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Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets

Andrew B Spalding

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UNWITTING SANCTIONS:
Understanding Anti-Bribery Legislation as Economic Sanctions
Against Emerging Markets

By Andrew Brady Spalding

ABSTRACT

Although the purpose of international anti-bribery legislation such as the U.S. Foreign Corrupt Practices Act is to deter bribery, empirical evidence demonstrates a more problematic effect. In countries where bribery is perceived to be relatively common, the present enforcement regime goes beyond deterring bribery and actually deters investment. Drawing on literature from political science and economics, this article argues that anti-bribery legislation, as presently enforced, functions as de facto economic sanctions. A detailed analysis of the history of FCPA enforcement shows that these sanctions have most often occurred in emerging markets, where historic opportunities for economic and social development otherwise exist and where public policy should encourage investment. This effect is contrary to the purpose of the FCPA which, as the legislative history shows, is to build economic and political alliances by promoting ethical overseas investment.

These perverse and unanticipated consequences create two policy problems. First, the sanctions literature suggests that the resulting foreign direct investment void may be filled by capital-rich countries that are not committed to effectively enforcing anti-bribery measures. This dynamic can be observed, for example, in China's aggressive investment in Africa, Latin America, and Central Asia, and creates myriad ethical, economic, and foreign policy problems. Second, by enforcing these laws without regard to their sanctioning effects, developed nations are unwittingly sacrificing poverty reduction opportunities to combat bribery. The paper concludes with various proposed reforms to the text and enforcement of international anti-bribery legislation that would further the goal of deterring bribery without deterring investment.

1 Fulbright Senior Research Scholar, Mumbai, India; Scholar in Residence, The Government Law College, The University of Mumbai. Ph.D., Political Science, the University of Wisconsin, Madison; J.D., The University of Nevada, Las Vegas. The author would like to thank Gordon Smith, Tom Miles, Bob Lawless, Ellen Podgor, Larry Solum, Dick Cassin, Nancy Rapoport, Steve Johnson, Barbara Black, and David Hess for their comments and support. Thanks to Rob Hatch for his research assistance.
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INTRODUCTION

Legislation prohibiting the bribery of overseas officials for business purposes has very rapidly risen from relative obscurity to become among the most significant legal issues in international commerce. Although the United States passed the first statute of its kind, the Foreign Corrupt Practices Act (“FCPA”), over thirty years ago, a number of economic and political factors contributed initially to a pattern of only sporadic enforcement by the U.S. Department of Justice and the U.S. Securities and Exchange Commission. Then in the late 1990s and the following decade, a number of historical events combined to precipitate a dramatic increase in anti-bribery legislation enforcement. Not least of these was the 1997 adoption by the member states of the Organization of Economic Cooperation and Development (“OECD”) of a convention obligating signatory countries to enact FCPA-type legislation. The adoption of that convention marked a sea change in worldwide attitudes toward bribery and the emergence of an


5 Founded in 1961, the Organization for Economic Co-Operation and Development “brings together the governments of countries committed to democracy and the market economy from around the world to support sustainable growth, boost employment, raise living standards, maintain financial stability, assist other countries’ economic development, and contribute to growth in world trade.” See http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html.

international, but not universal, commitment in principle to enforcing bribery prohibitions.\(^7\) No
longer at a competitive disadvantage,\(^8\) the U.S. resolved to finally give teeth to the FCPA, and
the rate of enforcement has since accelerated dramatically: the number of FCPA-related
enforcement actions by the SEC and DOJ over the last four years is roughly ten times the
number of actions from the five years preceding the OECD Convention.\(^9\) This acceleration is
likely to continue, as the DOJ has described the exponential increase in enforcement actions over
the last several years as the “tip of the iceberg.”\(^10\)

Although the incidence of anti-bribery law enforcement has risen sharply, it has not yet
produced a commensurate rise in legal scholarship. While legal scholars have explored the
moral and economic justifications for the legislation,\(^11\) debated the problem of cultural
relativism,\(^12\) evaluated underlying theories of liability,\(^13\) and discussed the problems associated

\(^7\) See, e.g., Barbara Crutchfield George, Kathleen A. Lacey, & Jutta Birmele, The 1998 OECD Convention: An
(2000); Barbara Crutchfield George, Jutta Birmele, & Kathleen A. Lacey, On the Threshold of the Adoption of
Global Anti-bribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the

\(^8\) For the legislative history reflecting initial concerns about a competitive disadvantage and an ultimate
determination that the OECD convention would supply the remedy, see infra notes 120-149, 184-207 and
accompanying text.

\(^9\) DANFORTH NEWCOMB & PHILIP UROFSKY, SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN
FCPA practice has characterized the recent enforcement pace as “frenetic.” Gibson, Dunn & Crutcher LLP, 2008
Mid-Year FCPA Update, (July 07, 2008), available at http://www.gibsondunn.com/ Publications/Pages/2008Mid-
YearFCPAUpdate.aspx.

\(^10\) See, e.g., http://www.bioworld.com/servlet/com.accumedia.web.Dispatcher?next=T08503; see also
http://www.fenwick.com/docstore/Publications/Litigation/sec/Sec_Litigation_Alert_01-28-08.pdf.

\(^11\) See, e.g. Beverley Earle, The United States’ Foreign Corrupt Practices Act and the OECD Anti-Bribery
(explooring the influence of Transparency International on the corruption debate); Marie M. Dalton, Comment,
Bus. 583 (2006) (juxtaposing moral and economic justifications for prohibiting bribery); Jennifer Dawn Taylor,

\(^12\) See, e.g., Padideh Ala’I, The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the
morality have justified exploitation by the “north” of the “south”); Christopher Duncan, Comments in the 1998
Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?, 1 Asian-Pac L. & Pol’y J.
16 (2000) (generally exploring the cultural clash that anti-bribery enforcement creates in developing countries);
with extraterritorial application, they have yet to engage the more fundamental questions concerning the statute’s impact and the extent to which that impact is congruent with the legislation’s underlying policies.

The surge in enforcement activity has provided a data set from which scholars can begin to study these effects. While there is little question that the legislation has succeeded to at least some extent in achieving its manifest purpose of curbing bribery, the data thus far strongly suggest a distinctly different enforcement outcome: companies subject to anti-bribery legislation are investing less in countries where bribery is perceived to be more prevalent. The difference is subtle, but critically important: enforcement of anti-bribery legislation is not just deterring bribery, but is deterring investment.

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It is easy to assume, as many today do, that deterring investment is the tacit purpose of the legislation -- that economic withdrawal from such countries is the natural and expected, if not intended, outcome of anti-bribery legislation. By this view, we can and should assess the legislation’s effectiveness by the extent to which it “induc[es] foreign investors to reduce their investments in corrupt countries.”\[^{17}\] This view further holds that developed nations can effectively combat overseas bribery by economically disengaging from the countries whose governments tolerate it. Because those countries depend on foreign investment to stimulate economic development, their governments will eventually succumb to pressure and implement reforms.

There is of course a familiar, if not altogether comfortable, term for this phenomenon: economic sanctions.\[^{18}\] The discomfort arises from the perception that the brunt of the sanctions’ impact is too often felt by the citizenry and not the government, and that despite these costs, the sanctions too often fail to effect meaningful reform. These problems become all the more acute where the target country has historically been poor, but whose economic conditions otherwise invite investment. Regrettably, anti-bribery legislation tends to sanction precisely such countries. Accordingly, although scholars and regulators have not previously applied the label of economic sanctions to the FCPA and its progeny, the data and literature suggest that we should do so now. Scholars must begin to wrestle with its implications, and to critically examine the assumption that the operation of anti-bribery legislation as de facto sanctions constitutes a successful implementation of the statute’s underlying policies.

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\[^{17}\] Cuervo-Cazurra (2008), *supra* note 16 at 2.

This article argues firmly that it does not. Focusing in depth on the FCPA as the origin of and template for international anti-bribery legislation, it shows that this legislation is not designed to function as de facto sanctions. This argument is based on two principal sources, the first of which is well-known, though the second is not. The first is the text of the statute, which plainly applies only to the suppliers of bribes. The text does not provide for the punishment of the recipients or solicitors of bribes, much less the governments that tolerate them. The second source is much more illuminating on this question, though astonishingly, almost completely unknown among lawyers and scholars. That source is the statute’s legislative history, which has not been analyzed at meaningful length in the academic scholarship on anti-bribery legislation. A deeper dig shows that the legislative history, like the statute’s text, provides no basis for the proposition that the legislation should serve to punish governments that tolerate bribery by withdrawing financial support in the hopes that economic hardship might incentivize reform. Businessmen, interest group leaders, congressmen, members of three presidential administrations, and indeed three U.S. Presidents, spanning both political parties and more than twenty years, provided statements on the legislative record relevant to this question, and did so in near-complete unanimity. While they specifically considered the practical effects of this legislation, they never contemplated that those effects would resemble economic sanctions.

Indeed, they specifically believed the exact opposite. A study of the statute’s history, like the text, very strongly supports an altogether different mechanism for achieving the statute’s important goal of promoting ethical overseas business practices. Those who participated in

19 For a discussion of the FCPA as predecessor to the OECD, see, e.g., Brown, supra note 14 at 265-320; DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT (2008) at § 13:2.
20 See infra notes 31-62 and accompanying text.
21 For a thorough discussion of the procedural (but not thematic) legislative history of the FCPA, see GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE (1982).
22 See infra notes 120-183 and accompanying text.
congressional hearings on the need for legislation prohibiting overseas bribery very clearly expected the statute to encourage investment in transitional economies to develop those markets and build economic and political alliances. The legislative history portrays the FCPA as a product of two formative events: Watergate, and the Cold War. While the former’s influence is widely recognized, the latter has been largely forgotten. Taken together, these events exposed a degree of corruption in U.S. business and government that, according to those who testified before Congress, tarnished the U.S. image abroad and weakened its standing in a bi-polar political struggle. To build and preserve critical alliances, the U.S. sought to announce to the world its intention to implement the highest standards of business ethics. Through its continued engagement in fragile transitional economies, the U.S. would promote ethics and economic efficiency while advancing its foreign policy goals. This is the logic on which the FCPA was founded, and it is not the logic of sanctions.

The FCPA is thus revealed to be a large-scale study in the law of unintended consequences. Section I of this article provides an introduction to the statute and shows that its manifest purpose is to punish those who supply bribes, and not to punish the recipients or solicitors, much less their governments or their fellow citizens. Section II demonstrates that the FCPA and related legislation, as presently enforced, constitute de facto economic sanctions against emerging markets. It first discusses the political science and economics literature on the purpose and effects of economic sanctions. It then discusses the quantitative evidence on the effects of anti-bribery enforcement, and shows that it is appropriate and useful to think of anti-

23 Id.
24 For a rare, albeit brief account of the FCPA’s historical context that recognizes the importance of foreign policy considerations (and tacitly acknowledges the Cold War), see RALPH H. FOLSOM, MICHAEL W. GORDON, & JOHN A. SPANOGLÉ, JR., INTERNATIONAL BUSINESS TRANSACTIONS, TRADE AND ECONOMIC RELATIONS (2005) at 392 (“The FCPA is a response to real and perceived harm to U.S. foreign relations with important, developed friendly nations, and the interest of the United States to prevent U.S. persons from making payments which might embarrass the United States in conducting foreign policy.”)
bribery legislation, as currently enforced, as de facto economic sanctions. It further shows that the majority of the FCPA enforcement actions have occurred in economies that are today regarded as emerging markets, and that the economic sanctions therefore have principal effect in countries that otherwise present historic opportunities for economic growth. Section III explores for the first time in the academic legal literature the legislative history of the FCPA. It introduces the colorful and animated disagreement on numerous fundamental issues surrounding the need for anti-bribery legislation, and then the striking unanimity on the statute’s fundamental purpose: to promote, and not deter, investment in transitional economies. In conclusion, the paper argues that sanctioning emerging markets to effect bribery-reducing reforms is an enterprise fraught with ethical, economic, and foreign policy risks that scholars and policymakers should promptly address.

I. THE TEXT OF THE FCPA: PUNISHING THE SUPPLIER AND NOT THE RECIPIENT.

This section provides a brief historical account of the FCPA’s origins and introduces the statute’s core provisions. The first subsection argues that scholars to date have only partially understood the historical events that precipitated the introduction and passage of anti-corruption legislation. A more complete understanding of the FCPA’s context reveals the statute to have been designed as a tool of foreign policy, and not merely of business ethics. Notably, however, it is a foreign policy tool to punish domestic actors only, and evinces no design to control domestic actors as a means of ultimately sanctioning foreign governments. That the statute is designed to impact the supplier of bribes rather than the solicitors, recipients, or the governments that tolerate them, is abundantly clear in the statutory text. Moreover, the statute’s purpose of punishing domestic actors, rather than foreign governments, is further suggested by one statutory exception and one affirmative defense.
A. Historical Context: Bribery as a Foreign Policy Problem

Scholars attempting to describe the origins of the FCPA have produced so many variations on the following theme. The Watergate scandal in the early 1970s exposed illegal payments made by numerous U.S. companies to domestic political campaigns. In response to this discovery, in 1974 the S.E.C. conducted an investigation and determined that payments were made not only to U.S. political campaigns, but to overseas campaigns and officers as well, and were typically accounted for through “slush funds.” As part of the post-Watergate reforms, Congress sought to supplement existing domestic anti-bribery legislation with comparable legislation that would prohibit payments to overseas officials and require more accurate accounting.

This story thus characterizes, accurately, the FCPA as an outgrowth of the post-Watergate domestic crisis in confidence. Americans had lost a degree of trust in their political and business leaders, and this legislation would help to ensure the proper conduct of U.S. business. By this account, it is quite predictable and not particularly noteworthy that the ensuing legislation primarily sought to punish companies and individuals doing some substantial portion of their business in or through the U.S. Watergate, after all, was a domestic problem; the solution was a matter of domestic policy, meant primarily to punish domestic actors.

