avoid liability by demonstrating that no economic harm resulted from the bribe. Economically based anti-bribery laws may also provide a complete defense to liability when the company concerned was the best qualified bidder or could otherwise have been properly awarded the business irrespective of the payment made or offered, as the case may be under the regulations of Greece.[34] Alternatively, such laws may incorporate, as an element of the offense, the requirement that there be an actual or intended effect to cause detriment to the public interest, as was required under

33. A. Timothy Martin, *The Development of International Bribery Law*, 14 NAT. RESOURCES & ENV'T 95, 102 (1999).

34. Astikos Kodikas [A.K.] [Criminal Code] 2656:1998 (Greece) (only prohibiting bribes made in order to obtain or retain "an unfair business or other advantage of pecuniary or any other nature that is not due"). ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GREECE: PHASE 2, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 28 (2005), *available at* http://www.oecd.org/dataoecd/51/13/35140946.pdf (expressing concern that "Law 2656/1998 does not cover . . . a briber who is the best-qualified bidder.").

former Hungarian law,[35] or require a showing of detriment to international business, as is required under Portuguese law.[36] Lastly, as is the case in Finland[37] and Norway,[38] economically based anti-bribery laws may impose liability upon violators proportionate to the value of the bribe, classifying a payment as aggravated bribery, entitled to increased punishment, on the basis of "whether it has resulted in a considerable economic advantage, whether there [i]s a risk of significant economic or other damage or whether false accounting information has been recorded or false accounting documents or false annual accounts have been prepared."[39]

In contrast, morally based anti-bribery laws criminalize payments on the basis of their classification as bribes, regard-

---

35. BüntetõTörvénykönyv (BTK.) (Penal Code) 258:B (Hungary), *amended by* Act CXXI of 2001

> Any person who gives or promises a favour to a foreign official person or with regard to him to another person, which may influence the functioning of the official person to the detriment of the public interest, commits a misdemeanour, and shall be punishable with imprisonment of up to two years.

36. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PORTUGAL: REVIEW OF IMPLEMENTATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATIONS ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 3 (2002), *available at* http://www.oecd.org/dataoecd/51/59/2088284.pdf (discussing Article 41-A of the Decree Law no. 28/84 (Portugal), which prohibits "Active corruption against international business").

37. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FINLAND: PHASE 2, REVIEW OF IMPLEMENTATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATIONS ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 16 (2004), *available at* http://www.oecd.org/dataoecd/52/0/2088239.pdf

> Pursuant to section 14 of the Penal Code, bribery is only considered aggravated where the briber intends to induce a public official to "act in service contrary to his/her duties with the result of considerable benefit to (himself/herself) or to another person," or "the value of the gift or benefit is considerable."

38. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NORWAY: PHASE 2, REVIEW OF IMPLEMENTATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATIONS ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 31 (2002), *available at* http://www.oecd.org/dataoecd/3/28/31568595.pdf.

39. *Id.*

less of their economic impact or considerations of efficiency. Under the moral approach, such payments are universally proscribed due to their inherent unethical nature, as "rais[ing] serious moral . . . concerns"[40] for international business, or because of their effect of "strik[ing] at society, moral order and justice" and of causing "damage to a society's moral fiber."[41] As such, even if the payment were ultimately economically efficient or value maximizing, caused no negative impact to the interest of the public or international trade, or resulted in no negative market externalities, under the moral approach, the payment would still be prohibited due to the intrinsic wrongfulness of the illicit act.

III.
THE FOREIGN CORRUPT PRACTICES ACT AS A MORALLY BASED ANTI-BRIBERY LAW

The United States' prohibition against bribery, the Foreign Corrupt Practices Act, was enacted in 1977 in the wake of the Watergate scandal,[42] which focused official and public attention on the prevalence of illegal political contributions and the usage of unrecorded "slush funds" by multinational corporations.[43] Such funds were expended to bribe foreign government officials overseas in order to secure lucrative business contracts. Indeed, a voluntary disclosure program implemented by the Securities and Exchange Commission ("SEC") led to admissions by over 400 American corporations, includ-

40. Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, 4.

41. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/Treaties/b-58.html.

42. *See* Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 348-52 (2000); Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 593-96 (Supp. 2002).

43. *Unlawful Corporate Payments Act of 1977: Hearings before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong. 184 (1977) (statement of W. Michael Blumenthal, Secretary of the Treasury) (the "most devastating disclosure that we have uncovered in our recent experience with illegal or questionable payments has been the fact that, and the extent to which, some companies have falsified entries in their own books and records").

ing 117 Fortune 500 companies, of making payments totaling more than $300 million[44] to foreign political parties and government officials.[45]

As a result of these disclosures, a widespread consensus developed within congressional and commercial arenas characterizing foreign bribery as harmful to the economic interest of U.S. companies and developing nations. Congress found that bribery of foreign officials not only obstructed market competition, directing contracts to inefficient businesses, but also threatened American corporate activities overseas, tarnished the image of America abroad and frustrated U.S. foreign policy objectives.[46] However, despite consensus regarding the economic harms resulting from bribery, Congress ultimately based the criminalization of foreign bribery on moral grounds.

In distinguishing prohibited from permissible payments, Congress focused not on the economic efficiencies of the regulated action but rather proscribed all payments that could be inherently classified as "corrupt."[47] The notion of corruption embodied in the Act, specifically expressed in the requirement of a corrupt intent, was defined utilizing ethical, as opposed to economic, criteria and was based upon the belief that payments designed to influence government officials to perform services outside their prescribed duties are morally wrong.[48]

As was expressed in the legislative history, the Act's incorporation of corrupt intent was designed to connote, in moral

---

44. *See* Peter W. Schroth, *National and International Constitutional Law Aspects of African Treaties and Laws Against Corruption*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 83, 87 (2003) (adjusted for inflation this amount would exceed $1 billion today).

45. SECURITIES AND EXCHANGE COMM'N, 94TH CONG., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 1 (Comm. Print 1976).

46. *Unlawful Corporate Payments Act of 1977: Hearings before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong. 1-2 (1977) (statement of W. Michael Blumenthal, Secretary of the Treasury).

47. 15 U.S.C. §§ 78dd-1, 78dd-2 (2003) (prohibiting payments or offers to pay money or anything of value "corruptly," directly or indirectly, to any foreign government official).

48. Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?* 1 ASIAN-PAC. L. & POL'Y J. 16, *27 (2000).

terms, the requirement of an evil or wrongful motive or purpose.[49] Indeed, as one author suggests, "for the corruptly element to be satisfied, a violator must not only have intended to purchase some favor from a government official, but must also have done so with the knowledge that this act was evil or bad."[50] At basic, by incorporating this moral standard into the Act, Congress ensured that the determination of whether a payment is prohibited would depend, at least in part, upon subjective judgments of whether the act could be characterized as good or evil.[51] As such, under the Foreign Corrupt Practices Act, "the classification of complex international transactions [must be conducted utilizing] the moral principles of 'evil,' 'bad,' and 'wrongful' to establish whether a practice is met with approval or sanctioned by the penalties of criminality."[52]

The principled tone of the Carter Administration[53] was expressed in the bribery prohibitions incorporated in the Foreign Corrupt Practices Act; as President Carter expressly stated, the Administration took "the unequivocal position that corruption in international business transactions is morally repugnant."[54] This characterization of bribery was echoed in the congressional debates surrounding the adoption of the Foreign Corrupt Practices Act and its subsequent amendments. Representative congressional statements include: "[t]he payment of bribes . . . is counter to the moral expectations and

49. S. REP. No. 95-114 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

50. Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?* 1 ASIAN-PAC. L. & POL'Y J. 16, *32 (2000).

51. Kenneth U. Surjadinata, *Revisiting Foreign Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. R. 1021, 1034 (1998).

52. *Id.* at 1087.

53. *See* ROBERT SHOGAN, PROMISES TO KEEP 41 (1977) (stating "an aura of religion surrounded [Carter's] early campaign and gave it a distinctive tone"). *See generally* Randy Mallory, *A Museum Honoring All Presidents in Odessa*, TEXAS HIGHWAYS, *available at* http://www.texashighways.com/currentissue/department.php?dept=passing (during Carter's presidential campaign buttons and posters were created depicting Jimmy Carter, who shares initials with Jesus Christ, in biblical dress and with long hair above the caption "J.C. Can Save America!")

54. United Export Promotion Policies, Message Transmitted by the President to Congress, WEEKLY COMP. PRES. DOC. 1689-1695 (September 9, 1980).

values of the American public;[55] "[b]ribery is immoral . . . bribery is a morally and socially pernicious practice;"[56] and "we have an obligation to set a standard of honesty and integrity in our business dealings not only at home but also abroad which will be a beacon for the light of integrity for the rest of the world."[57] As is evident from both the legislative history and the statutory language of the Act, the bribery prohibitions incorporated in the Foreign Corrupt Practices Act may arguably be characterized as morally based regulation.

IV.
OVERVIEW OF THE ACT

The Foreign Corrupt Practices Act prohibits corporations, and individuals acting on their behalf, from offering payments to foreign government officials for the purpose of obtaining or retaining business abroad. Additionally, the Foreign Corrupt Practices Act imposes recordkeeping and internal accounting control requirements on companies with securities registered under the Securities Exchange Act of 1934. The provisions of the Foreign Corrupt Practices Act have been construed broadly, often at the cost of predictability, with severe consequences resulting from their violation.

The Foreign Corrupt Practices Act has two substantive sections. First, the anti-bribery provisions prohibit: (1) certain issuers of securities,[58] domestic concerns,[59] their officers, directors, agents and stockholders; (2) from offering, paying, or

55. H.R. REP. NO. 95-640, at 5 (1977).

56. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure, Hearing Before the Comm. on Banking, Housing and Urban Affairs*, 95th Cong. 216 (1997) (statement of Nicholas Wolfson, Professor of Law, Connecticut University).

57. *The Activities of American Multinational Corporations Abroad, Hearings Before the Subcomm. on International Economic Policy*, 95th Cong. 5 (1975) (statement by Michael F. Butler, Vice President and General Counsel, Overseas Private Investment Corporation).

58. 15 U.S.C. § 78m(b)(2) (2002); 15 U.S.C. § 78l (2000); 15 U.S.C. § 78o(d) (2000) (Issuers are publicly held companies that are subject to either the registration or reporting provisions of the Exchange Act; issuers include foreign or domestic companies with securities registered on a nation securities exchange, companies possessing in excess of $10 million in assets with securities held by 500 or more person, and financial institutions filing Exchange Act reports with the Office of Comptroller of the Currency).

59. 15 U.S.C. § 78dd-2(h)(1) (2002). Domestic concerns include:

promising to pay anything of value;[60] (3) to any foreign official, political party, official of a public international organization, or candidate for political office; (4) if made with a corrupt intent; and (5) for the purpose of influencing the official act in order to secure or retain business.[61] Despite the intricate statutory test for establishing the provision of an illicit payment, the class of conduct violating the Act has been broadly construed, often at the cost of predictability and efficient business practice.

Prohibited conduct under the Act is not limited to furnishing monetary bribes. Rather, the statutory phrase "anything of value" includes both tangible and intangible benefits derived by the foreign recipient and has been broadly defined to include items such as information,[62] witness testimony,[63] promises of future employment,[64] provision of loans or college scholarships,[65] reimbursement of travel expenses,[66] and assistance in negotiating mergers or other business transactions.[67] Indeed, conferrals of even presumably innocuous benefits are prohibited, including the hosting of golf outings,[68] the provi-

---

(a) any individual who is a citizen, national or resident of the United States; and (b) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

60. 15 U.S.C. § 78dd-1 (2003).

