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Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?

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WHY DOES THE UNITED STATES REGULATE FOREIGN BRIBERY: MORALISM, SELF-INTEREST, OR ALTRUISM?

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INTRODUCTION

Why does the United States regulate bribery of foreign public officials? Don't U.S. authorities have more than enough corruption to tackle at home without worrying about the misdeeds of public officials in far-off lands?

There are several plausible answers to these questions. One is *moralism*, the idea that legislation such as the Foreign Corrupt Practices Act[1] (FCPA) is designed to make a moral statement, to send the message that corrupt practices are morally blameworthy no matter where they take place. A second, more cynical answer is that U.S. regulation is motivated by *self-interest*. Bribery is a relatively expensive way to obtain favors from foreign officials. Consequently, it is in the United States' economic interest to tie its firms' hands by preventing them from paying bribes for favors that they might otherwise be able to obtain by less costly and more legitimate means. Anti-corruption legislation can also serve the political interests of the United States. Prohibition of bribery can help maintain the image of the United States in foreign countries by preventing its firms

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, tit. I, § 101, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-2, and amending §§ 78ff, 78m (2006)) [hereinafter FCPA], *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, § 5001, 102 Stat. 1415 (amending 15 U.S.C. §§ 78dd-1 to 78dd-2, 78ff, 78m (2006)) [hereinafter 1988 Amendments], *amended by* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §1, 112 Stat. 3302 (codified at 15 U.S.C. § 78dd-3, and amending §§ 78dd-1 to 78dd-2, 78ff (2006)) [hereinafter 1998 Amendments].

from being associated with tainted foreign public officials, or at least making it possible for the U.S. government to disassociate itself from those firms by taking legal action against them. A third possibility is *altruism*, the idea that the United States should help foreign countries combat corruption as part of a broader commitment to promoting their economic and political development.

The legislative history of the FCPA suggests that moralism and self-interest played the most significant roles in shaping the original Act and its 1988 Amendments. Since then, altruism has played a more prominent role in shaping the FCPA and other initiatives aimed at foreign bribery. There is arguably some tension between self-interest and altruism as guides to enforcing the FCPA. In Part I, this essay traces the motivations for enacting the FCPA as expressed in the legislative history and examines how those motivations evolved over time as the FCPA was amended. Part II discusses the potential tension between self-interest and altruism and several ways in which that tension might be resolved.

I.
THE MOTIVATIONS BEHIND THE FCPA AND ITS AMENDMENTS

A mix of moralism and self-interest motivated the initial enactment of the FCPA. The FCPA was passed in direct response to evidence uncovered in the course of investigations sparked by the Watergate scandal. The Watergate Special Prosecutor uncovered evidence that major U.S. corporations had made illegal contributions to Richard Nixon's re-election campaign and to other political figures from secret "slush funds."[2] A subsequent Securities and Exchange Commission (SEC) investigation revealed that the illegal campaign contributions were, in some instances, also used as channels for "questionable or illegal foreign payments."[3] These findings, together with other information uncovered by a number of congressional hearings[4] and a special Presidential Task Force,[5] led to

2. The payments were detailed in S. REP. NO. 93-981, at 445–92 (1974).

3. SEC Report on Questionable and Illegal Corporate Payment and Practices, Exchange Act Release No. 642, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 3 (May 19, 1976) [hereinafter SEC Report].

4. *See Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379 and S. 3418 Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 43 (1976) [hereinafter *Richardson Letter*] (letter from Elliot Richardson, Secretary of Commerce and Chairman of Task Force on Questionable Corporate Payments Abroad, to Senator William Proxmire); *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 1–3 (1975); *Multinational Corporations and United States Foreign Pol-*

the drafting of several bills and, ultimately, the Foreign Corrupt Practices Act of 1977. This background has led many scholars to characterize the FCPA as an expression of "post-Watergate morality,"[6] a self-conscious effort to restore confidence in American business and the free market system.

The House Report on the bill that eventually became the FCPA made these moralistic motivations explicit:

> The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. . . . [I]t rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.[7]

The moral statement embodied in the FCPA was clearly intended for foreign as well as domestic audiences.[8] At the time, the United States was still embroiled in the Cold War and had recently lost ground to the Communists in Vietnam and Angola.[9] Taking a

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icy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations, 94th Cong. 385–86 (1975); *Lockheed Bribery: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 40, 57–58 (1975).