This conventional story is true, but it is not the whole truth. Indeed, there was another event involving bribery that likewise alerted Congress to the need for legislation prohibiting overseas payments, and which almost immediately produced congressional hearings. This event,

however, occurred prior to, and independently of, Watergate. In 1971, Congress provided the
Lockheed Corporation, then a major manufacturer of civilian and military aircraft, with a $250
million federal loan guarantee to prevent bankruptcy. Soon afterwards, regulators discovered
that Lockheed had, over the course of many years, paid numerous bribes to foreign governments
to secure contracts. By the time of the earliest congressional hearings concerning the need for
international anti-bribery legislation, Lockheed had already disclosed to the government that it
had paid several multi-million dollar bribes to various developed and developing countries,
particularly the Netherlands, Japan, and Italy, and had caused scandals in each of those countries
that were embarrassing both to them and to the U.S.

Because these bribes were paid to foreign governments and provoked public outcry in
those countries, they were not merely a domestic policy issue; rather, they raised the issue of
U.S. relations with foreign countries and the solution would necessarily implicate foreign policy
interests. As will be shown below, the ensuing legislation was in fact widely understood as an
instrument of foreign policy, intended to impact relations between the U.S. and other nations,
and not merely a component of a domestic ethics crisis. In light of the Lockheed payments, and
the recognition that they constituted a foreign policy problem in need of a foreign policy
solution, it is far more notable that the legislation was not designed to punish the recipients or
solicitors of such bribes, let alone the governments that tolerate bribery. This foreign policy tool,
both as originally passed and subsequently amended, is drafted to target and punish only the
suppliers of bribes.

26 Lockheed Corp. merged with Martin Marietta Corp. in 1995 to form the Lockheed Martin Corp.
27 The Activities of American Multinational Corporations Abroad: Hearing Before the Senate Comm. on Banking,
Housing, and Urban Affairs Concerning Foreign Agents and Foreign Government Officials by the Lockheed
Proxmire).
http://www.time.com/time/magazine/article/0,9171,917751-1,00.html.
B. The FCPA’s Exclusive Focus on the Supply of Bribes

The statute’s exclusive focus on the supply of bribes is evident in the persons who are subject to its prohibitions and the bases of jurisdiction over them, as well as the definition of the prohibited conduct. The anti-bribery provisions of the statute apply to three different classes of persons: “issuers,”30 “domestic concerns,”31 and “persons other than issuers or domestic concerns.”32 First, the anti-bribery provisions apply to any issuer that has a class of securities registered under section 12 of the Exchange Act or which is required to file reports under section 15(d) of that act. This prohibition applies to any officer, director, employee, or agent of such an issuer, or any stockholder acting on behalf of that issuer.33 The 1977 Senate Report explains that the purpose of this phrase is to make clear that it is corporate or business bribery which is being proscribed, rather than individual bribery.34 Second, “domestic concern,” is any individual who is a citizen, national, or resident of the United States,35 and applies to commercial entities to include any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the U.S. or which is organized under the laws of a U.S. state, territory, possession, or commonwealth.36 The 1977 Senate Report explains that this latter section is intended to apply to entities which are “owned or controlled by individuals who are nationals of the U.S.” and have

34 S. REP. No. 95-114, at 11 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4108. Whether or not an act of bribery is determined to be by the corporation or by an individual acting on his own “will depend on all the facts and circumstances, including the position of the employee, the care with which the board of directors supervises management, the care with which management supervises employees in sensitive positions and its adherence to the strict accounting standards” provided in the section. Id.
their principal place of business in the U.S. or a territory, possession, or commonwealth. The third category of person subject to the anti-bribery sections is first identified as a “person,” other than an issuer or domestic concern, who is in the “territory” of the United States at the time of the conduct in question, and who is not a national of the United States or a commercial entity legally organized in the United States. This third category was established by the 1998 amendments to satisfy the OECD Convention’s requirement that statutes cover “any person.”

As a result of this amendment, foreign corporations, even if subsidiaries of a U.S. corporation, as well as the employees of such corporations, may now be independently liable under the FCPA. However, liability continues to attach only to the supplier, rather than the recipient or solicitor, of the bribe, and the supplier must have done business in or through the United States. Even after the modifications of the FCPA to conform it to the OECD convention, the legislation remains targeted exclusively at suppliers.

The three principal sections described above were each originally drafted to require the traditional jurisdictional hook for expansive congressional action: that the conduct occurred through “any means or instrumentality of interstate commerce.” The 1998 amendments provided an additional basis of jurisdiction, codified with the section heading “Alternative Jurisdiction.” With that amendment it became illegal for any issuer or domestic concern or an

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37 S. REP. NO. 95-114, at 17. For more recent comments by the U.S. Department of Justice, see Lay-Person’s Guide to FCPA (hereinafter “DOJ Guide”), at §A, available at http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html ( “U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they ‘authorized, directed, or controlled’ the activity in question.”).
41 See Zarin, supra note 19 at 4-9. See also Mike Koehler, Why Compliance with the U.S. Foreign Corrupt Practices Act Matters in China, China Law & Practice, 2008, available at SSRN:
43 15 U.S.C. §78dd-1(g), §78dd-2(i).
officer, director, employee, or agent thereof who is a “U.S. person,” to corruptly do “any act” outside the United States “in furtherance of” a bribe or authorization of a bribe irrespective of whether the payor used interstate commerce, and is referred to as the nationality principle of jurisdiction. This language implements the OECD Convention’s requirement that member nations extend coverage of their anti-bribery statutes to acts outside the U.S. Although the language limits liability to conduct taken by persons on behalf of issuers or domestic concerns, the legislative history indicates that it was intended that “principles of liability, including principles of vicarious liability” that already apply under the FCPA would render U.S. issuers or domestic concerns liable for the conduct of officers, directors, employees, agents, or stockholders outside of the U.S. regardless of their nationality. As a result of the 1998 amendments, U.S. issuers and domestic concerns may now be liable under either territorial or nationality jurisdictional principles. But even taken together, it remains true that the statute reaches only those corporations and individuals that have substantial ties of some kind to the United States. Its intended target remains fairly close-range.

The conduct proscribed by the statute involves three elements: the payment, the recipient, and the purpose. It defines the payment as the “furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give or

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44 A “U.S. person,” in this context, is defined as any national of the U.S. or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the U.S. or its territory, etc.. 15 U.S.C. §78dd-3(f)(1).
45 Id.
46 Zarin, supra note 19 at 4-13.
47 S. REP. No. 105-277, at 3.
48 Id. at 4.
49 DOJ Guide, supra note 37, at § A. This new section does not depend on the Interstate Commerce Clause to establish jurisdiction. Rather, it falls under Congress’ constitutional authority to “regulate Commerce with foreign Nations” and to “define and punish . . . Offenses against the Law of Nations.” S. REP. No. 105-277, at 3 (citing U.S. CONST. art. 1, § 8, cl. 3 & 10).
authorization of the giving of anything of value.”⁵⁰ After defining the payment, it defines the persons to whom the payment must be made to violate the FCPA. First is any “foreign official,”⁵¹ which is as “any officer or employee” of a “foreign government or any department, agency, or instrumentality thereof.”⁵² Second is any foreign political party or party official or any candidate for foreign political office,⁵³ and this term is not further defined in the statute. The third group is third parties, such as agents, distributors, or joint venture partners,⁵⁴ defined in the statute as any “person,” to whom money or an thing of value is given while “knowing”⁵⁵ that any portion of that money or thing of value will be “offered, given, or promised, directly or indirectly” to any of the individuals in the first two groups above.⁵⁶

For all three categories of recipients, the act must be done for either of two sets of purposes. The first might be understood as direct influence (although that term is not used in the statute in this context): the payee is the person whom the payor seeks to influence. It can take any of three forms: the “influencing” of any “act or decision” of that individual, “inducing” that individual to “do or omit to do any act in violation” of that individual’s duty, or “securing any improper advantage” with that individual.⁵⁷ The latter phrase, “securing any improper

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⁵⁰ 15 U.S.C. § 78dd-1(a); .
⁵² 15 U.S.C. § 78dd-1(f)(1)(A), §78dd-2(h)(2)(A), §78dd-3(f)(2)(A). The 1977 House Report suggests that this definition should not include an employee “whose duties are essentially ministerial or clerical.” H. REP. NO. 95-640, at 8. After the 1998 amendments, language was added to provide that a foreign official may also include an officer or employee of a “public international organization” or any person acting in an official capacity for or on behalf of such an organization. 15 U.S.C. § 78dd-1(f)(1)(A), §78dd-2(h)(2)(A), §78dd-3(f)(2)(A). The purpose of this language is to comply with the OECD Convention. S. REP. NO. 105-277, at 3. Nonetheless, The DOJ interprets this section to hold that the prohibition applies to payments to “any public official, regardless of rank or position,” and that it is meant to focus on the “purpose of the payment instead of the particular duties of the official receiving the bribe. DOJ Guide, supra note 37, at §D (emphasis in original).
⁵⁴ DOJ Guide, supra note 37, at “Third Party Payments.”
⁵⁵ The statute expanded the definition of knowledge in 1988 to include “deliberate ignorance,” which under the statutory language is satisfied when a person is “aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. §§ 78dd-1(f)_2), 78dd-2(h)(3).
advantage,” was added in 1998 to mirror the language of the OECD Convention.\textsuperscript{58} The second category of prohibited purpose might be understood as indirect influence, in that the payee is not the person whom the payor seeks to influence, but is instead regarded as someone with the capacity to influence the ultimate target. This category includes “inducing” that individual to “use his influence with a foreign government or instrumentality thereof” to “affect or influence any act or decision of such government or instrumentality.”\textsuperscript{59}

For both direct and indirect influence, it must be done to assist in “obtaining or retaining business for or with, or directing business to, any person,”\textsuperscript{60} commonly referred to as the business purpose test.\textsuperscript{61} Moreover, the report makes clear that the corrupt requirement is satisfied even where the act is not “fully consummated,” or does not “succeed in producing the desired outcome.”\textsuperscript{62}

Again, these provisions, on their face, are directed only toward the supplier. Even where the recipient is identified and defined in the statute, it is not done to bring the recipient within the scope of the FCPA’s punitive measures. Rather, the recipient is defined only to further clarify the conduct that is prohibited for the would-be supplier.

C. The “Grease Payment” Exception and the “Written Law” Defense: Toleration of Host-Country Bribery

The statute’s express exception, and one of its two affirmative defenses, reflect a degree of tolerance of host-country bribery that would not be expected from a statute designed to punish foreign governments for condoning such conduct. The statutory exception is for “facilitating or

\textsuperscript{58} S. REP. No. 105-277, at 3 (citing OECD Convention, Art. 1, para. 4(a)).
\textsuperscript{60} §78 dd-1(a)(1)-(2), §78dd-2(a)(1)-(2), §78dd-3(a)(1)-(2).
\textsuperscript{61} DOJ Guide, supra note 37, at §E.
\textsuperscript{62} Id. See also H. REP. No. 95-640, at 8.
expediting” payments, otherwise known as “grease payments,” which are defined as payments to a foreign official, political party, or party official intended to “expedite or to secure the performance of a routing governmental action” by that payee. The statute provides categories of sample exceptions (although the common characteristic of the items in each category is not always self-evident): obtaining permits or licenses; processing visas or work orders; providing police protection, mail service, or scheduling inspections related to cross-country transit of goods; providing utilities service, loading or unloading cargo, or protecting perishable products from deterioration; and actions of a “similar” nature. The 1977 House Report distinguishes facilitating payments from bribery by distinguishing between payments that “cause an official to exercise other than his free will in acting or deciding or influencing an act or decision” versus payments that “merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.” An example provided in the legislative history is “a gratuity paid to a customs official to speed the processing of a customs document.” The statute further makes clear what routine governmental action does not include: any decision by a foreign official “whether, or on what terms, to award new business” to or to “continue business with” a party, or any action by a foreign official “involved in the decision-making process” to “encourage a decision to award new business to or continue business” with a party. The 1977 Senate report explains that this section is meant to apply to “grease payments,” and provides the additional examples of placing a transatlantic telephone call.

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63 S. REP. NO. 95-114, at 11.
64 15 U.S.C. §78dd-1(b), §78dd-2(b), §78dd-3(c).
67 Id.
69 S. REP. NO. 95-114, at 11.
In this context, the 1977 House Report demonstrates a degree of cultural sensitivity to differing cultural norms surrounding what in the U.S. is considered bribery. It explains that while facilitating payments, such as the above examples, “may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.” Far from expressing moral outrage, the report suggests that host-country bribery is to some extent inevitable, and even tolerable.

This tolerance is more powerfully apparent in one of the two affirmative defenses. The affirmative defense that is less relevant to the present analysis is that the payment, gift, offer, or promise was for a “reasonable and bona fide expenditure” that is by or for the payor and was directly related to either: 1) the “promotion, demonstration, or explanation of products or services,” or 2) the execution or performance of a contract with a foreign government or agency thereof. Examples provided in the statute include travel and lodging expenses. More important for these purposes is the other affirmative defense, which is that the payment, gift, offer, or promise was legal under the “written laws and regulations” of the payee’s country. The adjective “written” was added in 1988 to “make clear that the absence of written laws in a foreign official’s country would not by itself be sufficient to satisfy this defense.” The absence of a prohibition against bribery would not, then, be a defense, but the presence of a written law expressly permitting such payments is a defense. If host-country reforms were the express object of the legislation, it is hard to imagine that the FCPA would permit this defense.

70 H. REP. NO. 95-640, at 8.
73 15 U.S.C. §78dd-1(c)(1), §78dd-2(c)(1), §78dd-3(c)(1).
Admittedly, neither the grease payment exception nor the written law defense constitutes overwhelming evidence that trying to reform countries that have historically had a greater tolerance for bribery is beyond the statute’s purpose. But taken in conjunction with the core provisions, the message becomes clear. The payor, and not the payee, is the party held responsible under the statute. There is absolutely no part of the statute suggesting that the solicitor, recipient, or its government should be held responsible or punished for the bribe. The statute is thus “supply-side;” the “demand-side” is well beyond its purview.

