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ENFORCING INTERNATIONAL CORRUPT PRACTICES LAW

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This essay strives to advance the current international movement to deter the transnational corrupt practices that have long burdened the global economy and weakened governments, especially in “developing” nations. Laws made in the last decade to address this longstanding global problem have not been effectively enforced. Described here are the moderately successful efforts in the United States since 1862 to reward private citizens serving as enforcers of laws prohibiting corrupt practices. It is suggested that this American experience might be adapted by international

* Professor of Law, Duke University. The theme of this essay was presented to a session of the Inter-University Council Program on Public and Private Justice at Dubrovnik, Croatia on May 24, 2009 and to a panel of the Law & Society Association Meeting in Denver, Colorado on May 27, 2009. The possible relevance of American experience to the current international concern was first presented at a 2007 conference at the Duke Law School, that paper was published as Law and Transnational Corruption: The Need for Lincoln’s Law Abroad, 70 LAW & CONTEMP PROB. 109 (2008). It was presented again at a Conference on the Civil Law Consequences of Corruption at the Centre for European Law and Politics at the University of Bremen in March 15, 2008. That preview of this paper was republished in The Civil Law Consequences of Corruption 37 (Olaf Meyer ed., 2009). The earlier presentations did not advance the proposal presented here. But this paper has benefited from helpful reactions and conversations at each of the four presentations to very different conferees, but especially to those attending the Bremen conference. Todd Miller helped as an editor and research assistant. Jennifer Behrens of the Goodson Library at Duke has also been a great source of help.
organizations to enhance enforcement of the new public international laws.

THE TRANSNATIONAL CORRUPTION PROBLEM

The weakness of many governments caused in part by their vulnerability to corruption is a misfortune having serious transnational consequences. Given the rise of terrorism and piracy in weakly governed lands, and the declining physical condition of the planet we share, one need not be an ardent humanitarian to be concerned about the spreading deterioration of governments in many former imperial colonies.

A root problem for many failing or weak states is that they are disserved by officials seeking personal kickbacks on anything that can be bought from or sold by their government, including mineral leases, medical supplies, textbooks, building construction, roads, railways, tourism concessions, new airports, agricultural equipment, or even imaginary enterprises and activities. And the corrupt ruling elites who receive these bribes often protect themselves by investing their
proceeds overseas, not at home, thus contributing yet further to the attrition of the economy of the peoples they purport to serve.\footnote{Robert I. Rotberg, \textit{The Challenge of Weak, Failing, and Collapsed States}, in \textit{Leashing the Dogs of War} 83, 86 (Chester A. Crocker et al eds. 2007).}

The problem of corruption may be especially grave in nations endowed with natural resources highly valued by people in wealthier nations.\footnote{See generally Leslie Holmes, \textit{Rotten States: Corruption, Post-Communism and Neoliberalism} (2006); \textit{International Handbook on the Economics of Corruption} (Susan Rose Ackerman, ed. 2006).} Firms extracting minerals in distant nations are often careless about the environmental consequences of their extractions, but the concern of ruling elites about those consequences is often quite limited and reconciled by the personal rewards they receive as controllers of governments unable to deter either the corruption or environmental recklessness practiced by foreign firms. The World Bank calculated that bribes totaling a trillion dollars were paid in 2002.\footnote{Susan Rose Ackerman, \textit{Governance and Corruption}, in \textit{Global Crises, Global Solutions} 301 (Bjorn Lornberg ed., 2004).} A large share of that amount was undoubtedly paid to officials of weak governments by firms that extract and export natural resources for sale in the developed world. And much of the foreign aid to such nations provided by the World Bank or the International Monetary Fund also tends to end up in some officials’ secret bank accounts.
Unless and until means can be devised to deter bribery in failing and failed nations, globalization can be of scant benefit to “the bottom billion”\(^4\) identified by Professor Collier, who are destined to be governed weakly if at all. Their ungoverned states will continue to export poverty and serve as havens for all sorts of gangsters, pirates, and terrorists.

**THE AMERICAN FOREIGN CORRUPT PRACTICES ACT: THE LIMITS OF ITS PUBLIC ENFORCEMENT**

This problem of *transnational* corruption was first recognized as a matter for international concern in the United States during the Cold War. American firms had long been accustomed to bribing foreign officials in violation of their governments’ laws to induce those officials to invest public funds in American goods or services or to supply access to local resources. It was fair to assume that such payments were sometimes indispensable conditions of foreign trade by the American firms because contracts were often given to the highest bidder, i.e. the firm offering the biggest bribe.\(^5\) Bribes paid to foreign officials were in the United States regarded as expenses deductible against income for income tax purposes, regardless of their


illegality under foreign law, and thus were in a special sense subsidized by the United States government.⁶