5. President Ford established the Task Force on Questionable Corporate Payments Abroad on March 31, 1976. *See* H.R. Doc. No. 94-572, at 1 (1976). The Task Force's findings were set out in the *Richardson Letter*, *supra* note 4.

6. Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 Cornell Int'l L.J. 731, 743 (2000). *See* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. Legal Stud. S141, S161 (2002); Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J.L. & Bus. 583, 593–96 (characterizing the FCPA as "morally based regulation"); Walter Sterling Surrey, *The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime*, 20 Harv. Int'l L.J. 293, 293 (1979) (characterizing the background to the FCPA as the development of a new sense of morality and claiming that "[n]o one was really concerned with overseas bribery of foreign officials until the post-Watergate revelations of questionable corporate conduct").

7. H.R. Rep. No. 95-640, at 4–5 (1977).

8. *See* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 Fla. L. Rev. 351, 359–60 (2010) ("[T]he [FCPA] was in fact widely understood as an instrument of foreign policy, intended to impact relations between the United States and other nations, and not merely a component of a domestic ethics crisis.").

9. Saigon fell to Communist troops from North Vietnam on April 30, 1975. George Esper, *Communists Take Over Saigon; U.S. Rescue Fleet is Picking Up Vietnamese Who Fled in Boats*, N.Y. Times (May 1, 1975), http://www.nytimes.com/learning/general/onthisday/big/0430.html#article. A leftist government backed by the So-

stand against foreign corrupt practices was a step toward reclaiming the moral high ground in the battle for the hearts and minds of wavering nations. According to the House Report:

> Corporate bribery also 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.[10]

The idea that Congress intended the FCPA to make a moral statement is consistent with the fact that the drafters rejected a proposal backed by both President Ford and the SEC to eschew criminalization in favor of simply requiring disclosure of foreign bribery.[11] It also explains why proponents of the legislation were able to override claims that a criminal prohibition would be "essentially unenforceable."[12] Whatever its merits as a means of deterrence, a disclosure requirement does not make the same kind of moral statement as criminalization. Disclosure regimes deter by enabling embarrassment, by triggering naming and shaming. They work by exposing wrongdoers to condemnation by customers, suppliers, peers, and the public at large. What disclosure does not entail is explicit denunciation by the state; under a disclosure regime, denunciation is outsourced to society as a whole. By contrast, criminal prohibition is the most potent form of denunciation known to

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viet Union and Cuba took power in Angola on November 11, 1975. *Angola Due to Move Toward Marxist Rule*, N.Y. TIMES (Dec. 5, 1977), http://select.nytimes.com/gst/abstract.html?res=F5061FFE3F5E167493C7A91789D95F438785F9.

10. H.R. REP. NO. 95-640, at 5. In a similar vein, see S. REP. NO. 95-114, at 3 (1977) ("Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished."), and *Richardson Letter*, *supra* note 4, at 42 (discussing "[t]he problem of adverse effect on foreign relations").

11. *Compare* H.R. REP. NO. 95-640, at 6 ("After carefully considering all the testimony adduced, the committee concluded that [foreign bribery] should be outlawed rather than legalized through disclosure."), *with Richardson Letter*, *supra* note 4, at 61–65 (proposing a disclosure-based regime and rejecting criminalization). *See* SEC Report, *supra* note 3, at 57–66 (proposing a disclosure-based regime).

12. *Richardson Letter*, *supra* note 4, at 63 ("[T]he President has decided to oppose, as essentially unenforceable, legislation which would seek broad criminal proscription of improper payments made in foreign jurisdictions.").

law,[13] regardless of whether the prohibition is enforced. To the extent that the purpose of the legislation that became the FCPA was to make an immediate moral statement, criminalization made much more sense than a simple disclosure requirement.

Although the primary motivation behind the enactment of the FCPA may have been moralism, Congress was not completely oblivious to the FCPA's potential impact on U.S. economic interests. The House Report took the position that U.S. businesses would not be placed at a competitive disadvantage if they refused to pay bribes, citing evidence of firms that managed to compete successfully in export markets without paying bribes.[14] This view was consistent with the SEC's tentative finding (based on data provided by participants in its voluntary disclosure program) that cessation of questionable or illegal foreign payments "will not seriously affect the ability of American business to compete in world markets."[15]