II. THE FCPA IN PRACTICE: DE FACTO SANCTIONS AGAINST EMERGING MARKETS.

Despite the plain meaning of the text (and, as will be shown in section III, the legislative history) the enforcement of the statute has produced a different result altogether. This section demonstrates that the FCPA, as enforced, operates as de facto economic sanctions against countries where substantial foreign direct investment is occurring and yet which have substantial levels of corruption. Generally speaking, these will be the emerging markets. While economists have for years been using empirical data and quantitative methodologies to explore the collateral effects of anti-bribery legislation, legal scholars have yet to recognize the importance of their work and explore its implications. This section seeks to repair that disconnect. Subsection A draws on economic sanctions literature in economics and political science to provide a framework for understanding the impact of anti-bribery enforcement as sanctions. Subsection B discusses the quantitative research showing that enforcement of anti-corruption legislation has resulted not just in a reduction in bribery, but in a reduction in investment in countries whose governments tolerate bribery – that is, the legislation actually functions as economic sanctions against such countries. Subsection C shows that a majority of the FCPA prosecutions have occurred with respect to emerging markets. Taken together, these sections produce the
counterintuitive and alarming conclusion that anti-bribery enforcement amounts to de facto economic sanctions against emerging markets.


The most comprehensive treatment of the definition, history, and effectiveness of economic sanctions is the collaborative work of Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, and Barbara Oegg, Economic Sanctions Reconsidered (hereinafter “HSEO”). Originally published in 1985 and updated in 1990 and then again in 2007, they analyze 174 examples of economic sanctions, and draw upon the literature in political science and economics to understand their purpose and effect. Theirs and related work provide valuable groundwork for evaluating the extent to which anti-bribery legislation may be regarded as sanctions, and the extent to which it is likely to prove effective.

HSEO define sanctions as the “deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations.” To a lawyer, this definition has four elements: the 1) deliberate; 2) government-inspired; 3) withdrawal or threat of withdrawal; 4) of customary trade or financial relations. In sanctions jargon, the country applying the sanctions is often called the “sender” and the sanctioned country is the “target.” With respect to the senders, sanctions can be unilateral or multilateral, although the latter usually involve major powers

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75 Hufbauer, et al., supra note 18.
76 Id. at 3.
77 An alternative definition suggests that any conduct that intentionally deprives a people of its “means to an effective economic life” should be considered sanctions. GEOFF SIMONS, IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL? (1999) at 10. By this definition, military conduct that adversely impacted a target’s economy would be considered sanctions. This definition is counter to the generally accepted use of the term. Another, more often used definition is “coercive measures imposed by one country, or coalition of countries, against another country, its government or individual entities therein, to bring about a change in behavior or policies.” DIANNE E. RENNACK AND ROBERT D. SHUYE, ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW (1988) cited in HOSSEIN G. ASKARI, JOHN FORRER, HILDY TEEGEN, AND JIAWEN YANG, ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY (2003) at 14. However, this definition disregards the possibility that sanctions may be intended as expressive tools, and may or may not be designed to “bring about a change in behavior or policies,” and thus is not used here.
persuading their smaller allies to join. Sanctions rarely turn out in practice to be a complete blockade, either because of problems of enforcement, the so-called “black knights” that move in to supply the prohibited goods, or in the case of multilateral sanctions, the limited extent of international cooperation. Episodes thus vary greatly in the degree of sanctioning that actually occurs. Sanctions can involve any or all of three types of customary trade or financial relations: limitations on imports, limitations on exports, or restricting the flow finance. The target country need not be the adversary of the sender, and indeed, many of the most successful documented instances of sanctions have involved a friendly target who promptly acquiesced to the sender’s demands.

The nature and function of sanctions have evolved historically, and the sanctions that are commonly used, and which the FCPA resembles in important ways, are comparatively new. While the history of sanctions can be traced as far back as Pericles’ Megarian decree of 432 BC, sanctions generally became a regular and integral instrument of foreign policy, as a substitute for or at least a precursor to military action, after World War I. Sanctions became much more prevalent after World War II with the onset of the Cold War, as both the U.S. and the Soviet Union sought to preserve their spheres of influence. Both nations sought to effect the dramatic reform or the all-out collapse of various regimes within their respective spheres. The sanctions they imposed were typically comprehensive, meaning that they sought to effect a complete blockade of all relations with the target country.

After the end of the Cold War, the scholarly and regulatory community came to recognize that the comprehensive sanctions that had characterized most of modern sanctions

78 Hufbauer, et al, supra note 18, at 5.
79 Id. at 57-58.
80 Id. at 44-45.
81 Id. at 60.
history were perhaps too blunt an instrument. They frequently resulted in undue damage to the very people who were already victimized by an oppressive government, or to neighboring countries. This collateral damage would often occur despite the complete failure of the sanctions to reform the target regime. Indeed, the multilateral sanctions against Iraq that the UN imposed in 1990, and the colossal harm that resulted to the Iraqi people, were perhaps the most dramatic example. To continue to use sanctions to achieve foreign goals as an alternative to military intervention, while avoiding this collateral damage, countries began to develop “targeted sanctions.”

82 These sanctions involve more specific, tailored methods to punish governing elites and disrupt their activities while protecting the population. Examples have included arms embargoes, travel bans (either general travel into our out of the country, or travel restrictions on specific individuals or organizations) or, commodity bans such as oil or diamonds (or, as in the case of North Korea, banning the importation of luxury goods to deny its leader, Kim Jong-Il, some of his favorite habits). Most recently, the U.S. has imposed various targeted sanctions to combat terrorism, such as freezing the assets of designated foreign terrorist organizations or prohibiting all transactions with specially designated terrorists.

Notably, these targeted sanctions are quite frequently administered against an open-ended category of nations defined by their behavior, rather than one or a few discrete identified nations. Examples have included prohibiting certain forms of assistance to former Soviet-bloc countries for engaging in gross human rights violations (amendments to the Foreign Assistance Act of 1961), the decision by the U.S. to vote against the granting of loans by international financial institutions to countries condoning female genital mutilation (part of the Omnibus

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sanctions against countries engaged in a pattern of religious persecution.

Sanctions can serve either of two purposes, both of which must be examined with respect to the FCPA. While the most obvious purpose of economic sanctions would be to “coerc[e] target governments into particular avenues of response,” economists and political scientists have explained that economic sanctions might also be designed to accomplish an entirely different, non-instrumental goal. Under this alternative theory, sanctions are not necessarily designed to effect reforms in the target countries, and their success thus should not necessarily be measured by the extent of any resulting reforms. William H. Kaempfer and Anton D. Lowenberg have contrasted the “instrumental” theory of sanctions with the “expressive” purpose. By this theory, the value of sanctions lies in “taking a moral stance against some other nation’s objectionable behavior.” Where a target country offends the sender state, but the sender’s leaders may deem more severe intervention, such as military action, inappropriate, they may nonetheless feel compelled to “do something.” While the costs of military action may be too high, the political costs of doing nothing may be considerable because it projects weakness. Such domestic political pressure can “persuade the government in the sanctioning nation to respond by imposing sanctions to meet goals other than target compliance.” Indeed, the

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83 Id. at 5.
expressive purpose of sanctions sometimes occurs despite its instrumental ineffectiveness, but often the sanctions are “designed deliberately to be ineffectual.” ¹⁸⁸

Unlike expressive sanctions, measuring the effectiveness of instrumental sanctions is a tricky and contested matter. HSEO have developed a comprehensive rubric for evaluating the instrumental success of sanctions, and have undertaken to identify the variables that might explain those results. They recognize that the instrumental goals of sanctions might lie anywhere on a spectrum that begins with targeted policy changes (such as curbing religious persecution or drug trafficking), more dramatic policy changes (such as changing the alliances of a smaller nation), impairing military capacity, disrupting a military action, or ultimately, completely changing the target country’s regime. ¹⁸⁹ They have found that whether sanctions achieve their intended result depends on quite a number of economic and political variables. Among the political goals that bear the most relevance to anti-corruption legislation include the extent of international cooperation in enforcing the sanctions; whether both the senders and targets are members of the international organization that is coordinating the administration of the sanctions; the “warmth” of prior relations between senders and targets; and the political system of the target nations, ranging between autocratic and democratic. ¹⁹⁰ Economic variables include the costs imposed on the target countries; the costs to the sender countries; prior commercial relations between senders and targets; the relative economic size of the targets and senders; and the economic health and political stability of the targets.

Generally, targeted sanctions have proven, at least thus far, to be much less successful than comprehensive sanctions in achieving their instrumental goals. David Cortright and George

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¹⁹⁰Id. at 55.
Lopez, who have done the most comprehensive work in the field of targeted sanctions, concluded that “comprehensive, rigorously enforced sanctions are more likely to be successful than limited, unenforced measures.”^91 Elliot has declared the collective experience of targeted sanctions “disappointing.”^92 Still, they remain an integral part of foreign policy, have numerous advantages over comprehensive sanctions, and, perhaps with time, policymakers may learn how to utilize them more effectively.

Economic sanctions, then, can take any of several forms, and promote any or all of various possible policy objectives. As will be shown below, the present enforcement regime of anti-bribery legislation in the U.S. and elsewhere demonstrates that this legislation can, and should, be understood as de facto sanctions.

B. The Effect of Anti-Bribery Enforcement: Economic Withdrawal from Countries Where Bribery is Perceived to be Relatively Prevalent.

The first major contribution to the theory that anti-bribery legislation deterred investment in countries where bribery is perceived to be relatively prevalent was made by James Hines of the John F. Kennedy School of Government in 1995,^93 not quite twenty years after enactment of the FCPA and three years prior to the OECD treaty ratification. Hines analyzed the impact of the FCPA on the U.S. investment (as measured by Business International, which has since become part of the Economist Intelligence Unit) by looking at four indicators of U.S. business activity. First was foreign direct investment. Because the threatened penalties of the FCPA raise the costs of doing business in higher risk countries, Hines reasoned that one possible impact of the FCPA

^91 Cortright and Lopez, supra note 82, at 8.
would be a reduction in such business. The second factor that Hines examined was capital/labor ratios, which could be reduced as a result of the FCPA if firms conclude that an equally effective alternative to bribing local politicians would be to hire larger numbers of their constituents. Third, Hines looked at levels of joint-venture activity post-1977. The 1981 Comptroller General’s report to Congress had documented the concerns raised by the U.S. business community that they could become liable for the bribes paid by their joint venture partners, and that some companies had withdrawn from such ventures as a result of the FCPA. Hines reasoned that evidence that firms “systematically avoided participation in joint ventures in corrupt countries after 1977” would constitute further evidence of the FCPA’s impact. Finally, the same Comptroller General report indicated that the airline industry was most likely to be negatively impacted by the FCPA because of the unique prevalence of bribes, and so Hines concluded that a drop in U.S. aircraft exports after 1977, when controlling for other variables, was likely due to the FCPA. Although prior studies had suggested that the FCPA had no measurable impact on foreign investment, Hines moved beyond prior scholarship by distinguishing the impact of the FCPA from other unrelated factors.

He found that by each of these measures, U.S. business activity in corrupt countries showed “unusual declines” after 1977. Foreign direct investment grew substantially more

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94 Id. at 6.
95 Id. at 11.
96 Id.
97 Id. at 14.
98 Id. at n. 22. Indeed, the report’s survey of 250 firms in the Fortune 1000 noted that 30% of respondents reported a reduction in overseas business as a consequence of the FCPA, and in the airline and construction industries the figure is over 50%. Id.
99 Id. at 16-17.
101 Hines, supra note 93, at 2.
102 Id. at 1.
rapidly after 1977 in less-corrupt countries than in more corrupt countries after controlling for GDP growth and total FDI.\textsuperscript{103} Similarly, the median capital/labor ratio for corrupt high-growth countries fell slightly in the years after the FCPA, whereas it rose in less-corrupt countries.\textsuperscript{104} With respect to aircraft exports, while the U.S. share of the world’s exports declined in the years following the FCPA, it declined much more significantly, almost four times as much, in corrupt countries relative to less-corrupt countries.\textsuperscript{105}

Hines noted that while U.S. commercial engagement in corrupt countries dropped significantly as a result of the FCPA, there is no evidence to suggest that total foreign business activity in such countries dropped; rather, other firms that were not constrained by anti-bribery legislation apparently took the place once occupied by U.S. companies.\textsuperscript{106} He noted that the principal effect of the statute was to divert U.S. investments to less-corrupt countries, and in less-corrupt countries effectively “encouraging ownership substitution between [U.S.] and foreign investors.”\textsuperscript{107}

Hines’ analysis of the impact of anti-bribery legislation on investor countries was limited to the U.S. for the obvious reason that it was the only country with such legislation at the time of his study. Once that changed with ratification of the OECD convention, a new data set became available, and this data was analyzed for similar trends by Alvaro Cuervo-Cazurra, an M.I.T.-trained economist at the University of South Carolina School of Business. In his first article on the subject, Cuervo-Cazurra was able to essentially confirm and expand upon Hines’ thesis.\textsuperscript{108}

\begin{thebibliography}{9}
\bibitem{103} Id. at 10.
\bibitem{104} Id. at 12.
\bibitem{105} Id. at 17.
\bibitem{106} Id. at 19-20.
\bibitem{107} Id. at 20.
\bibitem{108} Cuervo-Cazurra (2006), \textit{supra} note 16. Cuervo-Cazurra further noted that Hines’ study had become subject to various methodological disputes, as noted in Shang-Jin Wei, \textit{How Taxing is Corruption on International Investors?}, 82 Rev. Econ. & Statistics 1 (2000). Cuervo-Cazurra believed that he had improved upon Hines’ methodology and yet confirmed the results. Again, the purpose of the present article is not to evaluate these methodologies.
\end{thebibliography}
Cuervo-Cazurra’s study was narrower than Hines in that he focused exclusively on FDI, but broader in that Cuervo-Cazurra used data on bilateral FDI inflows from 183 home economies to 106 host economies with varying quantified corruption levels.\textsuperscript{109}

Cuervo-Cazurra found that the phenomenon of businesses from countries with anti-bribery legislation investing less in highly corrupt countries was not limited to the U.S. Rather, high levels of corruption in a host country generally result in less FDI from signatories to the OECD convention.\textsuperscript{110} The same phenomenon that Hines identified with respect to the U.S. thus became more widespread as a result of the OECD convention. The underside of the phenomenon that Hines first identified – countries that are not bound by anti-bribery legislation continue to invest in corrupt countries – was likewise confirmed by Cuervo-Cazurra. Post-OECD, as signatory countries invested less in corrupt countries, these countries received relatively more FDI from countries with higher corruption levels.\textsuperscript{111} The result of these trends is that as anti-bribery legislation became more widespread, corrupt countries received less of their FDI from less-corrupt countries and more of their FDI from more-corrupt countries.\textsuperscript{112}

Cuervo-Cazurra further expanded this analysis in a follow-up article published in 2008,\textsuperscript{113} which had two major conclusions concerning the impact of anti-bribery legislation on levels of FDI in relatively corrupt markets. First, he was able to verify and restate the conclusion of his previous article -- that countries that implemented the OECD convention have become “more sensitive” to corruption and have reduced their FDI in more-corrupt countries.\textsuperscript{114} Second, he proposed a modification of Hines’ original thesis. He concluded that prior to the FCPA, U.S.