The Watergate scandal and the misuse of corporate money to fund President Nixon’s 1972 presidential campaign led to an investigation by the Securities and Exchange Commission (SEC) of reported expenses that might have been payments made to gain an illicit advantage with foreign government officials. The investigation coincidentally revealed widespread use of false accounting methods to conceal bribes paid to foreign officials.⁷ The SEC initiated the practice of investigating such reporting and seeking injunctions to compel companies to make full disclosures in the financial statements they distributed to investors.⁸ The SEC also initiated a voluntary disclosure program that led to the revelation that more than 450 companies had concealed at least $400 million (at least $4 billion in 2009 dollars) in bribes paid to foreign officials in one year. Among the scandals revealed was the payment of a million dollars (at least ten million by 2009 standards) by The Lockheed Aircraft Corporation to

⁷ See U.S. SECURITIES & EXCHANGE COMM’N, REPORT QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES TO THE SENATE BANKING AND URBAN AFFAIRS COMMITTEE (May 12, 1976).
Prince Bernhard of the Netherlands to secure a sale of military aircraft.\(^9\)

The domestic political reaction to these scandals led to enactment of the Foreign Corrupt Practices Act (FCPA) modifying the Securities Exchange Act to require transparent accounting for payments to foreign officials by all firms listing their securities on American exchanges.\(^{10}\) Thus, all firms, American or foreign, in which Americans were likely to invest were made subject to punishment for concealing illegal payments, or offers of payment, to officers of foreign governments as well as those paid in the United States. It was presumed that shareholders would disapprove and prohibit payments such as that made to Prince Bernhard.

Congress also noticed that the SEC had authority only over firms that are required to file public accounting statements that might be read by American investors, and had no authority over those American firms that were privately owned. To correct this imbalance, a criminal law to be enforced by the Department of Justice was


\[^{10}\] 15 U.S.C. §78(m).
added. The new law was adopted by a unanimous vote in both Houses of Congress and signed by President Carter in 1977. The criminal law prohibits “corruptly in furtherance of an offer, [any] payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” directly or indirectly to a foreign official for the purpose of influencing an official decision of financial consequence to the donor. These prohibitions were imposed on all American domestic concerns whether or not they were registered on a stock exchange, so long as any part of the transaction occurred in the United States (or in its territorial waters), in interstate commerce, or by use of the United States mail. The regulated firms are generally accountable for the corrupt conduct of their employees. But the prohibitions of this 1977 law did not apply to foreign nationals acting on behalf of

11 For a chronicle of the legislative history, see Donald R. Cruver, Complying with the Foreign Corrupt Practices Act (2d ed., 1999).


14 To some it seems unjust that innocent shareholders should bear a resulting loss caused by the criminal misconduct of their employees. John C. Coffee, Jr., No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981).
foreign subsidiaries of American firms if their misconduct occurred outside the United States.\textsuperscript{15}

The International Chamber of Commerce (ICC) gave a salute to the 1977 American law when, a year later, it promulgated its Rules of Conduct to Combat Extortion and Bribery. The leadership of the Chamber recognized bribes paid as a cost of competing in international transactions do nothing for the collective profits of its members or for the quality of the goods or services they purchase or provide. Unsurprisingly, these ICC rules were declared to be “ineffective as a practical matter,”\textsuperscript{16} but they were a first international acknowledgment of the radiating adverse global consequences of corrupt governments disserving weak states.

The FCPA was written only as public law to be enforced by the SEC and the Department of Justice. No provision was made for enforcement in civil actions brought by private plaintiffs.\textsuperscript{17} While it was to be enforced by public prosecutors in both the SEC and the Department of Justice, the number of enforcement prosecutions was

\textsuperscript{15} DEMING, supra note 13, at 8.
\textsuperscript{16} CRUVER, supra note 11, at 81.
\textsuperscript{17} See Lamb v. Phillip Morris Inc., 915 F. 2d 1024 (6th cir. 1990); United States v Kay, 359 F. 3d 738 (5th cir. 2004).
until recently never large.\textsuperscript{18} The Department of Justice was mindful of the adverse consequences of effective enforcement, e.g., that American investors were rewarded and American workers found jobs by making deals with foreign governments whose officers often expected to share the bribers’ wealth even if it might impose a cost on the peoples they were purporting to serve.