There were even suggestions that the FCPA would have positive economic effects for the United States. The House Report noted evidence that "in a number of instances, 'payments have been made not to "outcompete" foreign competitors, but rather to gain an edge over other U.S. manufacturers.'"[16] In addition, the SEC made it clear that it viewed *undisclosed* questionable foreign payments as bad for business.[17] The SEC took the position that information about such payments was generally material to investors because it bore upon both the quality of the company's business and the attendant risks.[18]

Economic self-interest played a more significant role in the 1988 Amendments to the FCPA. Those Amendments were motivated by concerns about the burden the FCPA imposed on U.S. exporters and issuers of securities.[19] Tellingly, they were enacted as

13. *Id.* at 61 ("[Legislation criminalizing foreign bribery] would represent the most forceful possible rhetorical assertion by the President and the Congress of our abhorrence of such conduct.").

14. *See* H.R. REP. NO. 95-640, at 5.

15. SEC Report, *supra* note 3, at 42–43.

16. H.R. REP. NO. 95-640, at 5 (testimony of Former SEC Chairman Hills, partially quoting Former Secretary of Commerce Richardson).

17. SEC Report, *supra* note 3, at 57–59 (describing the proposed action's primary aim as restoring integrity of corporate disclosure and accountability systems). For criticism of the SEC's approach to the problem, see *Richardson Letter*, *supra* note 4, at 53–56 (concluding that "[SEC disclosure] is, arguably, not an appropriate mechanism to deal with the full array of national concerns caused by the problem of questionable payments").

18. SEC Report, *supra* note 3, at 18–20.

19. *See* H.R. REP. NO. 100-576, at 916 (1988) (Conf. Rep.) (citing "unnecessary concern among exporters about the scope of the Act" and "unnecessary and

part of the Omnibus Trade and Competitiveness Act of 1988.[20] The 1988 Amendments limited the scope of criminal liability for violation of the accounting standards by imposing a knowledge requirement.[21] They also created exceptions and affirmative defenses to liability for certain payments to foreign public officials: namely, reimbursements for expenses incurred in connection with promotional activities, payments that were lawful under the law of the foreign official's country, and payments for routine governmental action.[22] The 1988 Amendments also created a procedure for the Department of Justice (DOJ) to issue general guidelines and advisory opinions and directed it to provide guidance on its enforcement policy to "potential exporters and small businesses that are unable to obtain specialized counsel."[23]

Last but not least, the 1988 Amendments directed the Executive Branch to negotiate with members of the Organisation for Economic Co-operation and Development (OECD) with a view to concluding an international agreement on foreign bribery.[24] This provision was in direct response to concerns that the FCPA placed U.S. firms at a competitive disadvantage relative to firms from countries without similar legislation.[25] It had long been recognized that unilateral action by the United States would not be able to deter all foreign bribery, simply because it would be impossible for U.S. law enforcement officials to obtain evidence from, or otherwise assert jurisdiction over, all the relevant actors.[26] Accordingly, at more or less the same time that Congress began considering domestic legislation to regulate foreign bribery, the Executive Branch began to press for international agreements on criminalization of foreign

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costly paperwork burdens imposed on issuers of securities by unclear and excessive accounting standards").

20. 1988 Amendments, *supra* note 1; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 19 U.S.C. § 2901, pt. 3 (2006)).

21. 1988 Amendments, *supra* note 1, § 5002 (codified as amended at 15 U.S.C. § 78m(b)).

22. *Id.* § 5003 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-2).

23. *Id.* § 5003(e)(4) (codified as amended at 15 U.S.C. §§ 78dd-1(d)–(e), 78dd-2(e)–(f)).

24. 1988 Amendments, *supra* note 1, § 5003(d) (codified as amended at 15 U.S.C. § 78dd-1).

25. *See id.* § 5003(d)(2)(A)(ii) (requiring the President to report to Congress on actions that might be taken in the event that negotiations failed to "eliminate any competitive disadvantage of United States businesses").