\textsuperscript{109} Id. at 6.
\textsuperscript{110} Id. at 2.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Cuervo-Cazurra (2008), supra note 16.
\textsuperscript{114} Id. at 10.
investors were not in fact investing less in corrupt countries, but that they began investing less after the ratification of the OECD.\footnote{Id. at 10-11.} In other words, the FCPA standing alone did not induce U.S. investors to invest less in corrupt countries, but the OECD induced both U.S. and other OECD signatories to invest less.

Whether Cuervo-Cazurra’s methodology is more reliable than Hines’ in evaluating the impact of the FCPA prior to the OECD convention is a question beyond the scope of this article. The relevant conclusion from these studies, for present purposes, is that the latest empirical studies suggest that anti-bribery legislation has a deterrent effect on investment in countries where bribery is perceived to be more prevalent. Moreover, the FDI void is filled by countries that are more tolerant of corruption. As the following section will show, the patterns of FCPA enforcement to date suggest that the countries where investment will be most deterred as a result of continued enforcement is the emerging markets.

C. The Enforcement Focus on Emerging Markets.

To identify the impact of the FCPA on emerging and frontier markets, I compiled a list of countries in which alleged acts of bribery formed the basis of either a finding of liability in a civil action, a conviction in a criminal action, or a settlement of either. Because these actions are frequently resolved through pleas, deferred prosecution agreements, or civil settlements,\footnote{See Lawrence D. Finder & Ryan D. McConnell, Devolution of Authority: The Department of Justice’s Corporate Charging Policies, 51 St. Louis U. L.J. 1, 1–3 (2006); see also STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS (2005).} it cannot be said that these instances of alleged bribery are proven; because the defendant will sometimes settle without admitting guilt, they cannot even be called admitted violations.\footnote{See Newcomb & Urofsky, supra note 9, for a breakdown of bribery-related FCPA cases by criminal action, civil action brought by the DOJ, and civil action brought by the SEC. Bribery-related charges might ultimately be settled either under the bribery provisions or the books and records provisions of the FCPA.} Rather, they are allegations of bribery that ultimately formed the basis of the resolution of a legal
action that is unfavorable to the defendant. For purposes of this analysis they will be referred to as “alleged violations.”

Each country in which an alleged violation occurred over this thirty-year period has been placed in one of the three categories suggested by the Standard & Poor’s typology: 1) emerging markets; 2) developed markets (those more developed than the emerging markets); and 3) markets that have not yet become sufficiently attractive investment destinations to the international business and finance community to have made the S&P list of emerging markets (hereinafter “less developed markets”). The categorizations of various countries, and the number of alleged violations that occurred in each, can be seen in the appendix. In total, there were 125 alleged violations – that is, 125 separate instances in which a defendant (or group of related defendants) became liable for one or more illicit payments in a particular country related to a single commercial transaction or set of closely related transactions.

Of these 125 instances, it is perhaps predictable that only nine, or 7% of the total, occurred in developed countries. Of those nine, only five have occurred since ratification of the OECD convention. Accordingly, very little FCPA enforcement activity occurs in developed countries. Outliers on the other end of the spectrum are those violations that occurred in countries that are not yet far enough along in their development to be included among the emerging markets. These amounted to 31, or 25% of the total. Of the 31, nine occurred in Iraq as part of the United Nations’ oil-for-food program. The remaining 22 instances occurred in 18 different countries – that is, in over 30 years of FCPA enforcement, only four such countries have been host to more than one FCPA violation. Accordingly, these enforcement actions are predictably diffuse and sporadic. In total, combining this group with the few alleged violations that have occurred in developed countries results in a total of 32% -- just less than one third of all
enforcement actions have occurred in nations either too developed, or not developed enough, to create a significant deterrent to investment. However, over two-thirds of all alleged violations – 85 instances, or 68% of the total – have occurred in emerging markets, as defined today by Standard & Poor’s.

Arguably, the patterns of enforcement in the first and third categories of markets – developed markets, and less developed markets – do not raise substantial public policy concerns. Developed countries, while unquestionably wrestling with public corruption problems of their own, generally have relatively lower levels of tolerance of public corruption. The most commonly cited gauge of public corruption is the Corruption Perception Index (‘‘CPI’’), which is put together by the non-profit organization Transparency International. Based on surveys of various practitioners, the CPI assigns a ranking of each of 180 countries. Using the 2008 rankings, the developed countries in which FCPA violations have occurred have a mean CPI index of approximately 29 out of 180 – they are among the least corrupt countries in the world. Given the low levels of corruption and of FCPA violations in these countries, any deterrent effect on future investment is likely to be minimal.

At the other end of the spectrum are the countries whose level of market development remain quite low. These are countries where there is a sufficiently high degree of volatility, and a low degree of economic development, that the finance community does not generally recommend investment. Unsurprisingly, the countries in this category that have been host to FCPA violations have a mean CPI ranking of 127 out of 180 – among the most corrupt countries in the world. In contrast to the developed countries, here there is little investment and much corruption. In sum, these are countries with limited current prospects for economic growth, with

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118 For a discussion of the CPI methodology, see http://www.transparency.org/policy_research/surveys_indices/cpi.
very high levels of corruption, and with only sporadic foreign investment. Because these countries have not yet been able to create the conditions for larger-scale foreign investment, the aggregate economic impact of FCPA enforcement actions is not problematic.

However, the frequency of alleged violations in emerging markets, and the deterrent effect on these countries that will likely result, raises a major public policy red flag. These are markets where opportunities for exceptional if not historic economic development exist, where the prospects of overcoming poverty are historically high, and where the developed world is already investing in substantial and systematic ways. Many of these countries are in critical stages in their political development, and moreover, are likely instrumental in the stabilization of their geographic regions. China, Russia, India, Pakistan, and Venezuela, as a few examples of the countries in S&P’s list of emerging markets where FCPA violations have already occurred and which have significant foreign policy implications. Finally, the mean CPI ranking of these countries is almost exactly the mean of all countries: 89 out of 180. Corruption levels in these countries, while undeniably a cause for concern, are only average.

In sum, both economically and politically, public policy would seem to strongly favor the building of economic ties in emerging markets. Yet these are the very countries in which most alleged violations occur.

D. Putting the Pieces Together: Anti-Bribery Enforcement as De Facto Sanctions Against Emerging Markets.

To what extent does this pattern of enforcement constitute economic sanctions? Although HSEO do not count the FCPA or the OECD convention as sanctions, and lawyers, political scientists, and economists have not generally treated them as sanctions, the legislation exhibits almost all of the characteristics of sanctions. They might rightly be counted as targeted sanctions – sanctions which target business that is obtained through the bribery of overseas
officials. The list of targeted nations is open-ended, as they often are for targeted sanctions. We
have seen that the markets that are most likely to fall into that open-ended category, and that
raise the most formidable policy questions, are emerging markets.

More specifically, consider the four elements of HSEO’s definition – the “deliberate,
government-inspired withdrawal, or threat of withdrawal, of customary trade or financial
relations” -- in reverse order. Foreign direct investment certainly constitutes trade and financial
relations. The levels of FDI that would exist absent the anti-corruption legislation are the
“customary levels” that are withdrawn as a result of the legislation. Moreover, the threat of
heightened FCPA enforcement, and the anticipation of more aggressive enforcement by OECD
signatories, should now, after the work of Hines and Cuervo-Cazurra, constitute at least a tacit
threat of further withdrawal. Because this withdrawal results from an act of government, it is
“government-inspired.” They began as unilateral sanctions, but, as often occurs, over time they
became multilateral with the ratification of the OECD convention. These sanctions are not
universally enforced, but then again, sanctions rarely are.

Despite these parallels, it will be shown below that the FCPA fails quite conspicuously
fails to meet the first of HSEO’s elements: the sanctions that result from the FCPA are not
deliberate. That is, the U.S. did not intend to punish target countries by withdrawing customary
trade and financial relations, either when it passed the legislation or later when amending it. The
FCPA thus resembles sanctions in every respect except, arguably, the most important: no
politically accountable governmental body ever decided to impose them. Section I explained
that the statute, on its face, punishes suppliers of bribes only. An exploration of the legislative
history shows that this was precisely the purpose of the statute. The legislative history
demonstrates that the FCPA was not to any meaningful degree an expression of disapproval of
the governments that tolerate bribery. More to the point, the congressional testimony, like the statute, does not reflect an intent to punish those governments by withdrawing customary trade and financial relations. In this respect, and perhaps only in this respect, the consequences of FCPA enforcement are materially different from the targeted sanctions that have become so common in the post-Cold War era.

III. THE LEGISLATIVE HISTORY: BUILDING ALLIANCES THROUGH ETHICAL INVESTMENT.

Given the FCPA’s straight-forward moral appeal and the context provided by the infamous Watergate scandal, the statute can lend itself to fairly simple assumptions about the values that motivated its passage. Relying on a general knowledge of the times and the structure and operation of the statute today, one can arrive at a number of incorrect conclusions about the zeitgeist of the time: that everyone believed in a universal ethical norm by which bribery was offensive; that immediate legislation was appropriate; that the legislation would ideally be multilateral, but if impossible, unilateral legislation was nonetheless called for; that the legislation should criminalize bribery; and that any negative impact to U.S. competitiveness would be easily outweighed by the moral and economic benefits of reducing bribery.

The prevalence of this way of thinking is due in part to the failure of legal scholars thus far to more deeply mine the legislative history. This history reveals that among businessmen, financiers, academics, congressmen, presidential appointees, and U.S. Presidents, there was substantial disagreement on numerous fundamental issues, including: whether bribery was common overseas; whether bribery was necessary to conduct business there; whether companies from countries other than the U.S. engaged in bribery; whether the U.S. should work toward an international consensus and a multilateral treaty prohibiting bribery or instead pass unilateral legislation; if the latter, whether it would impose a competitive disadvantage on U.S. businesses,
have no impact, or actually improve their competitiveness; and whether any such legislation should criminalize bribery or merely impose civil penalties. The debate was surprisingly heated and contentious, peppered with dramatic rhetorical flourishes and poignant metaphors.

The context of this debate creates a colorful context, against which the underlying unanimity becomes all the more striking. On the more fundamental question of the legislation’s purpose and its intended effects, every individual who testified clearly believed that the FCPA should encourage investment in higher risk countries to build economic and political alliances. The legislation would be an alliance-building tool. No one ever suggested, either in 1977 or in 1998, that the FCPA should punish countries that tolerate bribery by withdrawing economic support. Indeed, it should do precisely the opposite.

Subsection A will paint the backdrop by sampling the more divided testimony. Against that backdrop, subsection B will show the breadth of the consensus on the fundamental purpose of the legislation. Subsection C will further show that in ratifying the OECD Convention and amending the FCPA in 1998, the U.S. continued to believe that the legislation should promote, rather than deter, investment in countries that have historically been higher risk.

A. The Early Disputes: the Scope of the Problem and the Proper Remedy

The earliest and most fundamental issue before Congress was, of course, the magnitude of the overseas bribery problem – just how prevalent is bribery overseas, and how widely are U.S. businesses participating in it? This proved to be a topic of considerable disagreement. Many witnesses, and documents admitted into the record, suggested that the practice was nearly universal. In the course of the earliest hearings on the need for international anti-bribery legislation, Lockheed represented that bribes to overseas officials for business purposes had been made in “some countries . . . for centuries – and was a practice we believe was engaged in by a
great many companies, both American and foreign, including Lockheed.”

Its testimony went on to mention numerous other indicators that overseas bribery was widely practiced by businesses from many countries, and that it was known to exist by U.S. officials in both business and government.121

At least some of the media painted a similar picture. The prevalence of such payments was captured in a survey of Washington Post foreign correspondents published on June 22, 1975 and admitted into the congressional testimony reported that such payments “are ubiquitous and a way of life in many countries” and are “part of a deeply rooted system of doing business.”

Similarly, an interview by the Financial Times of the chairman of the U.S. Council of the International Chamber of Commerce suggested there are countries where, no matter the company’s size, “you could not do business without greasing someone’s palm.”

Two U.S. senators, in the course of the congressional hearings, powerfully voiced a similar perception of the prevalence of bribery in international business. Senator Abraham Ribicoff, Democrat from Connecticut, stated that “what disturbed me as I traveled around the world was the realization that American business was being internationally blamed for activities which are very obvious to me were a very common practice throughout the entire world. Not only the countries of the West – Western Europe, Japan, and the United States – but certainly through Africa, the Middle East, and Asia.”