But the FCPA had an additional legal consequence. A violation resulting in harm to competing firms exposes the offender to civil liability under the 1970 Racketeer Influenced and Corrupt Organization Act (RICO).\textsuperscript{19} And unlawful bribery is also a violation of state tort law if it causes foreseeable harm to a business competitor or others.\textsuperscript{20} As Judge Richard Posner opined: “bribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by


\textsuperscript{20} \textit{Korea Supply Co. v. Lockheed Martin Corp.}, 29 Cal.4th 1134, 131 Cal. Rptr. 2d 29 (2003).
stripping away all his gain.”21 Indeed, it is the sort of deliberate tort that may expose the wrongdoer to liability for punitive damages, imposed in the courts of almost any state in the common law tradition.22 As with criminal prosecutions, private claims in American courts for damages allegedly resulting from violations of the Foreign Corrupt Practices Act have been few. Yet the deterrent effect of the criminal law may have been enhanced by the prospect of civil liability imposed by private firms who lose business to a corrupting competitor, or perhaps even by a defrauded government. A recent example of such a civil action is that brought in 2009 by the Republic of Iraq in federal court in New York against 93 defendants alleged to have participated in frauds associated with the United Nations oil-for-food program. Iraq seeks $10 billion as compensation for what it describes as “the largest financial fraud in human history.”23 The claim seems plausible.


22 A full account of that tradition is LINDA L. SCHLEUTER, PUNITIVE DAMAGES (2 vols. 2d ed. 2005); and see STEPHEN DANIELS, HISTORICAL FICTION: PUNITIVE DAMAGES, CHANGE, AND THE POLITICS OF IDEAS (1996).

Public enforcement of the Foreign Corrupt Practices Act has improved in the 21st century. The role of the SEC was enlarged by the Private Securities Litigation Act of 1995. That law protects whistle-blowers who reveal corrupt acts to enforcement officials, expands the criminal sanctions, limits the confidentiality of communications to attorneys, and imposed a duty on auditors to detect and disclose corrupt practices. The auditor is no longer permitted to rely on personal confidence in the integrity of the audited firm, but must investigate the integrity of the firm’s reporting of payments made. In addition, the SEC has commenced the practice of requiring firms listed on American exchanges to disgorge profits proven to be derived from corrupt deals.

While the Department of Justice has substantially enlarged its staff of prosecutors responsible for corrupt practices law enforcement, it has reimbursed the national treasury by billions of


25 See generally DEMING, note 13, at 371-380).


27 Carrie Johnson, U.S. Targets Bribery Overseas, WASHINGTON POST, Dec. 5, 2007 at D1. And they may be increasingly prone to enforce criminal laws prohibiting money laundering, wire and mail fraud, and conspiracy laws in the
dollars collected from firms engaged in corrupt practices abroad. It is reported that American businesses creating joint ventures with Chinese companies or acquiring Chinese outfits are especially exposed to the risk of prosecution because of the probability that their ventures are corrupt.²⁸ And now, for the first time, the Department of Justice has begun to prosecute individual officers of firms who participate in the briberies and, along with the SEC, to require their employers to disgorge profits from deals acquired by their crimes. Among those successfully prosecuted is a member of Congress who is alleged to have negotiated a corrupt deal with Nigeria on behalf of an American firm.²⁹

Worthy of special note is the case against the Halliburton Company that has disgorged $550 million in 2008 as punishment for its corrupt practices in Nigeria.³⁰ Albert Jack Stanley, who managed context of bribery allegations. George J. Terwilliger, Corrupt Payments Abroad: FCPA and Other Risks, NATIONAL LAW JOURNAL, June 2, 2008 at 12.

²⁸ Sheri Qualters, Risk of Bribe Probe Grows for Business, NATIONAL LAW JOURNAL, Jan. 9, 2008 at 8.


the Halliburton subsidiary under the supervision of Richard Cheney, then the Halliburton CEO, \(^{31}\) reduced his own sentence to three years in prison when he became a primary witness in federal prosecutions for his firm’s bribery of public officers in Nigeria.\(^{32}\) Halliburton, long centered in Houston, in 2008 moved its corporate headquarters to Dubai, apparently in hope of reducing its exposure to federal law enforcement.\(^{33}\) Its continuing relationships in Iraq are not presently the subject of criminal proceedings, but they are an appropriate subject of continuing investigations.\(^{34}\)

Also to be noted is the prosecution of the German firm, Siemens, whose registration with the SEC exposed it to federal prosecutions for

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bribes paid to the Nigerian government. That prosecution came on the heels of a German prosecution.\(^\text{35}\) It resulted in a $1.6 billion fine paid by Siemens to the United States for corrupt practices in numerous nations.\(^\text{36}\) That fine was in addition to one paid to Germany.