26. *See, e.g.*, *Richardson Letter*, *supra* note 4, at 22.

bribery.[27] The 1988 Amendments marked a renewed emphasis on these international efforts and a tactical shift away from pursuit of a global agreement toward advocacy focused in a single forum, the OECD. These efforts ultimately bore fruit in the form of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[28]

The FCPA was amended in 1998 to conform to the requirements of the OECD Convention. At one point the House Report described the Amendments as an effort to "improve the competitiveness of American business and promote foreign commerce."[29] Consistent with the hypothesis that they were motivated by self-interest, the 1998 Amendments extended the FCPA to cover acts committed by foreign nationals while in the United States and increased the penalties applicable to foreign nationals employed by or acting as agents of U.S. companies.[30] Moreover, the benefits of the advisory opinion procedure created by the 1988 Amendments were not extended to foreign actors who were not US "issuers."[31] However, the 1998 Amendments also extended the scope of the FCPA as applied to U.S. nationals in various respects. For example, it made it possible to prosecute U.S. businesses and nationals for action that took place wholly outside the United States.[32] Consequently, it is difficult to interpret these Amendments as being motivated exclusively by self-interest.

In fact, the legislative history to the 1998 Amendments marked the debut of the altruistic idea that the FCPA might serve as a tool

27. *Id.* at 56–57 (summarizing U.S. efforts to encourage regulation of questionable payments through the OECD, the General Agreement on Tariffs and Trade, and the United Nations).

28. Organization for Economic Cooperation and Development [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 37 I.L.M. 1 (1998).

29. H.R. REP. NO. 105-802, at 1 (1998).

30. *See* 1998 Amendments, *supra* note 1, § 5002 (codified as amended at 15 U.S.C. §§ 78dd-2 to 78dd-3, 78ff).

31. *Compare* 15 U.S.C. § 78dd-1(e) (providing for DOJ advisory opinions to issuers upon request), *and* § 78dd-2(f) (providing for DOJ advisory opinions to domestic concerns upon request), *with* § 78dd-3 (appearing to be silent with respect to whether the DOJ will make advisory opinions for persons and business entities other than issuers or domestic concerns). *See* Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.4 (2009) (requiring that request for an opinion be submitted by an issuer or domestic concern).

32. *Id.*; Letter from Ann M. Harkins, Assistant Att'y Gen., Dep't of Justice, to Newt Gingrich, House Speaker (May 4, 1998), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/transltrs.pdf (transmittal letter summarizing the draft bill).

for promoting political and economic development. This idea began to circulate widely in the late 1980s and early 1990s, a period marked by growing acceptance of the view that corruption tends to inhibit democratization and economic development.[33] The U.S. Department of State deployed the altruistic and moral justifications for anti-bribery legislation to great effect in urging other countries to enact their own legislation criminalizing foreign bribery.[34] The conclusion of the OECD Convention marked the success of those strategies where previous appeals to U.S. trading partners' economic self-interest had failed.[35]

The State Department's altruistic talking points are reflected in the legislative history of the 1998 Amendments, including pronouncements from both Congress and the Executive Branch. The Senate Report that accompanied the 1998 Amendments described the enactment of the FCPA as a declaration that U.S. companies "should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices."[36] The House Report stated, "International bribery and corruption continue to be problems worldwide. They undermine the goals of fostering economic development, trade liberalization, and achieving a level playing field throughout the world for businesses."[37] In his signing statement, President Clinton declared, "The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development."[38]

The Obama administration has made it clear that anti-corruption law is a central part of its development policy. President Obama has described the promotion of broad-based economic

33. Abbott & Snidal, *supra* note 6, at S158–60. *See* Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 675–76 (2004). For a survey of the scholarly literature see SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999).

34. Abbot & Snidal, *supra* note 6, at S162–65.

35. *Id.*

36. S. REP. NO. 105-277, at 1 (1998).

37. H.R. REP. NO. 105-802, at 10 (1998).

38. Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998), *available at* http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=ZeCrKK/1/2/0&WAISaction=retrieve.

growth as one of the central pillars of his Global Development Policy.[39] When the President introduced that Policy in an address to the United Nations, he explicitly characterized U.S. anti-corruption initiatives as means of promoting economic growth in the developing world: "We also know that countries are more likely to prosper when governments are accountable to their people. So we are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights."[40]

An important theme running through statements made by both the Clinton and Obama administrations is that promoting development is consistent with U.S. economic interests. In this vein, there have been several official statements that the motivation for anti-corruption initiatives is a form of enlightened self-interest. The House Report for the 1998 Amendments stated bluntly that "[t]he goal of the United States is the promotion of stronger, more reliable, and transparent foreign legal regimes that, in turn, make for more reliable and attractive investment climates."[41] Similarly, in the speech announcing his Global Development Policy, President Obama categorized development "not only as a moral imperative, but a strategic and economic imperative."[42]

II.
TENSIONS BETWEEN SELF-INTEREST AND ALTRUISM

At first glance, there is considerable tension between self-interest and altruism as guides to enforcement of the FCPA. An enforce-

39. *See* Press Release, The White House, Office of the Press Secretary, Fact Sheet: U.S. Global Development Policy (Sept. 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy.