Similarly, Senator Frank Church, a Democrat from Idaho, concluded: “There is no doubt that these practices are common, and that they are

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120 1975 Senate Banking Hearing, supra note 27, at 26.
121 Id. at 27.
122 Id. at 26, 57-60.
123 Id. at 50-51.
used by foreign and American firms alike.”\textsuperscript{125} This perception was further articulated by members of the administration of President Gerald Ford. Robert S. Ingersoll, Deputy Secretary of State, noted, “We are told that businessmen from other countries take the view that what we call improper payments are a basic requirement of the societies in which they operate, and represent centuries old practices which no amount of indignation or legislation can change.”\textsuperscript{126}

This view of the role of bribery in international business was expressed perhaps most poignantly in a September 21, 1976 article in \textit{Foreign Affairs}, which had been admitted into the record, in which the author tellingly explained: “The legend persists that the Harvard Business School student who questioned the ethics of this practice was directed by his professor to enroll in the Harvard Divinity School.”\textsuperscript{127}

A very different perspective was articulated once the administration of President Jimmy Carter took office. The most forceful voice was that of George Ball, then of Lehman Brothers, but formerly Undersecretary of State under Presidents Kennedy and Johnson. Ball, who had become most famous for his opposition to escalation of the Vietnam War, struck a far more moralistic tone. In response to American businessmen suggesting that bribery is pervasive and necessary, he said, “such self-righteous answers cannot stand analysis. That American business firms are compelled to engage in bribery is disproved by the example of a number of our most successful enterprises that rigorously reject such practices yet still do enormous business all over the world.”\textsuperscript{128}

\textsuperscript{125} \textit{Id.} (statement of Sen. Church) at 1.
According to this worldview, the problem is not the absence of appropriate ethical standards abroad, but rather, of low standards in the U.S. Dr. Gordon Adams, director of the Military Research Council on Economic Priorities, a public interest research organization, observed that “the problem may not be one of lower standards abroad, but of low standards in general for U.S. corporate behavior.”\textsuperscript{129} In a sharper retort to the previous testimony, he stated, “If anyone thinks that these standards are vastly different in other countries than they are in the United States, then that person must indeed be naïve.”\textsuperscript{130}

Relatedly, there was substantial disagreement on whether the U.S. should act unilaterally in prohibiting overseas bribery, or instead, seek to build an international agreement that would result in multilateral legislation. Secretary Simon favored an international agreement with the UN, IMF, and OECD,\textsuperscript{131} and was concerned that unilateral action by the U.S. might “undercut the vital principle that cooperative action by the whole international community of nations is needed in order to deal effectively with this problem.”\textsuperscript{132} Likewise, Ian MacGregor, Chairman of the U.S. Council of the International Chamber of Commerce, testified that given the prevalence of bribery, “an international agreement, therefore, would be the only way to stop the practices,” and urged the committee to delay unilateral legislation until the problem could be further studied and a more effective and fair remedy supplied.\textsuperscript{133}

By contrast, Representative Stephen J. Solarz, Democratic Congressman from New York and a member of the House International Relations Committee, believed that “any truly effective international agreement which provided enforcement procedures and sanctions would be a long

\textsuperscript{130} \textit{Id.} at 35 (quoting Conference Board, an independent research organization, from \textit{The New York Times}, February 13, 1976.
\textsuperscript{131} 1976 \textit{Senate Banking Hearings}, supra note 128 (statement of William E. Simon, Secretary of the U.S. Dept. of the Treasury) at 86.
\textsuperscript{132} \textit{Id.} at 88.
\textsuperscript{133} \textit{Id.} (statement of Ian MacGregor, International Chamber of Commerce) at 52.
time coming – if ever. . . . To wait until bribery is solved on a multilateral basis may well be to wait forever. “134

The concern about unilateral action was based largely on the feared impact of such action to the competitiveness of U.S. businesses. Robert S. Ingersoll, Deputy Secretary of State, stated, “It is tempting to try to deal with the situation unilaterally, but there are serious risks for the United States in such an approach. There is widespread recognition in the Congress that such unilateral action would put U.S. companies at a serious disadvantage in the export trade.”135 This fear was shared by the International Chamber of Commerce, which testified that unless prohibitions on overseas bribery were internationalized, it “could, and in some cases would, mitigate severely against U.S. business and prevent it from being able to compete effectively in quite substantial markets of the world.”136 Similarly, Senator Ribicoff predicted that under unilateral legislation, “the American companies, who should be making payoffs then would be barred from making payoffs, the business that they should be getting would be going to foreign competitors who were undertaking the same practices.”137

Similarly, then-Senator Joe Biden, a Democrat from Delaware, also agreed that frequently in international business, not just in the Lockheed instance but in many others, U.S. firms are only competing against fellow U.S. firms.138 W. Michael Blumenthal, Treasury Secretary under Carter, testified that paying bribes, “apart from being morally repugnant and illegal in most countries – is simply not necessary for the successful conduct of business here or

135 1976 Joint Priorities Hearing, supra note 126 (statement of Robert S. Ingersoll, Deputy Secretary of State) at 154.
136 1976 Senate Banking Hearings, supra note 128 (statement of Ian MacGregor, International Chamber of Commerce) at 49.
138 1976 Senate Banking Hearings, supra note 128 (statement of Joe Biden) at 45.
overseas. I believe that the responsible elements of the business community agree."\textsuperscript{139} George
Ball concurred, testifying that frequently, as in the case of Lockheed, the U.S. company is only
competing against other U.S. companies.\textsuperscript{140} He concluded, “The only action that could
materially reduce the practice – and mitigate its consequences – is for the U.S. Government to
utilize its powers as the domiciliary state of most of the largest multinational companies by
enacting and enforcing comprehensive laws imposing on American corporations a standard of
conduct in their overseas dealings fully as strict as that required at home. Only when that is done
will our Government be able to speak with authority in shaping an international set of rules and
sanction. Having put our own house in order, we will be entitled to insist that foreign
governments do likewise – and, in time, this procedure should gradually bring some solid results.”\textsuperscript{141}

Some, even of the business community, testified that anti-bribery legislation would
actually improve the ability of U.S. companies to conduct business overseas. The Chairman of
Gulf Oil Corporation urged Congress, “you can help us, and many other multinational
corporations which are confronted by this problem by enacting legislation which would outlaw
any foreign contribution by an American company. Such a statute on our books would make it
easier to resist the very intense pressures which are placed upon us from time to time.”\textsuperscript{142}

Ultimately, both the House and Senate committee reports echoed this opinion.\textsuperscript{143} Similarly, the

\textsuperscript{139} Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S. 305 Before the
Senate Comm. on Banking, Housing, and Urban Affairs 95th Cong., 1st Sess. [hereinafter 1977 Senate Banking

\textsuperscript{140} 1976 Senate Banking Hearings, supra note 128 (statement of George Ball, Lehman Brothers) at 39.

\textsuperscript{141} Id. at 40-41.

\textsuperscript{142} 1976 House Consumer Protection Subcomm. Hearing, supra note 127, at 174 (statement of Bob Dorsey,
Chairman of Gulf Oil Corp.).

\textsuperscript{143} See S. REP. NO. 95-114, at 4 (“Many firms have taken a strong stand against paying foreign bribes and are still
able to compete in international trade.”); H.R. REP. NO. 95-640, at 5 (1977) (citing the testimony of S.E.C.
Chairman Roderick Hills that bribery is “unnecessary.”).
SEC interpreted its data to suggest that the cessation of such foreign payments “will not seriously affect the ability of American business to compete in world markets.”

As with the question of whether bribery is prevalent internationally, there was some doubt of whether any U.S. law should go so far as to criminalize such bribery, which the FCPA of course ultimately did. The Ford Administration was concerned that criminalization was both too severe and too difficult to implement. In President Ford’s August 3, 1976 Message from the President of the United States Urging Enactment of Proposed Legislation to Require the Disclosure of Payments to Foreign Officials, he urged passage of a bill that required reporting but did not criminalize payments, due to problems of “definition and proof.”

These competing worldviews, and the tensions among different witnesses and administrations, were illustrated in the following exchange. Frustrated by what he regarded as a tentative approach when he felt that an immediate and fairly strong response was needed, Senator Proxmire said, “I recall the story of an agency in the bureaucracy that was short on bureaucrats. They hired a talking parrot. And they made him a GS-15. They taught him to say only one phrase: ‘Very complex, very complex.’ Sometimes I get the feeling that that parrot, that very complex parrot, is in charge of the Federal Government’s groping, grasping, policy on bribery.” Elliot L. Richardson, President Ford’s Secretary of Commerce, responded that the Ford Administration was developing numerous non-criminalizing solutions, including information-sharing agreements, disclosure requirements, a code of conduct, and developing an international approach through the OECD and the UN. Expressing reservations about

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146 1976 Senate Banking Hearings, supra note 128 (statement of Sen. Proxmire) at 76.
147 Id. (statement of Elliot Richardson, Secretary of the U.S. Department of Commerce) at 79.
criminalization, he said, “Even a parrot must occasionally be right.”\textsuperscript{148} Following Richardson, Ford’s Treasury Secretary William E. Simon began his testimony, “The Treasury Department actually hired a second parrot, Mr. Chairman, and he says, ‘I agree, let’s study it.’”\textsuperscript{149}

B. The Early Consensus: Anti-Bribery Legislation as an Alliance-Building Instrument

There was one issue which no one apparently believed needed to be studied. Despite these contrasting viewpoints on crucial issues related to the nature of the problem and the appropriate remedy, an absolute consensus existed on the question of the purpose and intended effects of the proposed legislation. Bribery is a foreign policy problem because it jeopardizes our relations with countries whose alliances we very much value. Specifically, exposing the bribing of overseas officials undermines U.S. credibility and creates the conditions in which hostile governments can spread. Moreover, all agreed that these alliances must be maintained through the continued building of economic and political ties with vulnerable countries, and that the resulting legislation was therefore designed to promote investment in countries where bribery was occurring, rather than to withdraw investments as punishment. The legislative history reveals that this view was shared by the business community as well as by every member of Congress who spoke. The bi-partisan nature of this consensus is further apparent in the comments made by members of the Republican Ford Administration and the Democratic Carter Administration, whose comments were indistinguishable both in substance and tone.

The most fulsome explanation of the foreign policy implications of international bribery was provided by Congressman Solarz. He began his testimony: “it is important to examine the problem of overseas payments in broader terms than simply a matter of economics or even

\textsuperscript{148} Id. at 80.
\textsuperscript{149} Id. (statement of William E. Simon, Secretary of the U.S. Department of the Treasury) at 84.
In doing so, he articulated a view that would prove to be universal among witnesses that there existed another dimension to the problem of overseas bribery, and he used the example of Lockheed to illustrate. He described that the Lockheed scandal, which involved payments to Japanese officials, in Japan, “put the democratic system in Japan in grave danger.” Japanese opponents of the close ties between the U.S. and Japan were “handed a terribly effective weapon to drive a wedge between two close allies. At a time of uncertainty due to the shifting balances of power in Asia, our strongest and most stable ally in the region was faced with unnecessary turbulence, and a relationship which is at the very heart of our foreign policy was potentially jeopardized.” Lockheed’s bribes had also occurred in the Netherlands, where Prince Bernhard reportedly received $1.1M in bribes from Lockheed and was forced to resign. But, Solarz explained, “perhaps most serious” was the “delicate situation” with Italy, which was “one of the keys to the southern flank of NATO.” He explained that the power struggle between the democratic party – the Christian Democrats -- and the Communist Party was at that time quite pronounced, and the balance was precarious. He noted that “[a]llegations of payments by Lockheed served to advance the Communist cause in Italy where the Communist bloc was strengthened by the sight of corrupt capitalism.” His ultimate fear was that the Communist party would gain a majority in the Italian parliament and the country would be lost to the enemy.

He concluded that the foreign policy implications for the U.S. were “staggering, and in some cases, perhaps irreversible.” U.S. “foreign policy objectives” are “seriously impaired”

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151 Id. at 172.
152 Id.
153 Id. at 173.
154 Id.
155 Id.
156 Id.
when “foreign government is weakened by corruption as popular support erodes thus jeopardizing common interests shared with our friends overseas.”\textsuperscript{157} The example of Italy demonstrated that “Communist and other anti-U.S. forces are quick to take advantage of any evidence of immorality or corruption associated with pro-Western governments. Both fear and resentment are generated among foreign officials who become increasingly hostile as the United States continues to expose traditional corrupt practices abroad.”\textsuperscript{158} He continued, “The resulting economic and political instability is certainly detrimental to American foreign policy especially when it results in a backlash against American ideals and interests.”\textsuperscript{159} Ultimately, he observed, “Thus what is at stake is much more than the individual interests of corporations which are competing for a share of foreign markets. What is in fact at stake is the foreign policy and national interest of the United States.”\textsuperscript{160}

This view would be powerfully expressed by members of both the Ford and Carter administrations. Mark B. Feldman, Deputy Legal Adviser in the Department of State under President Ford, testified that “Corruption weakens the fabric of government, erodes popular support, and jeopardizes the important interests we share with our friends abroad. The free enterprise system is a vital factor in world economic growth upon which social progress, economic justice, and perhaps, ultimately, world peace depends. Corruption of friendly foreign governments can undermine the most important objectives of our foreign policy.”\textsuperscript{161}

Similarly, Ford’s Deputy Secretary of State, Robert S. Ingersoll, stated: “I wish to state for the record that grievous damage has been done to the foreign relations of the United States by

\textsuperscript{157} Id.  
\textsuperscript{158} Id.  
\textsuperscript{159} Id.  
\textsuperscript{160} Id.  
recent disclosures. . . . it is a fact that public discussion in this country of the alleged misdeeds of officials of foreign governments cannot fail to damage our relations with these governments.”

Treasury Secretary William E. Simon further stated that it “erodes the general reputation of the American business community, may adversely affect our relations with foreign governments and can contribute to a general deterioration in the climate for fair and open international trade and investment.” It is notable that this concern was thus voiced by members of both parties. Indeed, it would be voiced by both presidential administrations. Ford’s Commerce Secretary, Elliot L. Richardson, further articulated: “Bribery corrodes the confidence that must exist between buyer and seller if domestic and international commerce is to flourish. It threatens to poison relationships between the United States and nations with which we have long had mutually beneficial political and commercial ties.”