And the Department of Justice in January, 2009, for the first time initiated a proceeding to recover funds received as a bribe paid by Siemens to the son of the Prime Minister of Bangladesh and held in a bank account in Singapore. This appears to be its first effort to retrieve a bribe paid to a foreign official.\(^\text{37}\) The event seems perhaps to have alerted the Liberian government to the possible use of American aid in tracking its officials who have benefited from corruption in that nation.\(^\text{38}\)

But still there are constraints on enforcement of such laws by public officials. Because of their adverse domestic economic consequences, such federal prosecutions can be politically very difficult for the prosecutors in the United States Department of


Justice. For example, James Giffen, an American citizen, was arrested in 2003 and indicted in 2005 for bribing President Nursultan Nazarbaev of Kazakhstan on behalf of Mobil, Texaco, Phillips/Conoco and BP. His alleged offense had gained public attention in 2000.\textsuperscript{39} After four years of investigation, Giffen was charged with thirteen counts of violating the FCPA and thirty three counts of criminal money laundering. President Nazarbaev, who has been a friend of American foreign policy in the Middle East, was critical of the prosecution, perhaps sensing that he could even lose his office as a result of it.\textsuperscript{40} Prospective government witnesses are said to have received death threats. In his defense, Giffen alleged that he had been regularly debriefed by United States government officials, and claimed that "by the time of the transactions at the heart of the indictment, he understood himself to be working not only for the government of Kazakhstan, but also for United States government agencies.” The Justice Department moved to preclude the defendant

\textsuperscript{39} For a full account, see STEVE LEVINE, THE OIL AND THE GLORY: THE PURSUIT OF EMPIRE AND FORTUNE ON THE CASPIAN SEA (2007); and see ROBERT BAER, SEE NO EVIL: THE TRUE STORY OF A GROUND SOLDIER IN THE CIA’S WAR ON TERRORISM (2002).

\textsuperscript{40} Marlena Telvick, Kazakhstan: United States v. James H. Giffen, http://forumkz.addr.com/2004en/en_forum_03_06_04.htm (last visited July 13, 2009. The indictment also alleged that Swiss authorities had begun investigating accounts "nominally owned by offshore companies but beneficially owned, directly or indirectly, by Balgimbaev and Nazarbaev, into which Mr. Giffen had made tens of millions of dollars in unlawful payments" in 1999.”
from advancing the defense that he was acting on public authority, or to use information classified as secret by the government agencies said to be involved. The trial court denied the motion to preclude the defense, but did not rule on the motion regarding government secrets. On appeal by the prosecution, the court of appeals, after a year of deliberation, dismissed the appeal on the ground that the trial court order to be reviewed lacked the finality essential to appellate jurisdiction.\textsuperscript{41} The trial has been repeatedly postponed. It will perhaps be held some day,\textsuperscript{42} but it has been observed that “diplomats usually win over the prosecutors. and it would seem Kazakhstan is too important to continue the Giffen case.”\textsuperscript{43}

\textsuperscript{41} United States v. Giffen, 473 F. 3d 30 (2d cir. 2006).


The *Giffen* case, although extraordinary, illustrates a fundamental difficulty with public enforcement of any law forbidding bribery of foreign officials. The responsible public officers so engaged are required to punish their fellow citizens, with whom they may have diverse connections and shared interests, and to whom they own their official status, in order to protect a distant government with whom they have no connection.

**THE INTERNATIONALIZATION OF LAWS DETERRING CORRUPTION**

In the last decade of the 20th century, other nations, in conformity with the approval of the International Chamber of Commerce, began to align themselves with the 1977 American policy imposing criminal punishment on their citizens who bribe officers of foreign governments. The international campaign had its origins in the Asian financial crisis of the 1990s. That event elevated interest in international regulation of trade to provide greater stability in developing economies. The United States was especially interested in persuading other nations to join in regulating transnational bribery in


order to level the playing field for American firms constrained by its FCPA from offering the best bribes to the foreign officials seeking them. As a result of its urging and the concerns heightened by the crisis, the Organization for Economic Cooperation and Development (OECD) in 1997 promulgated a new international Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

This OECD Convention obligates signatory nations to enact criminal laws “functionally equivalent” to those it prescribes, and to cooperate with the enforcement efforts of other signatory nations. In support of the latter obligation, a system of private peer review was established; it subjects signatory nations to periodic reviews by teams of specialists from at least two other states. One substantive difference between the OECD Convention and the FCPA is that the Convention does not forbid campaign contributions to foreign


candidates for public office, as the FCPA does. And the Convention does not obligate signatory nations to enact accounting and record-keeping standards corresponding to those enforced in the United States by its Securities Exchange Commission.