40. President Barack Obama, Remarks by the President at the Millennium Development Goals Summit in New York, New York (Sept. 22, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york).

41. H.R. REP. NO. 105-802, at 10.

42. In this speech, the President cited this linkage as being "recognized" by his National Security Strategy. President Barack Obama, *supra* note 40. *See, e.g.*, PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 37–38 (May 2010) [hereinafter NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf. Interestingly, President Obama's cover letter to the National Security Strategy characterized support for anti-corruption activities as part of an effort to "advocate for and advance the basic rights upon which our Nation was founded," and added that "[o]ur commitment to human dignity includes support for development, which is why we will fight poverty and corruption." *Id.* at ii.

ment policy guided by economic self-interest, narrowly defined, would permit U.S. firms to pay whatever it takes to foreign public officials in order to meet and defeat competition from firms that are beyond the reach of U.S. law. If anything, a purely self-interested enforcement policy would involve prosecuting only foreign firms so as to give U.S. firms a competitive advantage. Altruism, by contrast, seems to demand vigorous proactive enforcement against both domestic and foreign firms in order to overcome the limitations and indifference of local anti-corruption institutions. This tension between self-interest and altruism is arguably greater than any tension between moralism and self-interest because the purposes of making a moral statement are satisfied by even weakly enforced criminal sanctions.

There are several ways in which the potential tension between self-interested and altruistic implementation of the FCPA might be resolved. One way is to challenge the idea that enforcement of the FCPA is contrary to the economic interests of U.S. firms.[43] Another way is to challenge the claim that vigorous and proactive enforcement of the FCPA serves the interests of countries in which corrupt foreign officials are located. A final approach involves introducing respect for popular sovereignty as a value that should constrain altruistic initiatives.

The first approach to resolving the tension between altruism and self-interest is to make the argument that bribery is an inherently bad way of doing business. If only because of the difficulty of enforcing corrupt agreements, bribery is often an expensive and unreliable way of obtaining the services of foreign public officials.[44] Since corrupt transactions are beyond the scope of the law, there is no guarantee that corrupt officials will deliver what they have been paid for, and even when they do initially deliver on their promises, there is little to stop them from trying to renege. According to this argument, a legitimately awarded government contract is probably cheaper to obtain and less likely to be revoked than a corruptly procured one. Consequently, U.S. firms collectively have an interest in deterring bribery. On the other hand, this argument cannot be pushed too far. Some "services" cannot be obtained from foreign public officials without paying a bribe: authorization to construct a plant in violation of local environmental protection laws might be

43. The arguments in this paragraph are developed at greater length in Kevin E. Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery*, 4 AM. L. & ECON. REV. 314 (2002).

44. *Id.* at 335.

an example. Strictly speaking, it is in the United States' economic interest to permit its firms to pay for these kinds of services.

An alternative way of reconciling altruism and self-interest is to appeal to the idea of enlightened self-interest. This is what the Clinton and Obama administrations have done in emphasizing the links between the democratization and development of foreign countries, on the one hand, and U.S. economic and political interests on the other. In an age of global interdependence there may be little distinction between pursuing self-interest and promoting the development of foreign countries on the brink of becoming either trading partners or terrorist training sites.[45] The Arab Spring—especially as it has unfolded in Egypt—has given new credibility to the idea that corruption can destabilize countries in which the United States has significant strategic interests.[46]

Other approaches to the tension between altruism and self-interest challenge the idea that altruism demands vigorous enforcement of the FCPA. Although there is a broad consensus that overseas corruption is a problem, there is less of a consensus about the extent to which aggressive enforcement of the FCPA represents the best solution to that problem.[47]

One important concern is that efforts by the United States and other jurisdictions to punish payment of bribes to foreign public officials may discourage multinational firms from doing business in countries where corruption is endemic, thereby threatening the

45. President Obama's National Security Strategy states:

> Development is a strategic, economic, and moral imperative. We are focusing on assisting developing countries and their people to manage security threats, reap the benefits of global economic expansion, and set in place accountable and democratic institutions that serve basic human needs. Through an aggressive and affirmative development agenda and commensurate resources, we can strengthen the regional partners we need to help us stop conflicts and counter global criminal networks; build a stable, inclusive global economy with new sources of prosperity; advance democracy and human rights; and ultimately position ourselves to better address key global challenges by growing the ranks of prosperous, capable and democratic states that can be our partners in the decades ahead.