In urging passage of legislation, President Ford stated that reports of bribery “have resulted in an erosion of confidence in the responsibility of many of our important business enterprises. In a more general way, these disclosures tend to destroy confidence in our free enterprise institutions.” The report repeats the theme that bribery is first and foremost a problem of image, creating a crisis of confidence, rather than substantive ethics or economic efficiency and growth. The legislation would “contribute in an important way to the restoration of confidence in America’s vital business institutions.”

Unlike their arguments on other issues, which marked a sharp departure from the prior administration, the comments coming from the Carter Administration were indistinguishable.

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162 1976 Joint Priorities Hearing, supra note 126 (statement of Robert S. Ingersoll, Deputy Secretary of the U.S. Department of State) at 154.
163 1976 Senate Banking Hearings, supra note 128 (statement of William E. Simon, Secretary of the U.S. Department of the Treasury) at 85.
164 Id. at 76.
165 1976 Presidential Statement Urging Enactment, supra note 144, at 1.
166 Id. at 3.
from those of its predecessor. Carter’s Treasury Secretary, W. Michael Blumenthal, stated, “The Carter Administration believes that it is damaging both to our country and to a healthy world economic system for American corporations to bribe foreign officials.” President Carter ultimately explained in his signing statement that “during my campaign for president, I repeatedly stressed the need for tough legislation to prohibit bribery. [The FCPA] provides that necessary sanction. I share Congress belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of wide spread overseas bribery have eroded public confidence in our basic institutions.”

Again, this view was expressed most forcefully and eloquently by the Democrat George Ball: “The vast volume of speeches, pamphlets, and advertising copy and propaganda leaflets extolling the virtues of free enterprise are cancelled every night when managements demonstrate by their conduct that a sector of multinational business activity is not free; it is bought and paid for. This is a problem that, like so many others, has relevance in the struggle of antagonistic ideologies; for, when our enterprises stoop to bribery and kickbacks, they give substance to the communist myth – already widely believed in third World countries – that capitalism is fundamentally corrupt.” Even most liberal, reform-minded advocates recognized the urgent foreign policy implications.

The congressional reports both captured this important basis for the legislation. The Senate Report stated that as “[t]he image of American democracy abroad has been tarnished.

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167 1977 Senate Banking Hearings, supra note 139 (statement of W. Michael Blumenthal, Secretary of the U.S. Department of the Treasury) at 67.
169 1976 Senate Banking Hearings, supra note 128 (statement of George Ball, Lehman Brothers) at 40-41.
Confidence in the financial integrity of our corporations has been impaired.” Government that otherwise had friendly relations with the U.S., such as Japan, Italy, and the Netherlands, came under “intense pressure from their own people.” The idea gained most fulsome expression in the House Report. The report discusses the ethical component of the bribery problem, and that bribery is not only unethical, but is “bad business as well.” It mentions that bribery “short-circuits the marketplace” by channeling business to companies that are “too inefficient” or “too lazy” to compete fairly. Bribery “rewards corruption instead of efficiency” and “puts pressure on ethical enterprises to lower their standards.” Despite these themes of ethics and efficiency, the overriding concern expressed in the House Report is with America’s international image. “It erodes public confidence in the integrity of the free market system.” The corrupt practices of some U.S. companies “casts a shadow on all U.S. companies.” It notes that the exposure of such activity can “damage a company’s image”, while secondarily mentioning that it can cause direct financial damage.

This report further sounded the theme of the foreign policy implications of overseas bribery. Bribery creates “severe foreign policy problems” for the U.S. The Lockheed scandal, for instance, “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.” Similarly, when it was revealed that multiple large oil companies bribed Italian officials, it “eroded public support for that Government” and jeopardized U.S.

171 Id.
173 Id.
174 Id.
175 Id. at 4-5.
176 Id. at 4.
177 Id.
178 Id.
179 Id. at 5.
foreign policy with Italy, the broader Mediterranean area, and “with respect to the entire NATO alliance.” Ultimately, it can “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 process of their nations.” These comments, again, assume that bribery is incongruent with the cultural norms of the payee’s country, and that its exposure sparks public outrage.

The foreign policy implications of bribery were perhaps stated most graphically, and somewhat comically, in the following exchange. When the executive of a company that was known to have bribed overseas officials in a European country was testifying, he suggested somewhat incredibly that although his company had in fact paid bribes to leaders of eastern European countries, the purpose of its work was to promote liberal free enterprise and stave off communism, and that this is why they had to bribe political parties. Then-Senator Joe Biden, sitting on the committee, facetiously asked, “how much did you contribute to the Communist Party?” Perhaps not appreciating the Senator’s tone, the attorney turned to the president of the corporation, conferred for a moment, and replied, “Well, $88,000.”

The foreign policy implications of bribery were unmistakable. But also unmistakable was the precise design of the intended remedy: continued investment, albeit subject to higher ethical standards. In the ensuing twenty years, the U.S. would realize that the FCPA was in fact restricting such investment by U.S. companies, and that this constituted a serious shortfall of the legislation. In 1998, Congress would undertake to correct that problem and create the conditions under which U.S. businesses would again be free to invest liberally in transitional economies.

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180 Id.
181 Id.
183 Id.
C. Affirming the Consensus in Amending the FCPA 20 Years Later.

As explained in section II, above, the FCPA was amended in 1988 in several respects, but as part of an omnibus bill, with minimal congressional testimony on the nature and purpose of anti-bribery legislation. The 1988 Amendments would prove most significant in their requirement that the President pursue the negotiation of an international agreement with the member countries of the Organization of Economic Cooperation and Development (“OECD”) to govern acts prohibited by the FCPA.\(^{184}\)

This requirement was ultimately satisfied on December 17, 1997, with the OECD Member States’ adoption of the Convention on Combating Bribery. The convention required each state to adopt its own legislation to enact its provisions into law and provide for its enforcement.\(^{185}\) The U.S. did so on December 8, 1998. While the convention does not require absolute identity among the statutes passed by the various states, it does require functional equivalence,\(^{186}\) and this in turn required amendments to the FCPA.

The U.S. ratification of the convention began with the May 4, 1998 message from President Clinton transmitting the OECD convention. The message referenced only a single policy behind ratifying the treaty: “Since enactment of [the FCPA], the United States has been alone in specifically criminalizing the business-related bribery of foreign public officials. United States corporations have contended that this has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to

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\(^{185}\) OECD Convention on Combating Bribery of Foreign Public Officials in International Business transactions, available at www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

\(^{186}\) See Zarin, supra note 19, at 13-3.
such laws.”

The President advocated ratification of the treaty because it would facilitate U.S. investment in countries where the FCPA had previously put it at a disadvantage.

The theme would prove fundamental in the ensuing congressional testimony, and was frequently captured with the same ubiquitous metaphor. In the hearings before the House Commerce Committee’s Subcommittee on Finance and Hazardous Materials, Congressman Mike Oxley, Republican of Ohio, stated that the convention would “go a long way to leveling the playing field.”

Congressman Bliley reiterated the theme of fighting bribery by “leveling the playing field,” as would Associate Director of Enforcement for the S.E.C. Paul V. Gerlach.

The metaphor eventually made its way into the presidential signing statement, wherein President Clinton explained that “U.S. companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at $30 billion per year.”

The overwhelming concern among congressional leaders and witnesses, as well as the president, in ratifying the OECD treaty was enabling U.S. businesses to compete with companies from countries that had not previously ratified or enforced anti-bribery legislation. The predictions of some in the original hearings that the FCPA would not adversely affect U.S. competitiveness had, by all accounts, proven wrong, and the inability of U.S. companies to continue investing in historically higher risk countries had become a major public policy concern. This theme proved so dominant that many of the other issues that had appeared in the testimony in the 1970s had, by 1998, disappeared. Among the vanished themes was the damage

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187 Message from the President of the United States Transmitting the OECD Convention (May 4, 1998), at III.
190 Id. (statement of Paul V. Gerlach, Associate Director of Enforcement of the U.S. Securities and Exchange Commission) at 11.
that bribery did to U.S. foreign policy interests. This disappearance was likely due largely to two factors: the collapse of the Soviet Union, which brought an end to bi-polar international politics, and the success of the FCPA in curbing bribery, which at least in part brought an end to the major overseas bribery scandals such as Lockheed’s.

But despite the absence of overt foreign policy themes in the 1998 testimony, from the concept of leveling the playing field there generally emerged three more subtle, but unmistakably present, themes that bear on the question of the FCPA’s intended effect on international relations. Each is consistent with the 1977 thinking.

First and perhaps most obviously, it remained true that the legislation would, and should, target only the suppliers of the bribes, and not the solicitors, recipients, or the governments that tolerate them. The express purpose of the convention was to bring suppliers subject to the provisions of effective anti-bribery legislation. Congressman Edward J. Markey, from Massachusetts, submitted a prepared opening statement which explained that in originally passing the FCPA, “it was hoped that by taking the lead to curb bribery by our corporations, America would put pressure on the other developed industrialized nations to adopt similar laws.”

Congressman Oxley testified that the problem which the OECD convention was designed to remedy “is that our competitors have much looser rules and enforcement mechanisms against bribery.” Congressman Thomas Manton, Democrat from New York, expressed the problem was not merely with the absence of fear of penalty, as certain trading partners, such as Germany, “apparently appear to actually encourage [bribery] through their tax codes.” The House Report ultimately noted that since 1977, U.S. businesses have “operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of

193 Id. (statement of Rep. Oxley) at 1.
194 Id. (statement of Rep. Manton) at 3.
The report states that the OECD treaty will, in relation to the FCPA, achieve “comparable prohibitions in other developed countries.” The object of the legislation, then as before, was to punish the supply of bribes, and not the demand. The convention was going after bribery suppliers in developed markets, and not solicitors, recipients, or the governments of developing markets.

Second, and nearly as obvious, in “leveling the playing field,” the objective was to encourage U.S. investment in those markets where the FCPA had served to inhibit it. Undersecretary of State Stuart Eisenstat testified that lost business to the U.S., as a result of the FCPA, was approximately $30 billion per year, and that the OECD would have covered about 70% of those deals. His concern was that the U.S. was being denied investment opportunities because of this legislation. Congressman Mike Oxley, Republican from Ohio, explained that the OECD would again enable that investment: “American business and American workers, the most productive in the world, are prime beneficiaries of free and open markets overseas. But to take advantage of the benefits of free trade, the business victory has to go to the best competitor. Transparency and openness are keys to free competition. The more fair the competitive environment, the better our companies will do.” The inability of U.S. businesses to invest in historically higher risk countries was precisely the problem which the 1988 amendments had directed the U.S. President to remedy, and which were in fact remedied by the adoption of the convention.

196 Id.
198 Id. at 61.
Third, the theme of how to effectively bring about host-country reforms appears in the testimony in ways that, albeit still faint, are unmistakably present. The few who hinted at the mechanism by which the OECD would effect these reforms suggested, although admittedly not overwhelmingly, that it should be heightened investment, not withdrawal. Two Congressmen alluded to the possibilities of reform. Congressman Manton explained that bribery’s “detrimental effect on economies and societies is evident. Corruption distorts the allocation of resources, undermines fair competition in the marketplace, hurts economic development, erodes confidence in political systems and fosters organized crime.”200 Drawing on recent economic events, Congressman Oxley explained that U.S. investment in developing countries is “better for the countries involved. Recent events in Asia show us that a lack of transparency can lead to market distortions and inefficiencies with negative results for national economies and individual citizens. This convention will not end bribery worldwide, and I think we all understand that, but it is an important step forward in America’s effort to lead the world to a more open, market-based system.”201 Congressman Oxley thus suggested, albeit in passing, that reforms in higher risk countries were perhaps one eventual result of the legislation, and that such reforms would occur as a result of investment rather than withdrawal. Similarly, the House Commerce Committee Report stated that the goal of the U.S. in ratifying the OECD was to promote “stronger, more reliable, and transparent foreign legal regimes that, in turn, make for more reliable and attractive investment climates.”202 The report characterizes the harm that comes to payee countries in terms of economic efficiency, rather than ethics, and the harm is two-fold. First, the quality of the products and services to be provided by the payor diminishes, in that

200 Id. (statement of Rep. Manton) at 3.
201 Id. (statement of Rep. Oxley) at 2.
countries that receive bribes may grant contracts to businesses offering an “inferior deal.”” 203 Second, it suggests that the perception that bribery is necessary in a country to do business in effect deters investment, in that “countries that have the most corruption have trouble attracting foreign investment because the need to bribe acts as a substantial added tax on the investor.” 204 While none of these comments expressly reference the intended mechanism of effecting reforms – whether it should be investment or withdrawal – both Congressmen Oxley and Manton, as well as the Committee Report, had already amply expressed their intention that the statute should promote investment.

The theme would become slightly more apparent in the testimony of General Counsel of the Department of Commerce, Andrew Pincus. He testified that implementation “around the world is absolutely vital to the promotion of our democratic ideals. Corruption is completely inconsistent with free trade and fair government, and implementation of this treaty is also vital to the ability of American companies to compete in the global economy. The unfortunate reality is that last year we estimate $30 billion in international contracts were alleged to involve bribery by foreign firms.” 205 Pincus did not seem to imagine that further losses to investors of the developed world would be the impetus to reform. Rather, in remedying the problem of lost U.S. business opportunities, both the U.S. and the OECD signatories would take advantage of those opportunities through continued investment, and that reforms would occur as a result.

Similarly, the signing statement provided, “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

203 Id.
204 Id.
205 1998 House Finance Hearing, supra note 188 (statement of Andrew J. Pincus, General Counsel to the U.S. Department of Commerce) at 6.
competition and harmful to efforts to promote economic development.”

Although Communism was no longer the enemy, it was nonetheless envisioned that liberal reforms could, over time, occur, if the developed world prohibited bribery and yet continued to actively invest in countries that were historically higher risk.

Host-country reform was clearly secondary in importance in 1998, subsumed under the imperative of promoting U.S. investment. But to the extent that it was addressed, all suggested that greater transparency, productivity, and efficiency could be obtained by encouraging investment in countries where the U.S. had been hamstrung by the FCPA in relation to companies from other countries. No one suggested that withdrawal was intended, foreseeable, or effective. The purpose of leveling the playing field, then, was to get the U.S. back in the game.