The 1997 OECD Convention marked the beginning of an international movement based on the premise that we all have a stake in the integrity of the global marketplace.\textsuperscript{48} Much energy and rhetoric is now being expended around the globe in campaigns to protest and deter transnational corrupt practices. The campaign can be seen and heard in such venues as the International Monetary Fund, the World Bank, the United Nations, the International Chamber of Commerce, the International Bar Association and non-governmental institutions that rate the corruption of governments and courts. Support has also been expressed by German observers who were concerned that German firms engaged in corruption abroad may have brought the practices home, i.e., that “globalization has become a motor for corruption in Germany”.\textsuperscript{49}

In response to this development, the American FCPA was amended again in 1998 as the International Anti-Bribery and Fair

\textsuperscript{48} See COMMENTARIES ON THE OECD CONVENTION ON COMBATING BRIBERY (1997). And see generally DEMING, supra note 13 at 93-130.

\textsuperscript{49} So we are told by a German prosecutor. Carter Dougherty, Germany Battling Rising Tide of Corporate Corruption, N. Y. TIMES, Feb. 15, 2007 at C1.
Competition Act\textsuperscript{50} in order to bring American law into accord with the OECD Convention.\textsuperscript{51} One substantive change made for this purpose was to legitimate “grease,” i.e. small rewards or tips to lower-ranking officers “to expedite or to secure the performance of a routine governmental action.”\textsuperscript{52} In some weak states, such “grease” may indeed be indispensable to the operation of impoverished governments.\textsuperscript{53} Another reform was an extension of the law to criminalize bribes paid to officials of “public international organizations.”\textsuperscript{54} And foreign nationals working for American firms were brought within the group subject to criminal liability for illicit payments or officers. But those working for foreign subsidiaries were still not included, leaving open a means of evasion that surely remains in use.


\textsuperscript{52} 15 U.S.C. §78dd-1(b). See The Etiquette of Bribery, THE ECONOMIST, Dec. 23, 2006 at 115 (noting that tactful strategies are used to ensure that bribes go undetected).

\textsuperscript{53} See J. S. Nye, Corruption and Political Development, 61 AM. POL. SCI. REV. 417 (1967).

\textsuperscript{54} 15 U.S.C. §78dd-1b.
Within a decade, thirty-six nations had ratified the OECD Convention including the governments of most of the major players in international commerce.\textsuperscript{55} Also, in 1997, the Organization of American States promulgated the Inter-American Convention Against Corruption;\textsuperscript{56} it is even more explicit in requiring that its ratifiers enact specified criminal laws. In 2002, the Council of Europe’s Criminal Law Convention on Corruption entered into force, with forty-six signatories.\textsuperscript{57} In 2003, the African Union opened for signature its similar convention.\textsuperscript{58} In 2006, the European Union adopted a resolution calling for the return of assets of illicit origin to nations victimized by corrupt practices.\textsuperscript{59}

Also in 2003, the United Nations opened its Convention Against Corruption\textsuperscript{60} negotiated in Vienna by the UN Office on Drugs


\textsuperscript{56} DEMING, supra note 13, at 101-104.

\textsuperscript{57} Id. at 105.


and Crime. It has been ratified by over one hundred nations and is also now in force. Its general tone is reflected in Article 17:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity. (emphasis added)

A similarly tentative tone is expressed in the UN Convention’s suggestions that each State Party take action to proscribe deliberate concealment of bribes or obstruction of justice, and provide for civil liability “if necessary.” It was said that this UN Convention, while diffident, will be a “focal point” of the United States’ campaign against corruption.

PUBLIC ENFORCEMENT OF THE NEW INTERNATIONAL CONVENTIONS

One may admire the sincere efforts of all those who have secured the promulgation and ratification of these international

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61 Id at Article 24.
62 Id. at Article 25.
63 Id. at Article 26.
conventions and yet question whether they are effective in serving their stated purpose, or merely express “a hollow commitment.” A thorough empirical study revealing an effect on the realities of weak governments has not been conducted, but the available data points to a conclusion that “enforcement must be re-energized.”

The impediments to enforcement by public officers are obvious and notably illustrated in the Kazakhstan case in the United States. Are public prosecutors in the nations signing a convention likely to be vigorous in prosecuting their fellow nationals or their local firms who employ many of their fellow nationals? For paying a bribe to a foreign official in order to secure a contract or other benefit that will indirectly serve the interests of their fellow nationals and their own national economies? How much effort can national prosecutors reasonably be expected to expend investigating possible violations of such international criminal laws? Vigorous prosecutors risk being seen by fellow citizens as ungrateful and unpatriotic. And how much money will parliaments and legislatures facing competing demands on public resources vote to appropriate to fund such investigations and


prosecutions? Can the system of peer review established by the OECD secure adequate answers to these questions? And when impoverished nations invest the needed resources and moral commitment to accuse and convict their officials and the foreign nationals who bribed them, can they expect that OECD nations in which the convicted foreigners have come to reside will assist in imposing punishments on their own countrymen? Corruption is so easily denied that exposure and proof generally require serious investigative effort requiring energy and resources that could perhaps be applied elsewhere to better serve the public good.  