61. 15 U.S.C. §§ 78dd-1, 78dd-2 (2003).

62. United States v. Sheker, 618 F.2d 607, 609 (9th Cir. 1980).

63. United States v. Zouras, 497 F.2d 1115, 1121 (7th Cir. 1974).

64. United States v. Schwartz, 785 F.2d 673, 680-81 (9th Cir.), *cert. denied*, 499 U.S. 890 (1986).

65. *Id.*

66. *See* U.S. v. Metcalf & Eddy, No. 99-CV-12566 (D. Mass., 1999) (the provision of first class airline tickets for a government official and his immediate family to travel from Egypt to various stops in the United States, value unspecified, violated the FCPA); U.S. v. Liebo. 923 F.2d 1308 (8th Cir. 1991) (reimbursement of airline tickets valued at $2,028 violated the FCPA).

67. United States v. Schwartz, 785 F.2d 673, 680-81 (9th Cir. 1986), *cert. denied*, 499 U.S. 890 (1986).

68. *See* U.S. v. Sawyer, 85 F.3d 713 (1st Cir. 1996); U.S. v. Standefer, 610 F.2d 1076 (3d Cir. 1979); *aff'd*, 447 U.S. 10 (1980); U.S. v. Niederberger, 580 F.2d 63 (3d Cir. 1978).

sion of food baskets,[69] and the donation of funds to charitable organizations.[70] There is no minimum pecuniary value required to implicate the bribery prohibitions and no de minimis exception exists to prevent the Act's application; rather, offers to make payments, even if never consummated, can violate the FCPA.

Prohibited acts under the anti-bribery provisions are inchoate crimes. Liability extends even if the illicit payment did not actually alter the official's conduct, the official lacked the authority to bring about the desired result, or the official could have undertaken the action lawfully even if no bribe had been issued.[71] To be held liable, the payor must solely posses the requisite "corrupt intent" in conferring the benefit, an intent to wrongfully influence a government official in order to direct, obtain or preserve a business opportunity.[72] Covered business opportunities include not only "the renewal of contracts or other business, but also . . . payments to a foreign official for the purpose of obtaining more favorable tax treatment" and other such benefits.[73]

The applicability of the Foreign Corrupt Practices Act may often be uncertain, as conclusively determining a recipient to be a foreign official covered by the Act is an often elusive exercise. According to the statutory definition, a foreign official includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality."[74] The expansive nature of this definition is particularly problematic in reference to centralized or newly privatized industries. As state

69. *See* U.S. Dep't of Justice, FCPA Rev. Proc. Rel. 81-02 (December 11, 1981) (provision of less than $2,000 of company's packaged beef products for personal use of government officials may violate the FCPA).

70. In the Matter of Schering-Plough Corporation, Exchange Act Release No. 49,838, 82 SEC Docket 3644 (Jun. 09, 2004) (the payment of $76,000 to a legitimate non-profit foundation over a three year period violated the FCPA where the foundation was headed by a foreign official capable of awarding contracts to the donor company).

71. *See* United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).

72. H.R. REP. No. 95- 640, at 18 (1977).

73. H.R. REP. No. 100-576, at 918 (1988).

74. 15 U.S.C. § 78dd-2(h)(2), *amended by* Pub. L. No. 105-336, 112 Stat. 3302 (Nov. 10, 1998), § 3(b)(2).

owned enterprises constitute government agencies or instrumentalities under the Act, payments made to officers and employees of these entities also fall within the statutory prohibition.[75] Therefore, gifts and courtesies extended to these individuals, no matter how meager or acceptable within traditional domestic business practices, might be classified as prohibited conduct under the FCPA.[76]

Particularly in comparison to the ambiguous nature of the statute, penalties under the anti-bribery provisions are substantial. The Foreign Corrupt Practices Act divides enforcement authority between the Securities and Exchange Commission and the Department of Justice ("DOJ"), and provides for civil and criminal penalties for violations of the bribery prohibitions. Corporations convicted under this statute are subject to a maximum criminal fine of two million dollars per violation.[77] Moreover, under the Alternative Fines Act, if the illicit payment results in pecuniary gain to the corporation or monetary loss to a third party victim, the maximum fine may increase, requiring the offending corporation to pay the greater of either twice the gross gain or twice the gross loss.[78] Civil fines, in an amount up to $10,000, are also authorized and equitable remedies, including civil injunctions, are available against offending corporations.[79]

The accounting standards provisions under the FCPA impose internal accounting controls and recordkeeping stan-

---

75. *See, e.g.*, U.S. Dep't of Justice, FCPA Rev. Proc. Rel. 93-1 (Apr. 20, 1993) (government controlled entity found to be an "instrumentality of the foreign government"); U.S. Dep't of Justice, FCPA Rev. Proc. Rel. No 94-1 (May 13, 2001) (general director of a state owned enterprise found to be a foreign official, despite local law holding otherwise).

76. An example of potentially prohibited conduct is the provision of medicinal paraphernalia to, the training of or the hosting of social events for doctors within state owned hospitals, a not uncommon practice by pharmaceutical and medicinal supply companies operating within the United States.

77. 15 U.S.C. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A) (2000).

78. 18 U.S.C. § 3571(d) (2003)

> If a person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

79. 15 U.S.C. § 78ff(c) (2004).

dards upon issuers of securities that are publicly traded within the United States. These provisions prohibit the falsification of corporate books and records, and require corporate management to implement a system of internal accounting controls to assure transactions are accurately and properly recorded. The accounting standards provisions apply to all public companies with securities traded within the United States regardless of whether they have any foreign operations.[80] Therefore, enforcement actions may be brought against companies for entirely domestic conduct. The SEC routinely interprets these requirements broadly to increase the accountability of public companies, to preserve the integrity of corporate records and to prevent the concealment of corrupt or questionable payments through inaccurate recordkeeping.[81]

V.
EXTRATERRITORIAL APPLICATION OF THE ACT

The provisions of the Foreign Corrupt Practices Act apply to foreign and domestic issuers alike, extending the reach of U.S. regulation and criminal law into foreign jurisdictions. Under the Foreign Corrupt Practices Act, foreign citizens and entities may be held directly liable, incurring ominous fines and substantial penalties, for violations of the Act's anti-bribery provisions. Additionally, foreign corporations and individuals, even if not within the jurisdiction of the Act, may be indirectly required to comply with these provisions, pressured by affiliates subject to the Act. As such, the Foreign Corrupt Practices Act represents a substantial extension of U.S. law into the business affairs of foreign citizens and entities.

Issuers, publicly held companies and individuals that are subject to either the registration or reporting provisions of the Exchange Act, are required to comply with the anti-bribery

---

80. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 102, 91 Stat. 1494, 1494 (codified at 15 U.S.C. § 78m(b)(2)(B)) ("every issuer who has a class of securities registered pursuant to Section 12 of [the Exchange Act] and every issuer which is required to file reports pursuant to Section 15(d) of [the Exchange Act]" must comply with the requirements of the accounting standards provisions).

81. *See* Address by SEC Chairman Harold M. Williams before the American Institute of Certified Public Accountants (Jan. 13, 1981), *in* 46 Fed. Reg. 11, 544 (Feb. 9, 1981).

provisions of the FCPA.[82] Those subject to these provisions include foreign and domestic companies with securities registered on a national securities exchange, companies possessing in excess of $10 million in assets with securities held by 500 or more persons, and financial institutions filing Exchange Act reports with the Office of Comptroller of the Currency.[83] Therefore, foreign entities and individuals, regardless of their principal place of business, country of incorporation, or degree of assets held in the United States, must comply with the anti-bribery provisions of the Foreign Corrupt Practices Act if encompassed within this definition.

Additionally, the anti-bribery provisions of the Foreign Corrupt Practices Act apply to domestic concerns, defined as:

> (a) any individual who is a citizen, national, or resident of the United States; and (b) any corporation, partnership, association, joint-stock corporation, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.[84]

As such, foreign entities operating abroad, yet incorporated within the United States, must also comply with the anti-bribery provisions of the Foreign Corrupt Practices Act. Additionally, U.S. citizens, nationals and residents employed or involved in the affairs of foreign entities or subsidiaries are subject to the requirements of the Act.

Moreover, persons other than issuers or domestic concerns are required to comply with the anti-bribery provisions of the Act. Foreign nationals or business entities organized under the laws of a foreign state may be held criminally or civilly accountable under the Act if they "utilize[e] the U.S. mails or other instrument of interstate commerce in furtherance of an unlawful, foreign bribe." while within the territory of the United States.[85] Thus, foreign entities, subsidiaries, distributors, agents, joint venture partners and citizens may be

82. 15 U.S.C. §§ 78m(b)(2), 78dd-1(a) (2002).

83. 15 U.S.C. § 78m(b)(2) (2002); 15 U.S.C. § 78l (2000); 15 U.S.C. § 78o(d) (2000).

84. 15 U.S.C. § 78dd-2(h)(1) (2002).

85. 15 U.S.C. § 78dd-3 (2003).

prosecuted under the Foreign Corrupt Practices Act if they commit any act, no matter how significant, within the United States that furthers the commission of an illicit payment.

It remains uncertain how broadly enforcement agencies will interpret the statute's territorial nexus requirement. The statutory phrase "territory of the United States" is defined to encompass all areas over which the United States asserts territorial jurisdiction.[86] Thus, acts undertaken within the territory of the United States consist not only of those within the actual territorial boundaries of the fifty States, U.S. territories, possessions, and commonwealths, but also those within airplanes licensed under U.S. law and passengers aboard airplanes en route to U.S. territories.[87]

Furthermore, Department of Justice officials have indicated that acts physically undertaken outside the territory of the United States, which result or trigger a foreseeable action to occur within the United States, such as the sending of an email by the foreign national to a U.S. resident, may be sufficient to meet this jurisdictional requirement.[88] This broad interpretation effectively transforms the jurisdictional nexus requirement into a finding that an "instrumentality of interstate commerce" was utilized.[89] Under such an approach, foreign individuals and entities may be held liable even if never physically present within the United States. As one author suggests, "an Indonesian businessman and his Indonesian company are now potentially accountable under the . . . FCPA for a corrupt payment that the businessman authorized to an Indonesian official while he was in Indonesia if part of the payment comes from funds held in a U.S. bank" or "if authorization of the payment was made using a U.S. licensed cellular telephone provider."[90]

---

86. *H. Rep. No. 105-802 to accompany H.R. 4353, International Anti-Bribery and Fair Competition Act of 1998*, 105th Cong. 21 (1998).

87. S. REP. NO. 105-277, at 6 (1998).

88. Peter Clark, Comments made by Peter Clark, Deputy Chief, Fraud Division, Department of Justice, at the American Bar Association Conference on the Foreign Corrupt Practices Act (Feb. 19, 1999).