NATIONAL SECURITY STRATEGY, *supra* note 42, at 15.

46. *See, e.g.*, Stuart Levey, *Fighting Corruption After the Arab Spring: Harnessing Countries' Desire to Improve their Reputations for Integrity*, FOREIGN AFFAIRS, June 16, 2011, http://www.foreignaffairs.com/articles/67895/stuart-levey/fighting-corruption-after-the-arab-spring ("From Tunisia to Yemen, the corruption of Middle Eastern regimes has played a significant role in motivating the Arab Spring.").

47. This and the following paragraphs draw heavily on Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?*, *in* INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES 283, 283–306 (Julio Faúndez & Celine Tan eds., 2010).

prospects for development of those countries.[48] OECD survey data and anecdotal evidence suggest that multinational firms are well aware of the FCPA and are making meaningful efforts to comply with it and similar legislation in other countries.[49] Likewise, statistical analyses of cross-border trade and investment flows suggest that enactment of the FCPA and similar legislation in OECD countries has reduced imports and foreign direct investment into countries that are perceived to have high levels of corruption.[50] Small firms, or firms from jurisdictions that do not have legislation equivalent to the FCPA, may make up for reduced business from U.S. multinationals. Nonetheless, there are solid grounds for believing that aggressive enforcement of the FCPA will reduce trade and investment flows to countries with high levels of corruption.

Is it a good thing for U.S. law to discourage firms from doing business with highly corrupt countries? Such a regime creates a collective incentive for inhabitants of countries prone to corruption to control corruption in the hopes of attracting foreign firms. In the optimistic scenario, local actors will be willing and able to respond to that incentive but there is no guarantee that such optimism is warranted. Meanwhile, the lost trade and investment might reduce opportunities for economic growth and poverty reduction.

A second concern about using the FCPA to combat corruption in foreign countries can be labeled "institutional displacement."[51] The concern here is that reliance on U.S. institutions as substitutes for local anti-corruption institutions will, over time, inhibit the development of the local institutions.[52] In other words, U.S. institutions may displace local ones. As a theoretical matter this concern arises even in situations in which U.S. institutions are clearly more effective in combating corruption than local institutions. Even then, the net impact of relying on U.S. institutions might be negative if their operation tends to inhibit the long-term development of

48. Spalding, *supra* note 8, at 351 ("In countries where bribery is perceived to be relatively common, the present enforcement regime goes beyond the deterrence of bribery, and ultimately deters investment.").

49. *See* OECD, MID-TERM STUDY OF PHASE 2 REPORTS: 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 128 (2006), *available at* http://www.oecd.org/document/13/0,3343,en_2649_34859_39884109_1_1_1_1,00.html.

50. Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad,* 39 J. INT'L BUS. STUD. 634, 645 (2008); Anna D'Souza, *The OECD Anti-Bribery Convention: Changing the Currents of Trade*, 97 J. DEV. ECON. 73, 73 (2011).

51. Davis, *supra* note 47, at 294–96.

52. *Id.*

local institutions. For example, if American forensic accountants can be relied on to investigate cases of transnational bribery involving public officials from Country X, there will be little benefit to Country X in building up local forensic accounting capacity. Why is this a problem? The fear is that if the institutions in Country X had not been displaced by the American ones, they would have improved over time to the point where they performed better than the U.S. ones.

There are at least two theoretical reasons to take the possibility of displacing local institutions seriously. The first relies on Hirschman's well-known analysis of the trade-offs sometimes entailed in permitting the clients of an organization to "exit" its sphere of influence as opposed to relying on their "voice" to motivate organizational change.[53] Suppose that victims of corruption could rely on the FBI, the DOJ, and U.S. courts to investigate, prosecute, and adjudicate complaints of bribery and to levy criminal or civil sanctions. In that case, why would those victims invest any effort in complaining about or pressing for the improvement of local anticorruption institutions? This may not be a problem if the U.S. institutions are perfect substitutes for local institutions. But suppose that the U.S. institutions only serve the needs of a subset of the local population, perhaps only people—such as foreign investors—who are victimized by transnational bribery as opposed to purely localized corruption. Suppose that the local prosecutors and courts would serve both constituencies. Suppose further that the voices of victims of local corruption are too weak to prompt change and the guardians of local institutions are indifferent to the prospect of losing jurisdiction over cases involving transnational bribery. In these circumstances it is quite plausible that permitting U.S. institutions to respond to corruption will retard the development of local institutions.