The weakness of the global resolve to punish foreign corrupt practices through criminal laws enforced by public servants has been on display in numerous places. For example, despite the disincentives, prosecutors in Lesotho, at the urging of the World Bank, sought in 2000 to punish Canadian, French, and Italian nationals and their firms for corrupt practices related to the Lesotho Highlands Water Project. As a result of their efforts, the World Bank debarred one firm from further participation in projects funded by it. And convictions in Lesotho resulted in penalties imposed on some

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67 See e.g., Corruption in Romania: In Denial, THE ECONOMIST, July 5, 2008 at 62.
subsidiary corporations, but the convicted foreigners remain at large. OLAF, the anti-fraud office of the European Union did supply some data on the parent corporate defendants, but other help to Lesotho was not forthcoming.\(^6^9\) Such events are obviously discouraging to prosecutors in developing nations who need to consider competing needs for their scarce professional resources.

And in 2004, the United Kingdom, having recently enacted its criminal law as required by the OECD Convention, initiated an inquiry into bribes allegedly paid by BAE Systems, the British weapons firm, to secure contracts with the government of Saudi Arabia. In November 2006, it was reported that Saudi Arabia, perhaps inspired by the Kazakhstan experience in the United States, threatened to break diplomatic relations with the United Kingdom if the investigation were not dropped.\(^7^0\) The next month, the investigation was dropped “after balancing the need to uphold the rule of law with the wider public interest.” Prime Minister Tony Blair justified the action by calling attention to the needs to secure the help of Saudi Arabia in dealing with Palestinian affairs and to secure


thousands of jobs of workers hired to perform the corrupt contract,\footnote{Kevin LaCroix, Corrupt Practices, National Security and the Rule of Law, The D&O Diary, http://www.dandodiary.com/2008/04/articles/foreign-corrupt-practices-act/corrupt-practices-national-security-and-the-rule-of-law/ (last visited July 13, 2009). On the public reaction to the discontinuance, see Barefaced, THE ECONOMIST, December 23, 2006 at 18; Heather Timmins & Eric Pfanner, Blair Defends Decision to Halt Inquiry Into Saudi Defense Contracts, INTERNATIONAL HERALD TRIBUNE, December 12, 2006 at 12; for a later account, see Alan Corwell, British Contractor Paid Saudi, Reports Say, N. Y. TIMES, June 6, 2007 at A3. See Todd Swanson, Note: Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law, 35 GA. J. INTL. & COMP L. 397 (2007).} considerations said to overbalance the rule of law. Mr. Blair’s successors were told by the High Court of Justice in 2008 to reconsider his decision to discontinue the investigation,\footnote{The case against the action was brought by an NGO, The Campaign Against Arms Trade. The organization was thanked by the court for bringing the action. High Court Re-opens Saudi Arms Corruption Investigation, EKKLESIA, April 24, 2008. http://ekklesia.co.uk/node/7051 (last visited July 13, 2009).} but on appeal the House of Lords affirmed the Prime Minister’s action in calling off the prosecution.\footnote{Christopher Hope. SFO Was Right to Call Off BAE-Saudi Corruption Probe, Law Lords Rule, LONDON TELEGRAPH, July 30, 2008. http://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/2473629/SFO-was-right-to-call-off-BAE-Saudi-corruption-probe-law-lords-rule.html (last visited July 13, 2009).} A “summit” conference was held in London in 2009 to explore the options and train business leaders to confront the issues.\footnote{See UK Anti-Corruption Summit 2009, http://businessassurance.com/uk-anti-corruption-summit-2009/ (last visited July 13, 2009).} That conference was apparently a part of a trend...
presenting other such “summit” conferences.\textsuperscript{75} In February, 2010, the Serious Fraud Office was able to secure an admission from BAE that it had concealed payments made to middlemen and a payment of a fine of roughly $50 million. But what made this possible was BAE’s confession of guilt under the United States Foreign Corrupt Practices Act and payment of a $400 million fine to the United States.\textsuperscript{76} The Serious Fraud Office has yet to demonstrate the will to punish the corruption of foreign officials by British firms seeking to gain an advantage to the Office’s fellow countrymen.

Anti-corruption laws do have a better chance of being locally enforced when a new regime takes over the corrupted government and might reveal the dealings of its predecessors. This happened in Nigeria in 2007\textsuperscript{77} and led to the investigation of Siemens by the German government enforcing its new foreign corrupt practices law enacted pursuant to the international initiatives. In 2006, Siemens’ Nigerian subsidiary had acquired a contract to build a power sector,

\textsuperscript{75} E.g., The 2\textsuperscript{nd} Annual Global Anti-Corruption Summit USA 2009, http://www.ethicalcorp.com/globalethics/ (last visited Jul. 13, 2009).


paying about $18 million to Nigerian officials to close the deal. Exposed in 2007, the firm not only lost a contract but its parent firm also became the object of criminal investigations in Germany and the United States, where its stock is traded and it is subject to the corresponding laws governing accounting in publicly traded firms. The German parent firm cooperated in the investigation and won a measure of restraint in the part of the prosecutors.\(^7\) It appears that it had budgeted $40 to $50 million a year in bribes paid to Nigerian officials from 2002 to 2006.