89. *Id.*

90. Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?* 1 ASIAN-PAC L. & POL'Y J. 16, *38 (2000); *See also* DONALD ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 4-9 (1995) ("Under this broad interpretation, a tele-

Lastly, foreign nationals or residents, otherwise subject to the adjudicatory jurisdiction of the United States,[91] may be held liable as a third party under the Foreign Corrupt Practices Act. As stated by the Committee on Interstate and Foreign Commerce, "the concepts of aiding and abetting and joint participation would apply to a violation under [the FCPA] in the same manner in which those concepts have always applied in both civil actions and implied private actions brought under the securities laws generally."[92] This statement has been interpreted to provide that "even a foreign national, acting with the knowledge or at the direction of an official or employee of the U.S. company, and over whom U.S. jurisdiction otherwise exists, would be subject to FCPA liability."[93]

Foreign nationals, entities, subsidiaries, or joint venture partners not possessing a territorial nexus nor otherwise subject to the adjudicatory jurisdiction of the United States are not liable for violations of the Foreign Corrupt Practices Act. However, issuers and domestic concerns, as defined by the Act, may be held liable for the violations of affiliated third parties, including actions undertaken by subsidiaries, contractors and sales agents. As the House conferees stated upon adoption of the Act, "any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity, would itself be liable under the bill."[94]

The scope of the Foreign Corrupt Practices Act was structured "to reach any U.S. company which uses its foreign sub-

---

phone call made by a foreign national flying over Europe could arguably be deemed to be an act within the territory of the United States.").

91. The bases of jurisdiction that may reasonably be expected to render a foreign national or resident subject to the adjudicatory jurisdiction of the United States include the following: presence (beyond transitory presence) in the territory; conducting regular business in the territory; conducting an activity in the territory that is the subject matter of the dispute; or conducting activity outside the territory that has a "substantial, direct, and foreseeable effect within the State," if that activity is the subject of the dispute. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421 cmt. c (1986).

92. H.R. REP. NO. 95-831, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4126.

93. H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407, 463-64 (1999).

94. H.R. REP. NO. 95-831, at 14 (1999), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4126.

sidiary as a conduit for [corrupt] payments."[95] Therefore, under the Act, parent companies can be subject to liability under at least three circumstances: (1) where the company knowingly aids or engages in the making of an illicit payment, including where the company negotiates, funds, facilitates or conceals the corrupt action;[96] (2) where the company authorizes or ratifies the corrupt payment, either implicitly or explicitly;[97] and (3) where the foreign subsidiary is found to be the company's agent, allowing the corporate veil to be pierced and the parent to be held vicariously liable for the actions of its subsidiary. Therefore, although not expressly subject to the provisions of the FCPA, the Act's requirements may be imposed on a subsidiary by its risk susceptible parent corporation. As one commentator states:

> [A]s a practical matter, because of its broad wording, the law does affect subsidiaries indirectly. For example, if a U.S. corporation owns a foreign subsidiary in Switzerland, and knows or has reason to know that this foreign subsidiary's business depend upon the making of bribes to a foreign government official, the U.S. company may be in violation of the law. One consequence is that the foreign subsidiary must conform its behavior to the requirements of the U.S. law even though neither it, nor its officers, directors, or employees may be penalized directly, or risk having its parent found to be in violation of U.S. law and subject to penalties. There is thus some extraterritorial consequence, regardless of whether one characterizes the act as an extraterritorial application of U.S. law.[98]

Issuers and domestic concerns may also be held liable for the conduct of its foreign sales agents.[99] In order to conduct

---

95. 123 CONG. REC. 38779 (1977) (statement of Rep. Eckhart).

96. 15 U.S.C. § 78dd-1(a), 78dd-2(a) (2004); SEC v. Eric Mattson & James W. Harris, Exchange Act Release No. 44,784, 75 SEC Docket 1808 (Sept. 12, 2001).

97. 15 U.S.C §§ 78dd-1(f)(2), 78dd-2(h)(3) (2003).

98. Stanley J. Marcuss, *Extraterritoriality: U.S. Anti-Boycott Law and the Foreign Corrupt Practices Act*, 15 L. & POL'Y INT'L BUS. 1135, 1144-45 (1983).

99. *See* SEC v. Triton Energy Corp., No. 1:97CV00401 (D.D.C. 1997) (corporation indicted for alleged conduct of their foreign agent in Indonesia); United States v. Cantor, 4 FCPA Rep. 699, 821601 (S.D.N.Y 2001) (officer

business legally and effectively in a foreign country, companies frequently employ local sales agents to serve as their representatives and consultants overseas. Companies and individuals employing foreign sales agents may be held liable for authorizing, consciously disregarding or deliberately remaining ignorant of illicit payments made by the third party in violation of the Foreign Corrupt Practices Act.[100] Furthermore, liability may attach even though the foreign agent is acting in full compliance with local law.[101]

Notably, the Act prohibits a once widely practice technique, referred to by one observer as "the paradigm situation," employed by companies to circumvent the requirements of the FCPA.[102] This technique contemplates hiring a foreign agent to procure a government contract and entering into a contingent fee arrangement, awarding a substantial commission if the company successfully acquires the contract. Although not expressly authorized to do so, agents often negotiated with foreign officials to share this commission if the official ensured the government contract would be awarded to the company. The SEC has stated that, even without specific authorization, a company may be held liable under the FCPA for actions of its foreign agent under these circumstances.[103]

Foreign distributors, companies purchasing merchandise for domestic suppliers and independently reselling them to customers, may also subject the supplying issuers or domestic concerns to liability under the Foreign Corrupt Practices Act. This may be the case even when the distributor takes title to the merchandise, independently contracts with customers,

---

indicted for payments made by a foreign sales agent to Saudi Arabian government officials).

100. *See* 15 U.S.C. § 78dd-1(a)(3), 78dd-2(a)(3) (2004) (prohibiting the payment by a company of anything of value to "any person" while knowing that all or a portion of that payment will be used, directly or indirectly, to bribe a government official).

101. John W. Duncan, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 NW. J. INT'L L. & BUS. 203, 210 (1982).

102. 6 ROGER M. WITTEN, SECURITIES LAW TECHNIQUES: TRANSACTIONS AND LITIGATION § 82.03 (2002).

103. *See* SECURITIES AND EXCHANGE COMM'N, 94TH CONG., REPORT TO SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) (factors influencing a finding of liability include the size of the commission paid, the reputation of the agent, the local customs, and the manner of payment).

bears all risk of loss, and receives no compensation from the supplier company.[104] If the domestic company and foreign distributor maintain a close relationship, and the domestic company advises and monitors the distributor in marketing the supplier's products, or permits the distributor to represent itself as an agent of the domestic company, the company may be held liable if the distributor engages in illicit conduct.[105] This is particularly true where the domestic company is directly involved with bidding on government contracts, or where goods are sold to the distributor at an unusually deep discount, enabling the distributor to purchase the goods and make an illicit payment while maintaining an adequate profit margin.[106]

As such, although the Foreign Corrupt Practices Act presumptively extends primarily to U.S. entities or nationals operating abroad, given the degree of engagement and interaction with foreign jurisdictions in the global marketplace, in practice, the Act operates to substantially influence the behavior of foreign citizens, government officials, and companies. As one author states, the Act "exerts a macro-level influence on the cultures and economies of the country into which it insinuates itself . . . [t]he statute extends to transactions in other countries and shapes their economic activity and development."[107]

VI.
CULTURAL STANDARDS AND THE APPLICATION OF THE ACT

At basic, the classification of behavior as corrupt is an expression of a community's conceptions of legitimate versus illegitimate practices. As one author states "by observing the way in which corruption is defined and identified in the laws, one can capture a state's perception about what it deems to be appropriate behavior."[108] An examination of the concept of

104. *Proceedings of the Seventh Annual Conference on Legal Aspects of Doing Business in Latin America: Adapting to a Changing Legal Environment*, 9 FLA. J. INT'L L. 1, 40 (1994).

105. Geoffrey Gamble & Theodore F. Killheffer, *The Enemies of United States' Trade Competitiveness: A Lawyer's Perspective*, 6 DEL. LAW. 7, 13 (1998).

106. *Id.*

107. Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 279 n.323 (1997).

108. Kenneth U. Surjadinata, *Revisiting Foreign Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. R. 1021, 1034 (1998).

corruption as codified in U.S. laws may provide an informative view into a typical western characterization of the term. However, characterizations of corruption in other nations may not comport with the western view.

Corruption and bribery have not been subject to universal definition, rather as cultural pluralism predominates despite a rapidly globalizing world, the scope of permissible payments has been diversely defined by local authorities in accordance with regional values and social norms.[109] Although most nations prohibit bribery, definitions of corruption vary worldwide, as countries characterize corruption and develop regulation in accordance with local traditions, cultural values, and economic policies. Therefore, as one author states, "while all cultures eschew corruption, culture remains a critical differentiator as opinions vary on what conduct falls inside and outside of that label."[110]

On a global scale, subtle distinctions between conceptions of corruption arise from cultural heterogeneity and varying local views on ethical behavior. Perceptions of corruption vary depending on factors such as "the industry where it is observed, the governing laws, and the local culture."[111] The application of the western definition of corruption, as embodied in the FCPA, abroad may be incompatible with the views and practices of other nations. As the "idealized notion of a global village" has not yet been realized,[112] the imposition of a distinctive value system beyond the confines of local borders may have the effect of "inflicting incongruent or discordant values

109. Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?* 1 ASIAN-PAC. L. & POL'Y J. 16, *5-*6 (2000).

110. H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407, 423 (1999).

111. Nikolay A. Ouzounov, *Facing the Challenge Corruption, State Capture, and the Role of Multinational Businesses*, 37 J. MARSHALL L. REV. 1181, 1185 (2004).

112. Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH & LEE L. REV. 229, 276-77 (1997) (stating "the world is still made up of an array of communities that embrace a widely divergent range of protocols, norms, values and behaviors," and quoting the Minister of Trade and Industry in Indonesia, "We do not have common standards on issues like corruption . . . [a]ny effort to relate them to trade will be detrimental to the functioning of the WTO in the future").

on others in instances where legitimate, nuanced moral differences [would be more] supportable."[113] In these contexts, parties may elect not to undertake economically efficient transactions in foreign nations because they violate U.S. moral standards, as encompassed in the FCPA, even though the transaction would not contravene local characterizations of corruption. Companies, in the face of liability, may voluntarily elect to forego foreign transactional opportunities, or they may be prevented from effectively competing to win the right to engage in these contracts, on the basis of the moral prohibitions incorporated in the Act.

The diversity of legitimate conceptions of bribery, and the Act's implicit adoption of culturally specific notions of prohibited behavior despite potential global heterogeneity, were recognized during the congressional debates. As the Secretary of Commerce stated, "the problem is defining what is a crime, what is moral and immoral, when you are dealing with a variety of societies and a variety of backgrounds."[114] In keeping with the Secretary's statement, the following observation by one author appears quite adept: "[m]ost people know corruption when they see it. The problem is that different people see it differently."[115]

A. *Traditional Practice of Gift Giving*

The anti-bribery provisions incorporated the Foreign Corrupt Practices Act apply without recognition to the sociological, economic and anthropological factors that have combined in some nations to create a local tradition of legitimate gift giving, tipping and hospitality. In a number of cultures, these

---

113. Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 231 (1999); *See also* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 277 (1997) ("The range of distinctions from one country to the next suggests that the FCPA may be poorly equipped to recognize and respect subtle differences in acceptable business practices around the world").

114. *Prohibiting Bribes to Foreign Officials, Comm. on Banking, Housing and Urban Affairs*, 94th Cong. 55 (1976) (statement of Elliot L. Richardson, Secretary of Commerce).