And what exactly is the game? Which countries would be host to myriad investment opportunities which the companies of countries that lacked anti-bribery legislation had been exploiting? It would be the countries with substantial economic opportunities, but where bribery remained enough of a problem that countries not previously bound by anti-bribery legislation had competed with an advantage over U.S. companies. Generally speaking, these would be the emerging markets. The goal of the 1998 amendments was thus to enable U.S. investment in such markets.

If economic withdrawal were the object, anti-competitiveness would not be a concern – policymakers would expressly intend that U.S. businesses continue to not invest in higher risk countries, regardless of what other developed-country competitors might be doing. But this is never suggested. The unmistakable intention is to promote continued investment in countries where bribery occurred. Neither was it ever suggested that countries that tolerate bribery should be held responsible for the prevalence of bribery and punished through economic withdrawal.

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To the contrary, the general view is that reforms might incrementally occur through the continued engagement of countries with corruption-free business practices.

No one, not a single witness, suggested that it was appropriate, let alone effective, to withdraw economic support from countries that refused to crack down on bribery. The concept is simply not present in the legislative history, just as it is not manifest in the statutory text. In showing that anti-bribery legislation fails to satisfy HSEO’s full definition of economic sanctions, the purpose is not to somehow prove that the “elements” have not been satisfied; HSEO’s definition is obviously not law. Rather, the purpose is to underscore that anti-bribery legislation resembles economic sanctions in every respect except arguably the most important: nobody ever intended them to be such. The FCPA, and its progeny, thus constitute a unique kind of economic sanctions: they sanction host countries despite the intentions of anyone who ever testified on the matter.

IV. THE CONUNDRUM OF UNWITTING SANCTIONS.

Given this legislative history, the FCPA is disqualified from one of the two recognized purposes of sanctions. It cannot be thought of, even with a caveat, as expressive sanctions, for the very simple reason that the U.S. never expressed a desire to impose them. Withdrawing economic support in protest of regimes that tolerated bribery was not the publicly-declared intention of the legislation, and the statute’s facial language contains no such provision. They are, then, unwitting sanctions; de facto, and not de jure.

To the extent that the withdrawal of these customary trade and financial relations has any value at all, it therefore must be instrumental value -- the capacity to effect reforms in target countries. However, thinking of anti-bribery legislation as instrumental but unwitting sanctions against emerging markets proves deeply problematic. Specifically, it presents two distinct sets
of problems: the first concerns the actual effects of the legislation’s enforcement, and the second concerns how those effects can be justified as a matter of public policy.

A. The Likely Effects of The Present Enforcement Regime.

If current enforcement trends continue, any of three aggregate outcomes might result, none of which is satisfactory. The first is that the targeted countries will respond to the economic withdrawal by implementing domestic reforms. While this might be the most desirable outcome, it is certainly not the most likely, as the economic sanctions literature casts substantial doubt on it as a realistic foreign policy goal. It is at best unclear whether these sanctions will work – that is, whether they will prove to be an effective instrument for effecting reforms in emerging markets. As explained above, economists and political scientists have demonstrated that whether sanctions are likely to prove effective is a complex analysis. Among the political goals that bear the most relevance to anti-corruption legislation include the extent of international cooperation in enforcing the sanctions; whether both the senders and targets are members of the international organization that is coordinating the administration of the sanctions; the “warmth” of prior relations between senders and targets; and the political system of the target nations, ranging between autocratic and democratic. Economic variables include the costs imposed on the target countries; the costs to the sender countries; prior commercial relations between senders and targets; the relative economic size of the targets and senders; and the economic health and political stability of the targets. Effectiveness thus depends on myriad political and economic factors, the combination of which is specific to each country. However, the FCPA has been enforced, and will continue to be enforced, against a very broad and open-ended swath of countries, with widely-varying political and economic conditions.

207 Hufbauer, et al, supra note 18, at 55.
208 Id.
Determining which of these countries are most likely to respond to OECD enforcement by cracking down on bribery would be a very detailed and time-consuming analysis, even if the DOJ and SEC were inclined to regularly conduct it.

The second scenario is perhaps less hopeful but is more realistic, as the empirical evidence demonstrates that it is already underway. As investment opportunities continue to develop in higher risk countries, at least some capital-rich countries may neglect, or even refuse, to ratify and enforce anti-bribery legislation. In sanctions terminology, these “black knights” will move in to fill the void created by the economic withdrawal of countries that are enforcing the OECD convention. Companies from countries that either have not ratified the OECD convention or do not enforce it, such as China or Russia, may not hesitate to invest in these countries. Cuervo-Cazurro in 2006 found this precise dynamic to be occurring, observing that “corruption in the host country results in relatively less FDI from countries that signed the OECD Convention, but results in relatively more FDI from countries with high levels of corruption.” More recently, China’s systematic investment in Africa, Central Asia, and Latin America, where CPI corruption levels remain relatively high, provides further evidence in support of these findings. If this dynamic were to continue, companies from those countries that actively enforce anti-bribery legislation would tend to seek out safer investment destinations. These will typically exist in more developed markets. The nations of the developed world will

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209 Cuervo-Cazurra (2006), supra note 16, at 2; Hines, supra note 93, at 20 (finding that the FCPA encouraged “ownership substitution” between U.S. investors, who were at that time the only investors subject to anti-bribery legislation, and foreign investors).


begin to invest in each other, while the less-developed economies with less-developed anti-bribery regimes will likewise invest in each other. The world economy could slowly begin to bifurcate into two economies: one in which bribery is tolerated and one in which it is not. To see this scenario play out, even if only partially, would raise innumerable problems in the ethical, economic, and foreign policy spheres alike.

It is a regrettable irony that this may not even be the least desirable result of the present anti-bribery enforcement regime. The third conceivable outcome is that the developed nations will continue to incrementally withdraw, but the black knights will not substantially fill the void. In this scenario, the emerging markets’ historic opportunities for growth, with its concomitant economic and social benefits, will be missed. The OECD-enforcing nations would have prolonged the suffering of poorer but hopeful nations, but to no effect. This result, while consistent with a firm ethical commitment to reducing bribery, is ultimately nonetheless tragic.213

B. Policy Problems Inherent in the Present Enforcement Regime.

Even if these de facto sanctions were likely to succeed in any given country, it is by no means self-evident that continuing to implement them would be a desirable course of action. That is, it is not at all clear that the benefits would outweigh the costs. The preliminary data suggests the possibility of substantial collateral damage that was neither intended nor foreseen: economic growth may be stunted in countries that otherwise enjoy historically rare opportunities to reduce poverty, and foreign policy alliances may be made or broken in critical and volatile areas of the world.214

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213 For discussions of the importance of foreign direct investment to economic development, see, e.g., THEODORE MORAN, EDWARD M. GRAHAM, & MAGNUS BLOMSTROM, eds., DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? (2005); THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT: THE NEW POLICY AGENDA FOR DEVELOPING COUNTRIES AND ECONOMIES IN TRANSITION (1998).
214 On the relation between foreign direct investment and U.S. Foreign Policy, see, e.g., EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT (2006).
Reflecting on these potential effects exposes a fundamental, and quite difficult, policy trade-off: if forced to choose between reducing poverty and reducing corruption, which should we prefer? To the extent that enforcing anti-bribery legislation undermines economic development, and thus reducing poverty and reducing corruption are to some degree competing goals, which should be the higher, or more immediate, priority?

The available data on the impact of anti-bribery enforcement supplies a preliminary answer to this question. In our enforcement of anti-bribery legislation, we have prioritized the reduction of bribery above the reduction of poverty. The work of Hines and Cuervo-Cazurra, combined with the data compiled in this article about the market types where enforcement actions usually occur, lead inexorably to this conclusion: those nations that are actively participating in the enforcement of anti-bribery legislation are sacrificing, in significant part, the opportunity to reduce poverty in the name of combating bribery.

We should take notice of this result. While there are at least two possible ways to justify it, neither is compelling. First, it might be said that combating bribery actually furthers economic development. By this line of reasoning, bribery and other forms of corruption are a detriment to economic efficiency, and reducing bribery will therefore promote efficiency and in turn promote economic development.\(^\text{215}\) This theory suffers from at least two problems. First, emerging markets are by definition uniquely positioned at present to experience historic economic development. The conditions that make this growth possible have not existed forever,

and it should not be assumed that they will remain indefinitely. Meanwhile, there would necessarily be a significant lag time before any instrumental value, in the form of host-country legal reforms, could be realized – the withdrawal of financial support would need to become more pronounced, governments would need to acknowledge the withdrawal as a consequence of the tolerance of bribery, legislation would need to be enacted in response, and that legislation would then need to be meaningfully enforced. The conditions that make emerging markets unique may or may not last long enough for these reforms to occur, and the opportunity for extraordinary development would be lost. If these market conditions did remain, the years that had passed in the interim would nonetheless mark a lost opportunity for growth. That is, even if the sanctions ultimately worked in promoting economic growth, people would still suffer.

The second problem with the economic justification is that incremental reductions in bribery will not necessarily improve economic efficiency. At a theoretical level, bribery impedes efficiency, and the absolute elimination of bribery would of course improve efficiency. But because sanctions could not completely eliminate bribery, the question becomes whether the reduction in bribery will lead to an increase in efficiency, and that answer is regrettably complex. Political scientists such as Samuel Huntington\textsuperscript{216} and Mancur Olson\textsuperscript{217} have famously observed that in transitional economies, where bureaucratic processes are particularly inefficient, bribery may actually allow a bypass of the inefficiency. By this ironic reasoning, in countries with inefficient bureaucracies bribery is necessary to the efficient conduct of business. While counterintuitive and just barely palatable, this theory must remain on the table in discussing the impact of anti-bribery enforcement on the economic development of emerging markets.

\textsuperscript{216} \textsc{Samuel P. Huntington}, \textit{Political Order in Changing Societies} (1968).
\textsuperscript{217} \textsc{Mancur Olson, Jr.}, \textit{Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships} (2000); Mancur Olson, Jr., \textit{Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others are Poor}, 10 J. Econ. Perspectives 13 (1996); Mancur Olson, Jr., \textit{Dictatorship, Democracy, and Development}, 87 Amer. Pol. Sci. R. 567 (1993).
Alternatively, we might prefer to rely on a deontological justification -- one that is ethical rather than economic. The deontological theory holds that bribery is absolutely wrong, and therefore should be sanctioned regardless of its economic impact.\textsuperscript{218} By this thinking, no amount of economic development could justify the tolerance of, or participation in, the unethical practice of bribing overseas government officials. This is less complicated than the economic rationale: if one begins from the premise that bribery is an absolute wrong, the only appropriate response is to work towards reducing it. The problem with this justification, however, is even more fundamental: there is simply no evidence that Congress, or any other deliberative body for that matter, has ever adopted this policy. As the legislative history shows, whether bribery is an absolute and universal moral wrong, which government should seek to immediately eradicate regardless of the economic implications, was heavily disputed in Congress. Unless and until politically accountable bodies adopt this principle, it should not be used to justify the enforcement of a statute where fines have exceeded $1 billion U.S. for a single company.\textsuperscript{219}

C. Proposed Reforms: Deterring Bribery without Deterring Investment.

This discussion of the uncertain justification for the present enforcement regime is obviously meant to sound a note of caution. Still, it must be emphasized that concern for tempering the sanction-like effects of anti-bribery legislation does not, by any means, imply an abandonment of the commitment to combating bribery. The purpose of any changes in the drafting or enforcement of anti-bribery legislation should have a very specific and limited purpose: the penalties should create a disincentive to bribe without creating a disincentive to


\textsuperscript{219} The total fines levied against Siemens A.G. by the U.S. and German authorities exceeded this amount. For the DOJ press release, see http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html.
invest. Put another way, while it is good to deter bribery, it is far better to deter bribery that occurs in the course of doing business. Promoting ethical business in transitional markets is precisely the purpose of the FCPA.\textsuperscript{220}

There are numerous reforms to the text and enforcement of anti-bribery legislation that would advance the policy of reducing bribery without scaring companies away from emerging markets. The first and most obvious is to bring the remainder of the capital-rich countries into the OECD Convention. The black knight effect occurs because there remain capital-rich countries with substantial FDI capacity that are not subject to anti-bribery legislation. Most notably, of the four large emerging markets -- Brazil, Russia, India, and China (the “BRICs”)
\textsuperscript{221} - only one of them, Brazil, has adopted the Convention.\textsuperscript{222} The OECD is presently engaged in negotiations with the remaining three, finding varying degrees of success. Mere adoption of the Convention, of course, is not enough, and the countries must meaningfully enforce it. While the time when China, Russia, and India have demonstrated a resolve to eradicating bribery that is commensurate to the more developed nations may not yet be imminent, it is clearly the first and most important piece of a long-term anti-bribery agenda.

A complementary piece that should be pursued concurrently is the broad implementation and enforcement of demand-side anti-bribery laws. Several conventions currently exist, at least on paper, that go beyond the supply-side legislation of the FCPA and OECD and prohibit the


\textsuperscript{221} Goldman Sachs first coined the acronym “BRIC” in 2001 to describe the four emerging markets that, by 2050, could replace most of the current G6 members in terms of GDP. See http://www2.goldmansachs.com/ideas/brics/index.html.

\textsuperscript{222} OECD Convention, \emph{supra} note 6. For the list of countries that have adopted the Convention, see http://www.oecd.org/document/44/0,3343,en_2649_34859_36433004_1_1_1_1,00.html.
solicitation or receipt of bribes. Some have been ratified by the member nations of important emerging market governmental organizations, including the Organization of American States’ Inter-American Convention Against Corruption, and the African Union’s Convention on Preventing and Combating Corruption. More generally, in 2004 the United Nations passed the Convention Against Corruption, which requires each member state to adopt legislation criminalizing not only the offer of a bribe but also the solicitation or acceptance. Similarly, international financial institutions such as the World Bank and the IMF have adopted guidelines that deny funding to governments whose officials have solicited or accepted bribes. Less formally, the International Chamber of Commerce has adopted rules addressing the demand of bribes, and has urged businesses around the world to implement them. To the extent that these conventions and guidelines are adopted and enforced, companies will be less fearful of doing business in the previously higher-risk markets.