As noted, the parent firm has now paid fines of $1.6 billion to the governments of Germany and the United States for its corrupt practices in many nations. Siemens has declared its intent never to do it again. But will future officers of Siemens keep that promise in mind? If so, can it compete successfully with firms less constrained by their governments? Is it reasonable to expect that Siemens’ experience suffice will deter other firms from other nations with less vigorous and less well-endowed prosecutors? A blacklistings of Siemens has been lifted and in 2008 it acquired new contracts with Nigeria to construct its power sector.\(^7\)

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It is reported that France, like Germany, has become actively engaged in anti-corruption law enforcement.\textsuperscript{80} That may be the reality throughout the European Union. Nevertheless, a skeptic may well doubt that the criminal laws pose a very serious threat to most of those many firms around the world whose profits, indeed perhaps their economic viability, seem to depend on their willingness, or at least the willingness of their subsidiaries and their local officers, to participate in the weakening corruption of officers of foreign governments to secure markets for their goods or services. Of course, such criminal laws express a moral judgment, and businessmen are not immune to moral suasion. But as Adam Smith noted as a predicate to his celebration of the marketplace,\textsuperscript{81} moral constraints lose force as they are applied over greater distances. The moral force of such international law is therefore chronically weak. And corrupt practices are by definition secret crimes that can be prevented or deterred only by vigorous investigation and forceful legal sanctions that may not be forthcoming.

\textsuperscript{80} Morgan Lewis, Anti-Corruption Laws in Europe; http://www.morganlewis.com/pubs/LIT_Webcast_Anti-CorruptionLawsInEurope_21jan09.pdf (last visited July 13, 2009).

\textsuperscript{81} \textsc{The Theory of Moral Sentiments} 136 (Oxford ed. 1976).
In recognition of the problem of weak public enforcement of criminal laws, the Council of Europe in 1999 adopted the Civil Law Convention on Corruption. Its aim, as stated by the Council is to take “into account the need to fight corruption and in particular provide for effective remedies for those whose rights and interests are affected by corruption.” Its signers are obliged to authorize civil actions for compensation of firms damaged by corrupt practices. This Convention entered into force in 2003. It provides for actions for compensation to the defrauded government, such as that of Iraq in the oil-for-food scandal, for all damages suffered as a result of corruption. It also provides for the protection of whistle blowers, the acquisition of evidence, and provisional remedies. In addition,


84 See text supra at note 23.

85 Id. Article 3.

86 Id. Article 9.

87 Id. Article 11.

88 Id. Article 12.
it requires transparency in company accounts and strives to promote international co-operation and monitoring.

With this Convention, the Council of Europe acknowledged the need for a civil enforcement mechanism imposing real adverse economic consequences on firms that bribe foreign governments. Civil liability is surely an important consequence deterring firms from bribing one another’s corporate officers in the private sector. The integrity of many other governments calls for a similar and plausible threat of civil liability. But while the Civil Law Convention is a significant step forward, reports of civil actions against offenders are few.

Primary attention seems to be given to the possible but seldom practiced invalidation of contracts tainted by corruption as the civil sanction to be imposed pursuant to the Convention. Such a civil contract action would presumably be brought by uncorrupted officers of the corrupted government. To date, no effort appears to have been made to bring the Council of Europe into line with the law of the United States recognizing bribery of foreign officials by American firms as a tort subject to punitive damages.

89 Id. Article 10.
90 See generally CIVIL CONSEQUENCES OF CORRUPTION (Olaf Meyer ed., 2009).
Thus, while the Civil Law Convention takes steps in the direction of civil enforcement, those steps seem unlikely to be sufficient to enlist private enforcement to deter European firms motivated by the marketplace to engage in corrupt practices, except possibly for the most blatant misdeeds.\textsuperscript{92} Notwithstanding the possibilities that remain open, one viewing the present situation might reasonably at this time assess the enactments of the United States and the other nations since 1998 conforming to all these conventions as a benign gesture but one of apparently quite limited consequence. If an act of transnational corruption should attract substantial public notice, the signatory nations have empowered themselves to stand on the side of integrity in government by conducting a criminal prosecution, or in Europe maybe even entertaining a civil contract action against their nationals who offend. The United States is no longer alone in taking that moral stand. And perhaps the enactments will serve to enlarge the force of moral suasion against corrupt practices. But the threat of adverse consequences for those engaged in transnational bribery, even in the United States, is still generally remote and evadable by most firms.