115. Kimberly Ann Elliot, *Corruption as an International Policy Problem: Overview and Recommendations, in* CORRUPTION AND THE GLOBAL ECONOMY 175, 177 (Kimberly Ann Elliott ed., 1997).

practices have not traditionally been considered to be corrupt, but rather are recognized means of gaining informal influence,[116] building business relationships among clients, expressing loyalty and gratitude, and complying with formal etiquette.[117] Indeed, in such cases gift giving may been culturally perceived to be innocuous or even admirable.

Anthropological accounts of traditional gift giving explain that the making of payments: formulate elaborate networks of social relationships; aid in the redistribution of assets within a society; are made to maintain personal relationships; and express compassion and appreciation.[118] As one author contends:

> A bribe to some is a harmless gratuity to others. It may represent an expression of gratitude, appreciation, or loyalty; a display of etiquette; a form of entertainment condoned by local protocol; a socially expected form of post-transactional celebration between transactors; a legitimate compensation for expenses incurred; a necessary facilitator or expeditor for services; a symbolic message conveying understanding of another's needs; or an acceptable token of nominal value.[119]

---

116. *See* Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1042 (1998) (Questioning the distinction between the western practice of political lobbying and traditional gift giving practices for exercising informal influence, practices he finds distinguishable only utilizing culturally specific criteria).

117. Nikolay O. Ouzounov, *Facing the Challenge: Corruption, States Capture and the Role of Multinational Business*, 37 J. MARSHALL L. REV. 1181, 1188 (2004).

118. *See* Vito Tanzi, *Governmental Activities and Markets*, FIN & DEV., Dec. 1995, at 24; *See also* RICHARD F. BELTRAMINI, BUSINESS BELIEVES IN GIFT GIVING: A RESEARCH ANTHOLOGY 163, 170 (Cele Otnes & Richard F. Beltramini eds., 1996)

> In a business context, the giver may be sending a symbolic message to the recipient, suggesting that the giver understands its customer's needs, and is willing to expend the resources to please them. Gift giving can also be a symbolic expression of loyalty that is essential in some cultures to the maintenance of a social relationship. The symbolic expression of gift giving can also serve an important social function in the negotiation process.

119. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. INT'L L. 419, 429 (1999).

Therefore, payments, prohibited as corrupt under the Foreign Corrupt Practices Act, may legitimately occur with in foreign nations where practices of gift giving are embodied in the cultural traditions of the country.[120] Countries around the world, including China, Japan, Indonesia, South Korea, and countries located within the continent of Africa, implicitly or expressly permit the provision of gifts and social gestures in business contexts. Indeed, not only are these gratuities permissible, but they may also be necessary to the transaction of business in these nations.[121]

In China, payments to government officials by foreign businesspersons may be advanced in accordance with the traditional practice of guanxi, a practice akin to the socially accepted practice of networking in America.[122] Under this cultural practice, gratuities are extended to aid in the cultiva-

---

120. Local gift giving traditions were recognized in the congressional debates preceding the adoption of the Act. *See The Activities of American Multinational Corporations Abroad, Hearings Before the Subcomm. on International Economic Policy*, 94th Cong. 33 (1975) (statement of Stephen J. Solarz, Member, Cong.) ("Many company executives consider it unrealistic to apply strict anti-bribery standards abroad . . . [t]ime and again the phrase 'payments were made in accordance with local customs and tradition' appears in a disclosure statement"); *See also Prohibiting Bribes to Foreign Officials, Comm. on Banking Housing, and Urban Affairs*, 94th Cong. 65 (1976) (statement of Elliot L. Richardson, Secretary of Commerce)

> The question of corporate ethics or morality which a particular payment raises depends on many factors . . . it is difficult to raise moral objections to political contributions which are legal and are made in accordance with the accepted customs of the state in which they are made.

121. John W. Duncan, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 NW. J. INT'L L. & BUS. 203, 210 (1982).

122. Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 250 (1999) (describing guaxni)

> To get things done in [China], people in business and other organizational settings routinely engage in networking processes that are encouraged and even applauded rather than condemned. These processes include identifying players who are most likely to be able to help achieve desired goals and developing relationships with these people to improve the likelihood that they will cooperate with rather than hinder the networker. The process entails integration. A networker may render a gift or favor today in hopes that he or she will be favored by the recipient tomorrow, when the tables are turned and the recipient is positioned to help the networker.

tion and maintenance of personal and professional relationships necessary to achieving the organizational aims and objectives of businesses operating within the region.[123] A parallel practice of providing gifts or benefits to further business associations and to exercise influence with government officials exists in South Korea, embodied by a practice called conji.[124] The conferral of gifts and the exchange of benefits are also key elements of Japanese business culture, where the exercise of discretionary governmental action must often be premised on an exchange of favors.[125] Within Japan, etiquette demands that not unsubstantial gifts or bonuses are exchanged at the close of the business year among colleagues or partners; as one commentator states, failure to engage in this cultural practice would constitute "a terrible breach of etiquette."[126] Indonesian culture also "strongly favors gift-giving, particularly as a means of expressing gratitude and loyalty to authority figures or to reward service."[127] Lastly, African nations practice this form of dynamic social contracting, providing benefits or patronage to encourage the dispersion of resources and redistribution of social wealth through the development of relationships with government actors.[128]

As such, the prohibitions embodied in the anti-bribery provisions of the Act, if applied to foreign nations possessing a tradition of gift giving, may be perceived as American idiosyncrasies in conflict with legitimate customary practices and may

123. *Id.* at 250.

124. *Id.* at 235

> [E]mbedded in South Korean culture is the concept of chonji, a kind of gratitude that can take many forms. For example, conji is expressed by the delivery of material gifts for leniency from teachers, favorable interest rates from bankers, or expedited administrative troubleshooting from government bureaucrats.

125. Peter Tasker, *Crusade Makes a Meal of Corruption Cleanup*, MAIL ON SUNDAY, Apr. 12, 1999, at 11; *See also* DIANA ROWLAND, JAPANESE BUSINESS ETIQUETTE: A PRACTICAL GUIDE TO SUCCESS WITH THE JAPANESE 81 (1985) (noting that gifts valued at $300 to $400 were "not uncommon" in 1985, a significant number particularly when adjusted for inflation).

126. DIANA ROWLAND, JAPANESE BUSINESS ETIQUETTE: A PRACTICAL GUIDE TO SUCCESS WITH THE JAPANESE 81 (1985).

127. Donna K. Woodward, *Foreigners Fathered RIs Graft*, JAKARTA POST, Dec. 17, 1997, at 4.

128. Brian C. Harms, *Holding Public Officials Accoutnable in the International Realm: A New Multi-Layered Strategy to Combat Corrpution*, 33 CORNELL INT'L L. J. 159, 186 (2000).

infringe upon the traditional jurisdiction of foreign nations to regulate practices occurring within their borders in accordance with local values.

If we are to respect cultural heterogeneity, however, we must ensure the practices of bribery versus legitimate gift giving are not equated, but rather remain distinct under the law. Traditional norms are all too often invoked to argue that certain cultures, generally those plagued with high levels of corruption, inherently encourage the provision of bribes. An important distinction must be drawn between bribery that is merely common within a culture and bribery that is accepted or adopted by a culture.[129] In some countries, "bribery has become a cultural ritual only in the sense that it is a prevalent practice, but not in the sense that it is a morally accepted practice."[130] In cultures possessing a legitimate gift giving tradition, bribery may be more prevalent as "there will simply be a higher tendency for one to attempt to mask a bribe as a gift, thus increasing one's susceptibility to engage in bribery."[131] Of course, traditional practices and cultural norms must not be invoked to justify an argument that these traditions "affect the concept of bribery [as differentiated from gift giving] by making the practice less condemnable relative to Western standards."[132]

Rather, in furtherance of respect for cultural diversity and local traditions, any defense based on the cultural viewpoints of these nations must extend only to legitimate gift giving practices, and must not be utilized to quell debate or efforts to eradicate bribery falling outside these cultural traditions. It must be ensured that arguments extolling the virtues of cultural pluralism are not abused to justify predatory or economically detrimental practices. As General Olesegun Obasanjo, President of Nigeria, forcefully argued:

> I shudder at how an integral aspect of our culture could be taken as the basis for rationalizing otherwise despicable behavior. In the African concept of appreciation and hospitality, the gift is usually a token.

---

129. Daniel Y. Jun, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT'L L. 1071, 1085 (1996).

130. *Id.*

131. *Id.*

132. *Id.*

> It is not demanded. The value is usually in the spirit rather than in the material worth. It is usually done in the open, and never in secret. Where it is excessive, it becomes an embarrassment and it is returned. If anything, corruption has perverted and destroyed this aspect of our culture.[133]

A sophisticated legal standard must be adopted to ensure that legitimate traditions of gift giving are entitled to respect while bribery not sanctioned by local custom is prohibited; only by making this distinction will local customs be afforded adequate international recognition.

B. *Differing Levels of Condemnation*

Furthermore, as one author states, notwithstanding traditional gift giving practices, even if condemnation of bribery were universal, "corruption is not a unitary phenomenon; it exists in a variety of manifestations and textures."[134] Countries differ in their intensity of condemnation of bribery, in their characterization of petty versus large scale bribery, and in their economic evaluations of illicit payments.

While all cultures, at least conceptually, may denounce the practice of bribery, perceptions, and condemnation, of petty bribery and nepotism vary greatly among nations. Empirical studies show that, for example: (1) in Bulgaria and Mongolia, while nepotism, intra-family payments, and small scale bribery of government officials are viewed as harmful, "the condemnation is fairly soft, and some . . . find the behavior to have some benefit or even a lot of benefit" for their countries;[135] (2) Romanians "understand that corruption by high officials is wrong, but regard low-level corruption as necessary and harmless;"[136] (3) in "Poland, Bulgaria, and France, an average of ninety percent of respondents justify bribery . . .

---

133. Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUBLIC POL'Y & MARKETING 108, 113-14 (1998).

134. Philip M. Nichols, George J. Siedel, & Matthew Kasdin, *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT'L L.J. 215, 238 (2004).

135. *Id.* at 236-7.

136. Kandis Scott, *The European Union and Romanian Mentalitate: A Case Study of Corruption*, 3 SANTA CLARA J. INT'L L. 225, 225 (2005).

while in the United States, Spain, and Hungary only three percent of the representative national samples declare such tolerance;"[137] and (4) citizens of developing and former communist states "have very solid but different norms than the foreigners . . . do about what is acceptable and what is not."[138] Moreover, in some nations, while bribery is condemned in the abstract, in practice bribery is permitted or proscribed on the basis of economic evaluations. In such countries, foreign nationals "engage[ ] in what can best be described as a static cost-benefit analysis [accepting bribery when it has socially beneficial results]. None defend[ ] bribery on its merits, but several point[ ] to situations when it is defensible."[139]

As such, even if corruption and bribery are universally condemned, subtle variations in intensity and form of condemnation are evident across nations. As one author eloquently states, "[c]orruption is chameleon-like with its many faces, different degrees, and varying intensities."[140] Regardless of universal consensus as to bribery in theory, no single characterization of bribery may be imposed on a global basis; generally imposed definitions of bribery will inevitably conflict with local conceptions of permissible behavior to some degree.

VII.
THE NECESSITY OF CONSIDERING ALTERNATIVE VALUES IN ENFORCING THE ACT

While there is ethical desirability in a universal prohibition against corruption, the adoption of morally based, as opposed to economically based, anti-bribery laws result in negative consequences that may include: (1) loss of efficient and value maximizing transactions, due to the over-inclusive na-

137. Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, 65 LAW & CONTEMP. PROBS. 251, 285 (2002) (citing IWONA JAKUBOWSKA-BRANICKA, CZY JESTESMY INNI? CZYLI W POSZUKIWANIU ABSOLUTNEGO AUTORYTETU [ARE WE DIFFERENT? OR, IN SEARCH OF ABSOLUTE AUTHORITY] (2000).)