The demonstrated sanctions-like effect of the FCPA further suggests that the calculation of corporate criminal penalties bears reexamination. The FCPA provides that a corporation may be fined the greater of twice the gross gain or loss that resulted from the bribery, and in recent

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229 15 U.S.C. §§ 78ff(c)(2)(A)-(B), 78dd-2(g)(2)(A)-(B). Subject to this maximum, the amount of the fine is governed by the Federal Sentencing Guidelines. See Zarin, supra note 19, at § 8:1.2. Additionally, engaging in an
cases, this formula has resulted in staggering penalties.\textsuperscript{230} Factoring the sanctions-like impact of these penalties into the equation might yield figures that still punish companies for wrongdoing but do not scare them away from foreign markets that badly need their capital.\textsuperscript{231}

More fundamentally, we should reevaluate the underlying theories of liability by which the government holds corporations accountable for FCPA violations. Indeed, one commentator has observed that “nothing magnifies the impact of the Foreign Corrupt Practices Act on corporations more than \textit{respondeat superior},” the common law doctrine by which employers are held liable for the conduct of their employees.\textsuperscript{232} As the U.S. Sentencing Commission explained, “Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees’ illegal actions.”\textsuperscript{233}

It is easy to imagine the impact of this doctrine in the FCPA context. Defendants are often large publicly-traded companies with ventures in various countries and various cultures. In some of these countries, bribery has long been regarded as a customary, acceptable, and even necessary way of doing business with a government that is likely perceived as egregiously


inefficient and inherently corrupt. Recognizing the risk, a company might implement a broad compliance program that includes rigorous anti-bribery training for its employees. Nonetheless, if a lower-level employee eager to close a deal pays a bribe, the company is criminally liable.

Penalizing companies for such acts, despite their best preventative efforts, perverts the purposes of the FCPA: while penalizing bribery, it creates a risk that large international companies feel they cannot afford to take, and they financially withdraw from higher-risk markets. The statute thus ultimately punishes the countries in which these companies would otherwise invest.

The outer limits of the doctrine were recently challenged in a Second Circuit case which, although involving environmental rather than anti-bribery laws, involved arguments that are at least as applicable to the FCPA context. An amicus brief co-authored by the former Enron prosecutor echoed the admonition of the U.S. Sentencing Commission and described the dangers of an overly broad application of respondeat superior:

A criminal indictment can be a life-or-death matter for a company. Yet, the vast sweep of the district court’s standard for the imposition of vicarious criminal liability makes corporations accountable for almost all criminal acts of any low level employees—even those acting against explicit instructions and in the face of the most robust corporate compliance program.

The same brief compellingly explained that the doctrine forces companies to settle criminal charges and forego the opportunity to prove their innocence at trial:

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234 U.S. v. Ionia Mgmt., S.A., 555 F.3d 303 (2nd Cir. 2009). The defendant-appellant was a company incorporated in Liberia with its principal place of business in Greece, and was convicted of violating the Act to Prevent Pollution on Ships for failing to maintain appropriate records of its petroleum deliveries while in U.S. waters. Id. The defendant, as well as an amicus, argued that a company should not be held liable under respondeat superior unless it “lacked effective policies and procedures to deter and detect criminal actions by its employees.” Id. at 310. The Second Circuit (McLaughlin, Calabresi, Livingston) held that the absence of such policies and procedures is not “a separate element,” and thus irrelevant to liability under respondeat superior. Id. The Wall Street Journal reported that Judge Calabresi, former Dean of the Yale Law School, found amicus’ argument in particular “interesting” and that it “appeal[ed]” to him as an “academic,” but further stated, “whether we should do something about this as judges is a different matter.” Former Enron Prosecutor: Criminal Charges Shouldn’t Be So Easy, Nov. 21, 2008, available at http://blogs.wsj.com/law/2008/11/21/former-enron-prosecutor-criminal-charges-shouldnt-be-so-easy/.

[Respondeat superior] has caused a tremendous imbalance between the power of a prosecutor and a corporate defendant. Given the hair-trigger for corporate liability even for the most responsible corporate citizen, many corporations forego any defenses in order to resolve threatened prosecution. . . . The potential for inappropriate prosecutorial pressure is particularly heightened in the area of corporate criminal investigations that end in Draconian non-prosecution and deferred prosecution agreements, where no court has oversight authority. There, the prosecutor effectively serves as both judge and jury. Because of the disastrous consequences of a corporate indictment and the ease with which corporations may be liable under the doctrine of respondeat superior, corporations are under immense pressure to agree to almost any terms. The vast majority of these negotiations go on behind closed doors, with little public scrutiny and no judicial review.236

This precise dynamic can be observed with powerful effect in the FCPA context, where companies routinely settle their charges through deferred prosecution and nonprosecution agreements to avoid the damaging publicity of a criminal trial.237

Although the Second Circuit in Ionia affirmed the district court’s ruling against the defendant,238 the case reflects cracks in the respondeat superior dam. For years, scholars have been compiling a substantial body of research calling for a more deliberate application of the doctrine that more effectively advances the underlying policies of punishment and deterrence.239

236 Id. at 22.
237 For a thorough discussion of the role of respondeat superior in FCPA enforcement, see the series of entries at The FCPA Blog: News and Views about the United States Foreign Corrupt Practices Act, at http://fcpablog.blogspot.com/search/label/Respondeat%20Superior. Dick Cassin, the blog author, argues, “Respondeat superior does more harm than good. Sure, it produces a 100% corporate “conviction” rate in FCPA cases, which must go down well at the Justice Department. But, it probably doesn't deter illegal behavior or encourage better compliance programs. And it puts overwhelming pressure on organizations to resolve threatened criminal cases. Because of the catastrophic effects of any potential conviction, companies have to settle with the government. So they rush into agreements that may require them to waive the attorney–client privilege, hand over employees' private documents and data, cut off support for their legal defense, and fire those who don't cooperate with government investigations.” Id. at Naked Corporate Defendants, (Jan. 22, 2009), http://fcpablog.blogspot.com/2009/01/naked-corporate-defendants.html. He concludes that “it is time to fix respondeat superior – either in court or in Congress.” Id. at In the Master’s Defense (Nov. 24, 2008), http://fcpablog.blogspot.com/2008/11/in-masters-defense.html.
238 Ionia Mgmt., 555 F.3d at 303.
A remedy, proposed by Professor Ellen Podgor, is to recognize a good faith defense for corporations where the violation occurred despite the defendant company’s best preventative efforts. Indeed, such a defense would substantially mitigate the sanctioning effect of FCPA enforcement, as the risk of doing business in foreign markets would substantially decrease.

D. Conclusion: Destined to Repeat History?

Given the delicacy of enforcing sanctions-like legislation, HSEO concluded their comprehensive analysis of the history of sanctions enforcement with a striking admonition. In light of the above discussion, this admonition applies with equal force to members of the international regulatory community who are now poised to greatly increase the enforcement of anti-bribery legislation:

Sender governments should think through their means and objectives before taking a final decision to deploy sanctions. Leaders in the sender country should be confident that their goals are within their reach, that they can impose sufficient economic pain to command the attention of the target country . . . that their efforts will not prompt offsetting policies by other powers, and that the sanctions chosen will not impose insupportable costs on their domestic constituents and foreign allies. These propitious conditions arise less often than the leaders of major powers seem to imagine.

This paper’s analysis of the text and legislative history reveals that sender governments have not yet adequately thought through their means. A public debate about whether to


withdraw investment from emerging markets has simply never occurred. This article means to suggest that it should, and promptly.

While the goal of reducing bribery is not controversial, the question of how to do so has proven quite complex. Indeed, it has become more complex, not less, since 1977. In sum, Senator Proxmire’s original introduction to the congressional inquiry into the need for anti-bribery legislation is even more appropriate today than it was then: “Virtually every [one] . . . thinks bribery is a dreadful thing. There is no dispute about that. The question . . . is the remedy.”\textsuperscript{242}

\footnote{\textit{1976 Senate Banking Hearings}, \textit{supra} note 128 (statement of Sen. Proxmire) at 75.}
APPENDIX: CATEGORIZING ENFORCEMENT ACTIONS BY MARKET TYPE

This appendix briefly defines the several market types used in this study, and explains how the countries in which FCPA violations have occurred are categorized into those types. A spreadsheet follows that shows, for each FCPA enforcement action, the country or countries in which the violation occurred, the Transparency International Corruption Perception Index ranking of each country, and its market type as defined by Standard & Poor’s.

There is almost no legal scholarship identifying the distinctive legal features of emerging markets. Despite the term’s wide usage today and the general recognition that law and politics figure prominently in the development of emerging markets, legal scholars lag well behind the community of legal and financial practitioners in understanding this phenomenon. A useful general characterization of emerging markets – and to this author’s knowledge, the only available definition in the law review literature, though written by a World Bank economist rather than a lawyer – explains that emerging markets are principally distinguished by two characteristics: volatility and transition. They are volatile in several related respects: the value of financial assets and volume of financial output vary dramatically; they are subject to price shocks; domestic policy is comparatively unstable; government regulation and intervention tends to be “procyclical,” meaning that it tends to exacerbate both booms and recessions; and investors often perceive policymaking as arbitrary. Emerging markets tend to be transitional in the sense that they have recently moved to a market economy from a planned economy; both their economic and political institutions are changing dramatically; there is a relatively short history of foreign investment; they are witnessing a rapid increase in the market’s participation in

244 Id. at 642-46.
the international economy; and they generally are experiencing dramatic changes in such demographic factors as fertility rates, life expectancy, and educational status.\footnote{Id. For a more technical description of the financial characteristics of emerging markets, see Wei Li & Richard Hoyer-Ellefsen, Characteristics of Emerging Markets, available at SSRN: http://ssrn.com/abstract=909890.}

Frontier markets, by comparison, might be thought of as nascent emerging markets (a nearly redundant phrase, but still illustrative). They exhibit the same characteristics as emerging markets, but to a different degree: they are not quite as far along in their transition, and are somewhat more volatile. Owing to the relative newness of the term, legal academic definitions are, perhaps fittingly, less developed than emerging markets, and this author could locate none. One investment company provides a very simple and useful definition: frontier markets “demonstrate a relative openness and accessibility for foreign investors” and are not “undergoing a period of extreme economic and political instability.”\footnote{See http://www.mscibarra.com/products/indices/fm/MSCL_Frontier_Markets.pdf.} Emerging markets and frontier markets, then, are different in degree but similar in kind. For this reason, they are combined into a single category of emerging markets for purpose of this paper, although the following spreadsheet preserves the distinction.

While various investment firms have provided slightly differing lists of emerging markets,\footnote{See, e.g., FTSE Group, available at http://www.ftse.com/Research_and_Publications/FTSE_Glossary.jsp; MSCI Barra, available at http://www.mscibarra.com/products/indices/licd/em.html#EM.} this article will rely on the categories created by Standard & Poor’s. A combination of its indices of emerging markets and frontier markets\footnote{See http://www2.standardandpoors.com/spf/pdf/index/brochure_EMDB.pdf; http://www2.standardandpoors.com/spf/pdf/index/SP_IFCG_Extended_Frontier_150_Factsheet.pdf.} yields the following list: Argentina, Bahrain, Bangladesh, Botswana, Brazil, Bulgaria, Cambodia, Chile, China, Colombia, Cote d’Ivorie, Croatia, Cyprus, Czech Republic, Ecuador, Egypt, Estonia, Georgia, Ghana, Hungary, India, Indonesia, Israel, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Latvia, Lebanon, Lithuania, Malaysia, Mauritius, Mexico, Morocco, Namibia, Nigeria, Oman, Pakistan, Panama,
Peru, Philippines, Poland, Qatar, Romania, Russia, Saudi Arabia, Slovakia, Slovenia, South Africa, South Korea, Sri Lanka, Taiwan, Thailand, Trinidad & Tobago, Tunisia, Turkey, Ukraine, the United Arab Emirates, Venezuela, and Zimbabwe. Countries that are more developed than the above are here referred to as “developed” in the spreadsheet and countries that are less developed are called “less developed.”

Calculating the number of alleged violations that have occurred in these countries, for the specific purpose of identifying the patterns among various types of markets, requires a number of methodological decisions. Where a single case involved bribery in multiple countries, each country is counted once. If there were multiple cases concerning the same set of transactions – for instance, separate criminal actions against multiple defendants, or overlapping DOJ and SEC cases – each country in which bribery occurred is counted only once. Where two unrelated cases involved bribery in the same country, that country is counted twice. This list does not include countries in which transactions were suspected to have occurred but which were not part of the underlying facts of the conviction or settlement. Finally, two older cases that involved an extraordinarily high number of countries, were not included in the tally because they would disproportionately influence the numbers. Otherwise, this index includes every alleged violation that resulted in a finding of liability, a conviction, or a settlement, between the original passage of the FCPA and October of 2008.

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249 The purpose of this analysis is to anticipate the effect of FCPA enforcement patterns on contemporary investment decisions. Accordingly, countries in which FCPA violations have historically occurred are categorized based on S&P’s contemporary market definitions – for instance, a country in which a violation occurred in 1985 may be categorized, for purposes of this analysis, as an emerging market based on its 2008 market conditions, rather than its 1985 conditions. A decision to invest in a particular country will of course be based on contemporary market conditions, but the impact of FCPA enforcement patterns on that decision will be based, at least in part, on where the violations have historically occurred.

The totals, as indicated in the spreadsheet below, are as follows. There have been 125 “violations” of the FCPA from its ratification to October of 2008. Of those, 31 occurred in less developed markets, six occurred in frontier markets, 79 occurred in emerging markets, and nine occurred in developed markets. The paper combines frontier and emerging markets, to produce a total of 85 violations in that market type.

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<td>U.S. v. Pitchford, Cr. 1:02-00365 (S.D.N.Y. 2002)</td>
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