A second reason for suggesting that displacement by U.S. institutions can inhibit the development of local institutions relies on the idea of learning-by-doing.[54] The premise of the learning-by-doing argument is that local institutions improve by gaining experience, rather than as a result of pressure from vocal constituents. The intuition is that professionals such as judges, lawyers, police officers, and accountants—as well as the organizations to which they belong—may need to cut their teeth on at least a few cases before they can be expected to perform at the same levels as more

53. Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970).

54. Davis, *supra* note 47, at 295–96.

experienced foreign institutions. On this view, lack of expertise or integrity on the part of local legal institutions may be consequences, rather than causes, of their disuse. To the extent that victims of corruption can rely on foreign lawyers, prosecutors, courts, and police forces to respond to their claims, local institutions will face diminished opportunities to acquire the requisite experience. This is sub-optimal whenever the long-term benefits of enhancing the quality of local institutions would outweigh the costs borne by victims who are poorly served while local institutions are in the process of acquiring expertise. Again, the conclusion is that limiting the role that U.S. institutions play in combating corruption may, over time, better serve the interests of local actors.

Of course, it is always possible that local institutions will respond to the threat of competition ("exit" in Hirschman's terminology) by improving their performance. Another possibility is that the performance gap between local and U.S. institutions will be so great that neither the effects of "voice" nor learning-by-doing can close the gap.

A third possibility is that U.S. institutions serve as complements to local institutions, not substitutes. In other words, the greater the extent to which U.S. institutions are involved in combating political corruption, the greater the benefits a country will derive from local institutions' anti-corruption efforts. In this case, the involvement of U.S. institutions will lead to more rather than less activity for local institutions. In this scenario the flip sides of the arguments set out above suggest that voice and learning-by-doing will tend to improve the quality of local institutions. For example, the fact that U.S. institutions are willing to investigate financial flows passing through the U.S. financial system and to assist in recovering misappropriated funds will tend to increase the benefits to local actors of initiating proceedings against corrupt actors and, by extension, of building local institutions capable of initiating such proceedings. The competence of these local institutions may very well increase as they attract the critical attention of local constituencies and accumulate experience.

A final way to reconcile the tension between self-interest and altruism in enforcement of the FCPA is to refer to a third value: respect for the sovereignty of foreign countries.[55] The drafters of

55. Steven R. Salbu has repeatedly criticized the enactment of the FCPA on account of concerns about interfering with the sovereignty of foreign countries. *See* Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 251–55 (1999); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419,

the FCPA implicitly rejected the idea that its mere enactment would be offensive to countries in which recipients of prohibited payments were based.[56] But respect for sovereignty also provides a basis for arguing about how the FCPA ought to be enforced. Specifically, taking concerns about sovereignty into account suggests that enforcement priorities should be shaped by actors based in the jurisdiction most affected by corrupt activity. These actors typically will not be U.S. prosecutors. Consequently, while respect for sovereignty will not necessarily weigh against enforcement of the FCPA, it will often weigh in favor of reactive, rather than proactive enforcement.

CONCLUSION

The U.S. government has always expressed a mix of reasons for regulating the practices covered by the FCPA, but the mix has changed over time. The idea of using the FCPA to promote foreign countries' economic development has become more prominent in recent official statements than it was when the legislation was initially drafted. This idea is potentially in tension with another idea reflected in the FCPA's legislative history: namely, that the FCPA should serve to promote the economic interests of the United States. The ways in which that tension is resolved will have significant implications for the future of the FCPA.

437–47 (1999); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 282–85 (1997).

56. *See Foreign Payments Disclosure: Hearings on H.R. 15481, S. 3664, H.R. 13870 and H.R. 13953 Before the Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 94th Cong. 89 (1976). Hon. Gerald L. Parsky, Assistant Secretary of the Treasury for International Affairs, stated:

Any attempt to apply a U.S. criminal statute to acts consummated abroad would involve an extraterritorial application of U.S. law. While there are no absolute legal prohibitions on such extraterritorial application, attempts by the United States to apply our anti-trust 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 would be forthcoming in the present instance. *Id.*