138. Kim Lane Scheppele, *The Inevitable Corruption of Transition*, 14 CONN. J. INT'L L. 509, 520 (1999).

139. Philip M. Nichols, George J. Siedel, & Matthew Kasdin, *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT'L L.J. 215, 236 (2004).

140. Daniel Y. Jun, *The Foreign Corrupt Practices Act and Structural Corruption*, 18 B.U. INT'L L.J. 273, 273 (2000).

ture of the prohibition; (2) diplomatic tensions with foreign nations, negatively impacting U.S. international relations; and (3) foregone business opportunities, as foreigners have declined to subject themselves to U.S legal standards and liabilities and companies have avoided transacting business in nations where bribery may be prevalent.

A. *Enforcement as Generating Potential Economic Inefficiencies*

Through the incorporation of moral standard of corruption, the Foreign Corrupt Practices Act runs the risk of being over-inclusive in its prohibition of payments to foreign government officials. While most practices classified as corrupt under the Act will, concededly, be economically inefficient, by utilizing an ethically based definition of corruption the Act inevitably proscribes some efficient and welfare maximizing transactions on the basis of non-universal moral prohibitions.[141] As one author states:

> Assuming, arguendo, that ninety percent of all corrupt practices are inefficient, the value-based definition of corruption would still include ten percent of practices that are efficient. Given the monumental value of U.S. transactions that occur globally on a daily basis, enacting value-based laws that proscribe the ten percent of practices considered efficient (but inconsistent with U.S. values) may add significant costs to U.S firms operating abroad.[142]

The costs imposed by the over-inclusive definition of corruption under the Act, even if representing only a small percentage of prohibited transactions under the FCPA, can be inferred to be significant, even to disinterested observers.

Given the amount of U.S. investment being outwardly exported to foreign countries, the prohibitions under the Act have considerable economic impact on transactions overseas. Between 2003 and 2004 alone, the United States exported $392.6 billion in foreign direct investment worldwide.[143] If in-

---

141. Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1025 (1998).

142. *Id.*

143. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECENT TRENDS IN FOREIGN DIRECT INVESTMENT IN OECD COUNTRIES 4 (2005), *available at* http://www.oecd.org/dataoecd/13/30/35439819.pdf.

vestment estimates from 1990 and 2003 are included, outward foreign direct investment dollars exceed $1.8 trillion.[144] The inclusion of foreign direct investment since the time of enactment of the FCPA in 1977 would drive this number even higher. Even if efficient conduct proscribed under the Act is only a small percentage of foreign investment, given the considerable degree of investment being outwardly exported to foreign countries, the price imposed by the over-inclusive Act may be significant.

Additionally, studies have monitored the specific economic effect of the Foreign Corrupt Practices Act in the context of foreign transactions. Notable among these studies are: a recent report generated by the White House Export Disincentive Task Force estimating the Foreign Corrupt Practices Act "cost[s] the United States $1 billion annually in lost trade opportunities;"[145] a study undertaken by former U.S. trade representative Mickey Kantor concluding that U.S. firms had lost $45 billion in foreign contracts in 1994 due to the prohibitions of the Act;[146] and findings by then Secretary of Commerce Ron Brown that U.S. exporters had lost $25 billion in sales as a result of the bribery ban.[147] Even if only a small percentage of the lost opportunities or transactions detailed in these studies were economically efficient, as opposed to just morally proscribed, the price tag imposed by foregoing these opportunities under the FCPA would be notable.

Furthermore, the application of the Foreign Corrupt Practices Act beyond U.S. borders may result in the kind of economic inefficiencies incident to what some commentators have termed "transplant shock," defined as the possibility that "legal rules that work well in one nation may not work well, and ultimately may be rejected, in a nation with a different

144. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL FOREIGN DIRECT INVESTMENT FLOWS: INFLOWS AND OUTFLOWS (2004), *available at* http://www.oecd.org/dataoecd/14/3/8264806.xls

145. GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: COMPTROLLER GENERAL'S REPORT TO THE CONGRESS 6 (1981).

146. *See* Amy Borrus, *A World of Greased Palms: Inside the Dirty War for Global Business*, BUS. WK, Nov. 6, 1995, at 36.

147. *Hearing of the House Int'l Relations Comm, Int'l Econ. Policy and Trade Subcomm, on U.S. Export Promotion Program*, 104th Cong. (Oct. 12, 1995) (testimony of Secretary of Commerce Ron Brown).

historical, political or cultural background."[148] These authors have shown that transplanting legal rules without "deliberate consideration of the [receiving] country's institutional makeup, history, political economy, social structure, and cultural values" can have negative consequences, including the enhancement of economic inefficiencies and agency problems.[149] Although eliminating bribery and corporate malfeasance are laudable goals, the need to take culture into account in formulating international standards has been widely recognized.[150] As one commentator observed, "[l]aw cannot simply be translated into another language [and] resettled to another country;"[151] the imposition of legal rules on foreign countries without consideration of cultural diversity, even if done with admirable aims, can result in other unanticipated, yet economically and socially disruptive, consequences.

B. *Foreign and Market Reaction to the Enforcement of the Act*

The enforcement of the Foreign Corrupt Practices Act imposes additional costs in terms of foreign diplomatic relations. The extraterritorial application of the Act has caused tension with both the foreign governments and the entities subject to the Act's provisions.[152] This tension stems from the Act's perceived usurpation of the local government's prescriptive jurisdiction to regulate business practices and corruption occurring within its national borders; such tension is exacerbated when foreign and American conceptions of corruption do not coincide.[153] Indeed, as one author states, "[p]otential host

148. *See also* Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can A Transplant Take?* 3 (UCLA Sch. of L., Working Paper No. 02-11, 2002), *available at* http://ssrn.com/abstract_id=313679.

149. *Id.*

150. *See generally*, Amir N. Licht, Chanan Goldshmidt & Shalom H. Schwartz, *Culture, Law, and Finance: Cultural Dimensions of Corporate Governance Laws* (Working Paper Series, 2001), *available at* http://ssrn.com/abstract=277613.

151. Irina Shirinyan, *The Perspective of U.S. Securities Disclosure and the Process of Globalization*, 2 DEPAUL BUS. & COM. L.J. 515, 528 (2004).

152. Steven R. Salbu, *The Foreign Corrupt practices Act as a Threat to Global Harmony*, 20 MICH. INT'L L. 419, 433 (1999) ("the attempts of one sovereign to moderate activity within the borders of another will always pose the risk of disagreements, resentments, and conflict").

153. Michael S. Sinkeldam, *Comments, Payments to Foreign Officials by Multinational Corporations: Bribery or Business Expense and the Effects of United States*

country resentment of extraterritorially applied legislation is hardly debatable[;] [t]he imposition of influence and control across borders is an undeniable source of transnational tension and strife."[154] The application of American bribery conceptions and prohibitions abroad contravenes traditional notions of comity and respect for independent nations' prescriptive jurisdiction to regulate activity occurring within its borders in accordance with local standards.[155]

Furthermore, given the invasiveness inherent in the enforcement of the Foreign Corrupt Practices Act abroad, the application of the FCPA may be particularly detrimental to foreign diplomatic relations. Enforcement of the Act in foreign jurisdictions often requires the assumption of surveillance and monitoring of foreign officials and businesspersons, an exercise of authority often viewed as objectionable.[156] Moreover,

---

Policy, 6 CAL. W. INT'L L.J. 360, 360 (1975-1976) ("International law supports the view that each nation has the right to maintain exclusive jurisdiction to regulate the activities and investments of [companies] within its territorial boundaries"); *See also Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Fin. of the Comm. on Interstate and Foreign Commerce*, 94th Cong. 89 (1976) (statement of Assistant Secretary of the Treasury for International Affairs Gerald L. Parsky)

> Any attempts to apply U.S. criminal statutes to acts consummated abroad would involve an extraterritorial application of U.S. law. While there is no absolute legal prohibitions on such extraterritorial application, attempts by the United States to apply our antitrust and export control laws in a similar way have created substantial problems in the past. The application of our laws abroad often conflicts with foreign laws or practices and is looked upon as an unwarranted intrusion into the sovereignty of other states . . . It can be expected that similar reactions will be forthcoming in the present instance.

154. Steven R. Salbu, *The Foreign Corrupt practices Act as a Threat to Global Harmony*, 20 MICH. INT'L L. 419, 433 (1999).

155. Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 254 (1999) ("Even if other states are entitled under international law to monitor . . . transactions and distinctions [occurring in foreign jurisdictions], comity and respect for sovereign autonomy suggest that they should do otherwise").

156. *The Activities of Am. Multinational Corps. Abroad: Hearings Before the Subcomm. on Int'l Economic Policy of the Activities of Comm. on Int'l Relations*, 94th Cong. 24 (1975) (statement of the Deputy Legal Advisor of the U.S. State Department); *But see* Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 678-79 (2000)

criminalization of bribery conducted abroad infringes upon the prosecutorial discretion of foreign enforcement agencies, presuming the superiority of U.S. laws and agencies over those of the foreign nation in which the conduct took place.[157] As was stated during the congressional debates:

> Such an assertion of jurisdiction by the United States over conduct in a foreign country . . . demeans the enforcement responsibility of the foreign state for such conduct, discredits the applicable foreign law and deprives the foreign states of the often critical determination as to whether, in the light of relevant legal and political considerations, to initiate prosecution for a particular offense.[158]

Perceptions of U.S. economic interests and foreign policy in the current era do not afford the United States with the authority or legitimacy to dictate commercial policy abroad.[159] Fear that U.S. culture is supplanting national traditions has been prevalently referenced overseas; as one author states, an increasing number of foreign nationals:

> [R]egard economic globalization as a campaign to impose Western values, under which a country's development strategy and reform efforts are judged by how close they approach the Anglo-American model. Among these people there are rising concerns that, unless something is done, their own cultures and

---

> [T]he risk may be minimal because law enforcement agencies worldwide are unlikely have the resources to identify and effectively prosecute even a fraction of the typically covert violations . . . It is not surprising that the FCPA has been viewed historically as ineffectual.

157. H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407, 437 (1999).

158. AD HOC COMMITTEE ON FOREIGN PAYMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION 12-13 (1977).

159. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. INT'L L. 419, 443 (1999)

> In a world where U.S. flags are burned in demonstrations against alleged U.S. arrogance and hegemony, any perception of an overweening megalith has the potential to fuel backlash and create an atmosphere of conflict, acts of retributive terrorism, and even war.

> even value systems will be swallowed up by foreign norms.[160]

Although some might qualify this claim as an extreme viewpoint, the Foreign Corrupt Practices Act's intrusion on prescriptive jurisdiction and foreign political processes abroad may predictably have negative effects on international relations and may result in the frustration of commercial relations of American businesspersons abroad even among those that do not share this perception.

It has also been demonstrated that the Foreign Corrupt Practices Act has had an injurious and disruptive effect on: the willingness of foreign firms to engage in business partnerships with American entities, the propensity of U.S. companies to invest abroad, and the competitiveness of U.S. businesses operating in overseas markets. Due to severe penalties and risks of prosecution under the Act, American entities have been inhibited in retaining business partners in foreign jurisdictions. As one author states, as a result of the FCPA, "avoidance of an international business transaction between U.S. companies and companies from developing countries [is often] more economically feasible than fulfillment of an agreement."[161]

Studies show that as the costs of prosecution are often greater than the benefits derived from transacting with U.S. entities, foreign businesses have "distanced themselves from American jurisdiction by rejecting agency or joint venture opportunities with American [corporations], by slowing trade with and investment in the United States, or by transferring liquid assets out of American banks."[162] In the post-FCPA world, vulnerable to claims of corruption and unwilling to subject themselves to intrusive inquiries into corporate dealings, foreign entities often elect to engage in business partnerships only with non-U.S. companies, where less threatening and unambiguous legal standards apply.[163] This result was recognized during the congressional debates:

---

160. Takashi Kawachi, *A New Backlash Against American Influence,* JAPAN ECHO, Apr. 1998, at 45.

161. Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?* 1 ASIAN-PAC L. & POL'Y J. 16, *28 (2000).

162. *Id.* at *34.

163. John W. Duncan, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard,* 4 NW. J. INT'L L. & BUS. 203, 209 (1982)

> [T]he predictable response of [foreign nationals] to proposals [to engage in a business transaction with a U.S. entity] is to refuse to do business with them. Foreign businessmen have no desire to become enmeshed in procedures required by U.S. law or to risk embarrassing inquiries into their business practices. They can find other customers for their services.[164]

Additionally, as a result of the ominous civil and criminal consequences arising from a FCPA violation, American companies have declined to invest in potentially lucrative markets where gratuitous payments may be a prerequisite to the completion of a business transaction.[165] Despite commendable economic advances, illicit payments remain endemic in many developing nations.[166] As one commentator found, "[i]n a number of endemically corrupt countries throughout the world, bribery is so entrenched that outsiders have only two real choices – to pay bribes, or to avoid doing business entirely."[167] Prominent among these so-called endemically corrupt countries are two prominent magnets for overseas investment today, China and India.[168] Despite tremendous investment po-

---

> Another effect of such FCPA prohibitions is the unwillingness of foreign officials to do business with United States companies because of the concern that United States court and media will label them 'corrupt,' even though they comply fully with their national laws.

164. *Business Accounting and Foreign Trade Simplification Act: Joint Hearings before the Subcomm. on Securities and the Subcomm on International Finance and Monetary Policy of the Comm on Banking, Housing, and Urban Affairs*, 97th Cong. 266 (1981) (statement of Mark Feldman)

165. Rajib Sanyal & Subarna Samanta, *Correlates of Bribe Giving in International Business*, INT'L J. COM. & MGMT., Jan. 1, 2004 at 1 ("In certain countries normal business transactions cannot be initiated or completed without paying bribes").

166. DONALD ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 1-3 (1995).

167. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. INT'L L. 419, 433-34 (1999); *See also* E.C. Lashbrooke, Jr., *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT'L L. J. 227, 235 (1979) ("A 1975 survey indicated that almost one-half of the corporate chief executive officers of major U.S. enterprises thought that bribery was necessary in order to do business in some foreign countries").

168. Shang-Jin Wei, *Can China and India Double Their Inward Foreign Direct Investment?* 6 (Nat'l Bureau of Econ. Research, Working Paper, 1999), *availa-*

tential, many U.S. businesses have chosen to "abandon [such] countries altogether, presumably because it was not profitable to remain in the market."[169] For example, the Bechtel Corporation abandoned a $2.5 billion gas pipeline project in Turkmenistan after determining that it would be impossible to complete the transaction without violating the provisions of the FCPA, given the prevalence of bribery in the region.[170] Abandonment can impose tremendous costs on the competitiveness of American business internationally and result in harm to U.S. economic interests domestically.

VIII.
NEED FOR ANTI-BRIBERY REGULATION

Considering the gravity of harms resulting from bribery and the powerful position of multinational corporations, entities that are notoriously difficult to regulate in the global economy, the adoption of some anti-bribery legislation is economically defensible and, indeed, necessary. Multinational corporations may be economically more powerful than the nation in which they conduct business, as the capitalization of some multinational corporations exceeds the gross domestic product ("GDP") of many nation states. For example, the largest multinational corporation in 2006, Exxon, possesses assets in excess of $208 billion, revenues of $339 billion and profits of over $36 billion.[171] The revenues of this corporation are larger than the GDP of 202 of the 232 countries on which the CIA maintains economic records.[172] Indeed, Exxon's revenues surpass the GDP of nations such as Sweden, Switzerland, Austria, and Greece and exceeds the GDP of nations like the

---

ble at http://www.nber.org/~confer/99/indiaf99/India-China-FDI.PDF#search='China%20india%20investment.'

169. John W. Duncan, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 NW. J. INT'L L. & BUS. 203, 223 (1982).

170. *The Next Oil Frontier: How America's Soldiers, Oilmen, and Diplomats are Carving Out a New Sphere of Influence on Russia's Borders*, BUSINESSWEEK, May 27, 2002.

171. *The World's Largest Corporations, Fortune 500*, FORTUNE, April 17, 2006.

172. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2005), *available at* http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html.

Cayman Islands, Sierra Leone, and Tajikistan by multiples of fifty.[173]

Given the formidable economic resources of multinational corporations, these entities act as an undeniable challenge to government regulation. The economic power of corporate interests is of particular concern when evaluating the independence and regulatory power of government in developing states. Enticed by investment opportunities and lower production costs, multinational corporations are increasingly relocating their operations within the borders of developing nations.[174] The enforcement of regulation by developing nations to prohibit the injurious corporate conduct of highly capitalized multinational corporations can be characterized as an undertaking of David versus Goliath proportion. Plagued by often weak enforcement mechanisms and agencies, precarious national legal frameworks, and fragmented local politics, these developing nations often lack credible deterrence power to control the predatory conduct of multinational corporations.[175]

Furthermore, the power disparities between multinational corporations and local government may be further exacerbated by international investment competition, particularly given the financially disparate position of many developing nations. Following the maxim "capital will go where it is wanted and stay where it is well treated,"[176] developing countries have been known to repeal corporate prohibitions and create lax regulatory environments to entice multinational investment in a so-called regulatory race to the bottom.[177] Under such regimes, corporations may have incentive to exploit the comparative weakness of the state, imposing social and market costs in

173. *Id.*

174. Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. U. J. INT'L HUM. RTS. 186, *1 (2005).

175. Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 216 (2005).

176. WALTER B. WRISTON, THE TWILIGHT OF SOVEREIGNTY: HOW THE INFORMATION REVOLUTION IS TRANSFORMING OUR WORLD 36 (1992).

177. Darren M. Springer, *Reimagining the WTO: Application of the New Deal as a Means of Remedying Emerging Global Issues*, 29 VT. L. REV. 1067, 1085 (2005).

order to maximize profits. As one author stated, "[b]usiness can hold countries to ransom over investment regimes and deregulation of labour markets. Transnationals can manipulate markets, exploit subsidies or simply relocate if things get bad."[178] As such, responsibility for controlling injurious or exploitive corporate conduct, including bribery and corruption, cannot be rested solely at the doorstep of developing nations – countries which may be encumbered by corporate capture – if the harmful effects of bribery are to be curtailed.

Unlike domestic entities, "multinational corporations form webs of economic relationships well beyond the control of any one state."[179] Without international prohibitions, the global power and influence exerted by mobile multinational corporations would remain largely unaccountable and the economically injurious effects of bribery may go unregulated. Repealing prohibitions against bribery would not only have detrimental economic consequences for the countries in which bribery is practiced, and for interconnected global markets, but would also cause diplomatic tension with foreign governments. Indeed, the Foreign Corrupt Practices Act was originally adopted, in part, to mitigate the foreign policy dilemmas that resulted from the disclosure of payments, totaling millions of dollars in bribes, to foreign government officials. As one representative stated:

> Corporate bribery . . . creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.[180]

178. K.D. EWING & TOM SIBLEY, INTERNATIONAL TRADE UNION RIGHTS FOR THE NEW MILLENNIUM 15 (2000).

179. Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law,* 37 COLUM. HUM. RTS. L. REV. 287, 291 (2006).

180. H.R. REP. NO. 95-640 (1977)

The bribes uncovered in the SEC investigations preceding adoption of the Act, involving corporations such as Lockheed, Exxon, and Mobile Oil, placed a strain on diplomatic relations and ran counter to U.S. foreign policy objectives. For example, in 1976, "the Lockheed scandal shook the Government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations."[181] In another incident involving the Lockheed corporation, "Prince Bernhardt of the Netherlands was forced to resign from his official position as a result of an inquiry into allegations that he received $1 million in pay-offs from Lockheed." Furthermore, in Italy, alleged bribery payments by "Lockheed, Exxon, Mobil Oil, and other corporations to officials of the Italian government eroded public support for th[e] government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well."[182]

Indeed, more recently, in 2005, the foreign relations implications of bribery were witnessed by incidents including "the removal of the vice-president of South Africa after corruption allegations; investigations of heads of state or former political leaders in Israel and Costa Rica; and major corruption trials in France, Nepal and Venezuela."[183] As such, prohibitions against illicit bribery, particularly large scale bribery, are necessary to safeguard relations with foreign nations. Both in terms of maintaining the legitimacy of foreign governments and in order to avoid the criticism that America permits its corporations to behave abroad as they would not permit them to behave at home, some level of anti-bribery regulation appears prudent.

Furthermore, the repeal of prohibitions against bribery would also engender criticism from the business community, eager to avoid the market distortions and economic harms incident to prevalent bribery. Studies have demonstrated that

181. *Id.*

182. *Id.*

183. Cobus de Stardt, *Lessons Learned from Anti-Corruption Campaigns Around the World*, in GLOBAL CORRUPTION REPORT 2006 1 (Transparency Int'l ed., 2006), *available at* http://www.transparency.org/content/download/4821/28518/file/Part%202_7_deSwardt.pdf.

the rate of corruption and bribery in a country play a decisive role in determining where firms are willing to invest.[184] However, current investment rates also demonstrate that current regulation under the Foreign Corrupt Practices Act may be overbroad. The fact that businesses continue to invest at high rates in nations that have been documented to have high levels of corruption, such as China[185] and Mexico,[186] may imply that they can distinguish between regimes with inefficient versus efficient practices. For example, although the corruption ratings for Indonesia[187] and Uganda[188] are roughly identical, and both countries share similar Third World economic status, investors have channeled far more capital into Indonesia.[189]

As such, although legislation appears necessary, in discussing the harms to be avoided in adopting anti-bribery regulation, legislators may be better served by focusing on the harms resulting from inefficient practices, rather than moral prohibitions. In serving this end, the Foreign Corrupt Practices Act should incorporate exemptions and defenses to limit its application in contexts where proscribed conduct may be economically efficient or where prohibitions might strain foreign relations with other nations.

IX.
EXEMPTIONS TO ANTI-BRIBERY LEGISLATION IN OTHER NATIONS

In balancing the need for regulation while preserving local government's prescriptive jurisdiction to regulate conduct occurring within national borders in accordance with local

184. Susan Lim, *Corruption: Can it be Stamped Out?*, STRAITS TIMES (Singapore), Oct. 8, 1995, at 1 ("60% of the Asian business executives polled said that corruption was one of the biggest barriers to doing business.").

185. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2004, at 5 (2004), *available at* http://www.transparency.org/cpi/2004/dnld/media_pack_en.pdf (China received a Corruption Perception Index ("CPI") score of 3.4; CPI scores relate to "perceptions of the degree of corruption as seen by business people and country analysts and ranges between 10 (highly clean) and 0 (highly corrupt).").

186. *Id.* (Mexico received a CPI score of 3.6 in 2004).

187. *Id.* (Indonesia received a CPI score of 2.0 in 2004).

188. *Id.* (Uganda received a CPI score of 2.6 in 2004).

189. Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1049 (1998).

norms, other countries have incorporated various exceptions in their anti-bribery regulations. These exceptions can be classified into two categories: those limiting the extraterritorial application of regulations, and those permitting a defense based on social custom or courtesy.

In consideration of notions of comity and deference to local legislators, certain countries have imposed complete or partial restrictions on the extraterritorial application of their anti-bribery regulations. Countries including Canada, the United Kingdom and Japan have declined to exercise extraterritorial jurisdiction over offenses committed in violation of their anti-bribery laws in foreign nations.[190] Additionally, countries including Austria, Belgium, Finland, Denmark,[191] the Netherlands,[192] and France, while asserting extraterritorial jurisdiction, "make [enforcement] contingent upon the prin-

190. U.S. DEP'T OF STATE, BATTLING INTERNATIONAL BRIBERY, 2001 ANNUAL REPORT 13 (2001), *available at* http://www.state.gov/documents/organization/4356.pdf.

191. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DENMARK REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 14 (2001), *available at* http://www.oecd.org/dataoecd/39/57/2018413.pdf.

> Pursuant to subsection 7(1), acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state shall be subject to Danish criminal jurisdiction where the act was committed in the following circumstances:
> (a) outside the territory recognised by international law as belonging to any state, provided acts of the kind in question are punishable with a sentence more severe than simple detention; or
> (b) within the territory of a foreign state, provided that it is also punishable under the law in force in that territory.

192. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NETHERLANDS REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 19 (2001), *available at* http://www.oecd.org/dataoecd/39/43/2020264.pdf.

> Pursuant to article 5.1 of the Penal Code, the Netherlands has jurisdiction over criminal offences committed outside the Netherlands by Dutch citizens in the following 2 cases:
> (1) In respect of any of the serious offences defined under certain articles of the Penal Code. The articles of the Penal Code relevant to the offence of bribing a foreign public official (i.e. articles 177, 177a and 178) are not mentioned here.
> (2) In respect of an offence that is considered a serious offence under the criminal law of the Netherlands and is also considered a criminal offence under the laws of the country where the offence was committed.

ciples of dual criminality or reciprocity, thus requiring that the laws of the country whose official is bribed or a third country where the bribe is paid also prohibit bribery of foreign officials."[193] The regulations adopted in Greece allocate further deference to local enforcement authorities, premising the exercise of extraterritorial jurisdiction "upon the complaint of the government of the country in which the crime was committed."[194] In adopting restrictions, these countries justify limitations on extraterritorial jurisdiction by recognizing that the imposition of laws by outsiders can alienate foreign governments even if the law itself is unobjectionable.

Other nations, in recognition of cultural traditions of gift giving, and local conceptions of bribery, incorporate exceptions for gifts made in accordance with social custom. For example, Korean regulation provides an exception for payments that would be otherwise acceptable under local custom or tolerated by local authorities in: providing that "an act which is conducted . . . in pursuance of accepted business practices, or other action which does not violate the social rules [of the country in which it is undertaken], shall not be punishable;"[195] and providing a defense to allegations of bribing a foreign public official where "such payment is permitted or required by the law of the foreign public official's country."[196] Danish law provides a similar exception to the crime of bribing a government official, noting that in foreign countries, "special conditions may prevail [so] that certain token gratuities . . . fall outside the criminal scope [of the anti-bribery prohibitions]

193. U.S. DEP'T OF STATE, BATTLING INTERNATIONAL BRIBERY, 2001 ANNUAL REPORT 13 (2001), *available at* http://www.state.gov/documents/organization/4356.pdf.

194. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GREECE: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 28 (2005), *available at* http://www.oecd.org/dataoecd/51/13/35140946.pdf.

195. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, KOREA: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 28 (2004), *available at* http://www.oecd.org/dataoecd/17/13/33910834.pdf.

196. *Id.* at 29.

under the circumstances even though they would be criminal bribes if they had been given in Denmark."[197] The law provides this exception even when "the gratuities [were] . . . granted to make the foreign public official act in breach of his duties."[198]

Moreover, some countries exempt from punishment, or provide a reduced sentence, for companies who pay bribes in response to official solicitation. For example, under the regulation of Spain "the penalties for active foreign bribery are reduced in cases of solicitation by the public official" and an "individual who consents to solicitation for a bribe by a public official but reports it, within 10 days, to the relevant authorities" is exempted from prosecution.[199] Hungarian law also provides that a "perpetrator of the crime [of active bribery of a foreign public official] shall not be punishable, if he gave or promised the favour upon the initiative of the official person because he could fear unlawful disadvantage in case of his reluctance."[200] In providing exemptions and defenses on the basis of cultural practice and local custom, such regulations not only grant deference to foreign government to regulate in accordance with societal values, but also allow businesses to operate without fear that following local standards may subject them to criminal sanction in their home countries.

The Foreign Corrupt Practices Act, also incorporates an affirmative defense permitting gift giving practices that are "lawful under the written laws and regulations"[201] of the for-

197. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DENMARK REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 3 (2001), *available at* http://www.oecd.org/dataoecd/39/57/2018413.pdf.

198. *Id.*

199. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SPAIN: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 37 (2006), *available at* http://www.oecd.org/dataoecd/28/35/36392481.pdf.

200. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HUNGARY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION PHASE 1 BIS REPORT 4 (2004), *available at* http://www.oecd.org/dataoecd/32/23/2510372.pdf.

201. 15 U.S.C. § 78dd-1(c)(1) (2003) (establishing an affirmative defense when "the payment, gift, offer, or promise of anything of value that was

eign country.[202] This affirmative defense may appear to ensure that local law predominates over the imposition of American standards. However, given the limited nature of this defense, the assurance will often be illusory. The defense is available only where the proscribed conduct is explicitly permitted by the "written laws and regulations" of the country. The mere absence of a law prohibiting the payment is likely insufficient to establish the defense.[203] Unfortunately, traditional gift giving practices or cultural conceptions demarcating less egregious forms of bribery are infrequently codified as legitimate in the local law;[204] rather these practices are implicitly recognized as legal where local law does not prohibit them.[205] As one author states,

> [T]he culture gap between payments banned under the FCPA and those considered acceptable in another country is very unlikely to be manifested in written law. The permission of certain practices in other countries will most likely be achieved by omission – i.e., by leaving the acceptable behaviors out of the written enumeration of prohibited acts. The legality defense is singularly ill-equipped to accommodate cultural differences.[206]

---

made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country").

202. Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1034 (1998) (noting that some "argue that because payments made to foreign officials that are 'lawful under the written laws and regulations of the foreign country' serve as an affirmative defense to prosecution, the FCPA is not truly exporting a U.S. criminal bribery statute").

203. H.R. REP. 576, 100th Cong. 922 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1955.

204. Peter B. Clark, Deputy Chief of the Fraud Section, Criminal Division, Department of Justice, Statement at a Conference on the FCPA in Washington, D.C. (April 20, 1995) ("According to a survey conducted by the State Department prior to the passage of the 1988 Amendments, no country expressly permitted the bribery of its own governmental agents in its written laws and regulations").

205. *See* Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 288 (1999) (noting that "[t]he vast majority of laws . . . simply state what payments are not available").

206. Steven R. Salbu, *The Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?* 1 ASIAN-PAC. L& POL'Y J. 16, *16 (2000)

Even if bribery is expressly prohibited under the foreign system, the formal written laws of many developing countries have been modeled after their prior colonial western counterparts and are unlikely to contain references to accepted cultural practices.[207] Anti-bribery laws in these nations, although remaining on the legal books, are frequently only nominally enforced and may not be indicative of accepted behavior.[208] However, notwithstanding their nominal status, under the FCPA, American enforcement agencies and courts would give force to these laws as binding, without reference to local custom or contextual interpretation. As such, the protections afforded to local conceptions of corruption under this exception are insufficient to mitigate the negative economic and diplomatic implications incident to the enforcement of the Foreign Corrupt Practices Act to commercial activity abroad.

X.
INCORPORATION OF A DE MINIMIS STANDARD

Therefore, a more meaningful exception must be incorporated under the Foreign Corrupt Practices Act if impediments to foreign investment in countries possessing alternate conceptions of permissible conduct or legitimate traditions of gift giving are to be removed. One possibility that may be particularly applicable to the foreign bribery context is the incorporation in the FCPA of a statutory or judicially based de minimis exception.

The legislative history of the FCPA is replete with comments by congresspersons and witnesses advocating for the inclusion of a monetary limit to distinguish corrupt and permissible payments. Such testimony advanced theories for demar-

207. Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1034 (1998) ("As a by-product of western colonial influence, the written laws of developing states often mirror those found in their western counterparts, particularly with respect to corrupt practices").

208. DONALD ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 5-9 (1995); *See also* Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1042 (1998) ("[A]nti-corruption laws found in foreign states are rarely enforced by local officials. The anti-corruption laws probably remain on the books because no one ever thought to challenge them, given that for practical purposes, those laws do not really exist").

cating payments on the basis of set monetary limits, through established pecuniary ceilings[209] or percentages of the recipient country's per capita income,[210] or on the basis of foreign perception and the legitimacy of the payment under local culture.[211] Essentially, two options may be pursued in adopting a de minimis exception to prosecution under the FCPA: (1) a judicially applied defense to prosecution for payments made in accordance with local culture or custom; or (2) a legislative imposed monetary threshold below which all payments are deemed per se permissible.

A. *Judicial Exception*

De minimis exceptions granting judicial authority to dismiss prosecutions for payments made in accordance with local culture have been recognized in foreign jurisdictions. For example, as previously noted, the Korean Supreme Court has long recognized a "social courtesy exception" defense prohibiting prosecution for gifts and payments offered in furtherance of social custom or etiquette.[212] Such an exception or defense can be meaningfully incorporated into the American FCPA in order to ensure that legitimate cultural traditions of other nations are not maligned or criminalized.

1. *Model Penal Code Section 2.12*

The principles underlying the Model Penal Code section 2.12 may prove adaptable to formulating a de minimis exception under the FCPA based on judicial interpretation of permissible payments under local culture. This section has been invoked to dismiss prosecutions of conduct that, although

209. *See Business Accounting and Foreign Trade Simplification Act: Joint Hearings Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. and Monetary Policy of the Senate Comm. on Banking, Hous., and Urban Affairs*, 97th Cong. 438, 442-43 (1977) (prepared statement of Wallace L. Timmeny, Kutak, Rock & Huie).

210. *Unlawful Corporate Payment Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Fin. of the House Comm. on Interstate and Foreign Commerce*, 95th Cong. 44 (1977) (comment of Rep. Krueger, Member, Hous. Comm. on Interstate and Foreign Commerce).

211. *Id.*

212. 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, 564 (1997).

facially prohibited by statute, are licensed or tolerated by custom, or impose trivial harm or do not result in the harm sought to be prevented in adopting the law, or whose prohibition could not reasonably have been intended by the legislature. Specifically, Section 2.12 of the Model Penal Code, entitled "De Minimis Infractions" provides that:

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense. The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.[213]

Five Jurisdictions (New Jersey,[214] Hawaii,[215] Pennsylvania,[216] Maine[217] and Guam[218]) have adopted Section 2.12, although several have made the exception permissive rather than mandatory.[219]

At basic, de minimis exceptions originate from the common law maxim "de minimus non curat lex," interpreted to mean "the law does not concern itself with trifling matters."[220]

---

213. MODEL PENAL CODE § 2.12 (1962).
214. N.J. STAT. Ann. § 2C:2-11 (West 1995).
215. HAW. REV. STAT. § 702-236 (1993).
216. PA. CONS. STAT. ANN. tit. 18, § 312 (West 1998).
217. ME. REV. STAT. ANN. tit. 17A, § 12 (1983).
218. GUAM CODE ANN. tit. 9, § 7.67 (Westlaw through P.L. 28-037 (2005)).
219. Jessica E. Rank, *Is Ladies' Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 SETON HALL L. REV. 223, 236 (2005).
220. Brent G. Filbert, *Defense of Inconsequential or De Minimis Violation in Criminal Prosecution*, 68 A.L.R. 5th 299, 299 (2006).

The defense signifies "that mere trifles and technicalities must yield to practical common sense and substantial justice"[221] so as "to prevent expensive and mischievous litigation, which can result in no real benefit to the complainant, but which may occasion delay and injury to other suitors."[222] De minimis exceptions have been recognized in a variety of contexts including contract, tort, civil and criminal matters.[223]

Application of a de minimis exception, similar to that incorporated in the Model Penal Code, to the context of foreign bribery would preclude prosecution for payments made "within customary license or tolerance," defined as conduct undertaken in accordance with a "behavioral pattern followed with certain regularity within a community with its approval or at least without its disapproval."[224] This behavior pattern can be evidence by local law or by informal customary rules within a community.[225] Furthermore, prosecutions of value maximizing payments might be dismissed under the exception as "not actually caus[ing] or threaten[ing] the harm or evil sought to be prevented" by the Foreign Corrupt Practices Act, doing so "only to an extent too trivial to warrant the condemnation of conviction," or as constituting conduct that could not "reasonably be regarded as envisaged by the legislature" in enacting prohibitions against bribery under the Act.[226] As such, the incorporation of a comparable exemption in the FCPA may appear useful in conforming the Act to local customs and in granting deference to governments and enforcement agencies in foreign jurisdictions.

However, the difficulties in integrating such an exemption into the FCPA become apparent upon further review. As conceptions of culture and bodies of customary rules are nebulous and constantly evolving, businesses may find the exception marred with uncertainty. This uncertainty is furthered by

221. Goulding v. Ferrell, 117 N.W. 1046, 1046 (Minn. 1908).

222. Schlichtman v. N.J. Highway Auth., 579 A.2d 1275, 1279 (N.J. Super. Ct. Law Div. 1990).

223. Jessica E. Rank, *Is Ladies' Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 SETON HALL L. REV. 223, 238-242 (2005).

224. Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis"* Defense, 1997 B.Y.U. L. REV. 51, 55 (1997).

225. *Id.* at 56.

226. MODEL PENAL CODE § 2.12 (1962).

the fact that customary rules often apply within subsets of nations; discrete norms are adopted by different ethnic, religious, or professional groups. Therefore, such an exception would assume a wide and diverse range of justified conduct within a jurisdiction at any particular moment. This exception would also create a host of problems in ascertaining legally definable notions of culture, in avoiding disparate treatment of foreign citizens, in ensuring that no business or person remains above the law, and in protecting society's interest in preserving the integrity of global markets and preventing predatory corporate conduct abroad.

Furthermore, although proponents of a cultural defense argue that such a "defense is integral to the United States' commitment to pluralism: it helps maintain a diversity of cultural identities by preserving important ethnic values,"[227] care must be taken to ensure that a de minimis defense to the FCPA is not used as a sword rather than as a shield. Acceptance of such a defense, although promoting the admirable cause of protecting multiculturalism and affording recognition to disparate cultures, runs the risk of deterring other fundamental goals, including the expansion of legal protections for the vulnerable and least powerful nations in our global economic system, and the protection of citizen's rights in developing nations to be free from harms imposed by the injurious conduct of multinational corporations.

Additionally, such a judicially enforced exception may prove to be of limited utility in practice, as Foreign Corrupt Practices Act prosecutions are predominantly resolved through plea and non-prosecution agreements rather than through judicial determinations. As one study indicated, "Since 1990, DOJ prosecutions under the FCPA against fifty-one individual defendants and corporations have been resolved. Of those fifty-one, twenty-nine were resolved through plea agreements. In only four of those cases was there a conviction after trial."[228] Furthermore, given the degree of harm,

227. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1301 (1986) (acknowledging the admissibility of cultural evidence in criminal trials and advocating for the creation of a formally recognized cultural defense).

228. Danforth Newcomb, *Digests of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977* 5 (2006), *available at* http://www.shearman.com/files/Publication/875fc0ce-c01f-4a5

reputational and economic, incident to public disclosure of investigation or indictment under FCPA, those charged with violations will likely be unwilling to seek litigation in order to determine whether an uncertain de minimis exception may absolve them of liability.

B. *Statutory Exemption*

A statutorily based de minimis exemption precluding prosecution for payments falling under set monetary limits, established pecuniary ceilings or percentages of the recipient country's per capita income may be more meaningfully incorporated in the Foreign Corrupt Practices Act. Neither the statutory language of the Foreign Corrupt Practices Act nor its legislative history requires the amount of the foreign payment to surpass a particular threshold amount before liability may attach.[229] There is no de minimis exemption to either the bribe or the benefit encompassed in the law; the Act prohibits bribes irrespective of the value of the advantage gained, the result of the payment, the tolerance of such payments by local authorities, or the purported necessity of the payment to obtain or retain business abroad.

As such, the Foreign Corrupt Practices Act makes no distinction between grand and petty bribery. If made with corrupt intent to obtain or retain a business opportunity or improper advantage, the provision of gifts or payments, even of nominal value, could violate the FCPA.[230] It is true that, traditionally, prosecution under the Act has been premised on large scale bribery; past infractions have involved payments in excess of ten thousand dollars.[231] However, principled interpretation of the Act does not ensure that businesspersons would not be prosecuted for smaller payments.[232] As the history of Exchange Act § 10(b) demonstrates, past practices of

---

a-bbdd-4398dd262fac/Presentation/PublicationAttachment/feb06073-a442-4979-89a7-46096f5ee975/LT_022806.pdf.

229. Barry A. Sanders, *Foreign Corrupt Practices Act – Antibribery Provisions, in* THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 18:12 (Ved P. Nanda, ed. 2005).

230. DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT § 6:5 (2005); 15 U.S.C. §§ 78dd-1 to 78dd-3 (2004).

231. Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 668 (2000).

232. *Id.*

prosecutorial restraint do not serve to prohibit more aggressive enforcement should enforcement priorities change.[233] Trends related to SEC and DOJ enforcement indicate that, even in the past five years, "FCPA enforcement has become increasingly more aggressive at all stages, from investigation to prosecution."[234] As such, it can be predicted that FCPA violators will be subjected to a higher degree of scrutiny and graver consequences in the future, increasing the risk of FCPA violation for even small scale bribes.[235]

Unlike their larger counterparts, small scale bribes are unlikely to be universally condemned across societies. The provision of lower value gifts and payments are less likely to have economically inefficient ramifications or result in a distortion of the bidding process, and will more often involve socially and culturally acceptable expressions of gratuity, confidence, etiquette and hospitality.[236] As such, distinction should be made between payments made to obtain or retain business opportunities or advantages on the basis of magnitude, so as to prohibit fewer incidents of economically efficient payments to foreign officials.

In order to ensure that American businesses may effectively pursue economically advantageous business opportunities abroad, and in order to conform the Act to local customs and traditions that may view small scale payments, gifts, and gratuities as innocuous or even admirable, a de minimis exception based on the magnitude of the bribe should be incorporated into the FCPA. Such an exception could preclude from prosecution payments made when the value of such payments falls below set monetary limits, established pecuniary ceilings or percentages of the recipient country's per capita income or national gross domestic product. The latter limitation has the greatest appeal, as a standard based on national GDP or per capita income could effectively counteract the disparate for-

233. 15 U.S.C. § 78j(b) (2000); Franklin A. Gevurtz, *The Globalization of Insider Trading Prohibitions,* 15 TRANSNAT'L LAW. 63, 71 (2002).

234. Danforth Newcomb, *Digests of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977* 8 (2006), *available at* http://www.shearman.com/files/Publication/875fc0ce-c01f-4a5a-bbdd-4398dd262fac/Presentation/PublicationAttachment/feb06073-a442-4979-89a7-46096f5ee975/LT_022806.pdf.

235. *Id.*

236. *Id.* at 683.

eign exchange values of the U.S. dollar in developing versus industrialized countries. In formulating such an exception, care must be taken to ensure that transactions are not structured to permit multiple payments that, while individually falling under the statutory limit, in aggregate would exceed permissible values under the exception. Additionally, the maintenance of existing standards imputing the payments of subsidiaries and agents, made on behalf of a parent corporation, to the parent entity is necessary in order to avoid circumvention of the Act.

Concededly, not all payments falling under such a statutory threshold will be economically efficient or value maximizing; indeed, some payments may be undertaken to obstruct market competition or thwart the economic interests of society. However, by limiting permissible payment thresholds to sufficiently low levels, respect for local culture and foreign conceptions of proscribed conduct can be accorded while the market distorting and economically harmful effects of bribery are mitigated. Such a legal framework would permit businesses, eager to enter and compete in markets abroad, to make small scale, value maximizing payments without fear of legal liability, while also minimizing the socially and economically harmful effects of corruption. As such, the incorporation of a statutorily based de minimis exception could shift the prohibition under Foreign Corrupt Practices Act closer to the economic, rather than the moral, side of the anti-bribery regulation continuum.

XI.
CONCLUSION

Transnational corruption, specifically the bribery of foreign government officials distorts market competition, instills inefficiency into economic transactions, impedes the development of international commercial relationships, and undermines public confidence in democratic governance. Considering the gravity of harms resulting from bribery and the powerful positions of multinational corporations in the global economy, the adoption of some anti-bribery regulation is economically defensible, and indeed, necessary. However, when not derived from economic principles but from moral disap-

probation, regulation proscribing bribery of foreign officials may have negative economic consequences.

The moral prohibitions incorporated in the Foreign Corrupt Practices Act have resulted in such economically inefficient consequences as: the loss of efficient and value maximizing transactions, due to the over-inclusive nature of the FCPA prohibition; diplomatic tensions with foreign nations, negatively impacting U.S. international relations; and foregone business opportunities, as foreigners have declined to subject themselves to U.S. legal standards and liabilities and companies have avoided transacting business in countries where bribery may be prevalent. While there is ethical desirability in a universal prohibition against corruption, the Act must be altered to incorporate a more economically based, as opposed to morally based, prohibition against bribery.

In furtherance of this end, the Foreign Corrupt Practices Act should incorporate a statutory based de minimis exemption precluding prosecution for payments falling under set percentages of the recipient country's per capita income or gross domestic product. By limiting permissible payments through the imposition of a statutory threshold, market distortions and economically inefficiencies can be mitigated while also ensuring that value maximizing transactions, foreign direct investment abroad and foreign diplomatic relations are not inhibited.