\textsuperscript{91} 84 Stat. 922, 18 U.S.C. §901 et seq.

THE AMERICAN EXPERIENCE WITH PRIVATE ENFORCEMENT
OF ITS DOMESTIC CORRUPT PRACTICES LAWS

This contemporary international problem is redolent of American legal history beginning in the 18th century. The new nation’s citizens were then quite familiar with the problem of governmental corruption. Ben Franklin in 1767 had observed that “[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.”93 This is so because to most citizens their government was a distant anonymity having no moral claim upon themselves. And they sensed that the line of moral conduct for those in public service is not always clearly drawn. The faint line between a campaign contribution and a bribe is a premier modern American example of this lack of clarity.94 Family interests, longstanding


friendships, cultural or sub-cultural connections, and political alliances supply other sources of tolerated improprieties.\textsuperscript{95}

Mindful of corrupt practices observed in the Continental Congress that waged the war for independence,\textsuperscript{96} Franklin’s contemporaries in the earliest years of the nation recognized the impediments to effective public enforcement of laws forbidding corrupt practices. Drawing on longstanding English practice, they allowed private citizens who had the requisite fortitude to initiate lawsuits and pursue claims in the name of the United States against any person or firm defrauding their government.\textsuperscript{97}

In the 19\textsuperscript{th} century, the English forsook this practice of private enforcement of public law. But it became an important tool of

\textsuperscript{95} See generally CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE (Monique Nuijten & Gerhard Anders eds. (2007). Alan Smart & Carolyn L. Hsu, Corruption or Social Capital?: Tact and the Performance of Guanxi in Market Socialist China, id. at 167 offers an especially powerful example.

\textsuperscript{96} For example, Samuel Chase (later Mr. Justice Chase of the United States Supreme Court), was dismissed from the Continental Congress waging the war for his illicit use of inside information to turn a profit for himself. JAMES HAW, STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 105-108 (1980).

government in the United States as it remained an unsettled and contentious place not so unlike many of the 21st century’s “emerging nations.” During its Civil War in the 1860s, the nation’s Secretary of War, responsible for oversight of the military striving to suppress the slave states’ secession was dismissed by President Lincoln for paying his friends twice the market price for cavalry horses that turned out to be afflicted with “every disease horse flesh is heir to.” 98 Such scandals led to the enactment in 1862 of the False Claims Act, then known as “Lincoln’s Law.” 99 That law required the offender guilty of defrauding the government to pay double damages, half of which would be paid to the “relator”, i.e. the citizen who commenced and maintained a claim on behalf of the United States to secure compensation from those engaged in corrupt practices for harm resulting from the taking of bribes by its officers. Thereafter, numerous relators came forward in the name of the United States to pursue claims against private contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall. 100


Under the False Claims Amendments Act of 1986, “Lincoln’s Law” was reinforced and made to impose treble damages liability on those responsible for corrupt practices.\textsuperscript{101} And the 1986 law continues to assure the relator of a substantial reward if the defendant is shown to have defrauded the government. Indeed, it has been amended again in 2009 to make it still more effective.\textsuperscript{102} Brief consideration of that law as a possible model for international law is therefore timely.

For several reasons, such private enforcement by citizens is perceived to be more effective than criminal law enforcement. First, as noted, proceedings under the federal False Claims Act are not criminal proceedings and so proof “beyond a reasonable doubt” is not required; a “preponderance of proof” will, if credited, suffice to support a judgment against the defendant who appears to have paid a bribe to an official. Second, the private citizen-relator has, like the public prosecutor, the rights conferred on civil litigants by American rules of civil procedure to compel disclosure of possible evidence\textsuperscript{103}

\textsuperscript{101} 100 Stat. 3153 (codified as amended at 31 U.S.C. § 3739(d)(1)–(2) (2000)).


\textsuperscript{103} See Fed. R. Civ. P. 26–37. This right was conferred on all civil litigants by the rules promulgated pursuant to the Rules Enabling Act of 1934, 48
and to compel non-party witnesses to supply their evidence as well.\textsuperscript{104} Also, much of the government’s files are exposed to private investigation as a result of the Freedom of Information Act enacted in 1966.\textsuperscript{105} And a relator, unlike a civil plaintiff in England or most other nations, is ordinarily not liable for the legal expenses of the defense even if he and/or the government is unsuccessful in proving the case.\textsuperscript{106} Also, a relator having a credible claim may secure private legal counsel without payment, because lawyers are available to present such claims for compensation that is contingent on their success.\textsuperscript{107}

When a false claims case is filed by a relator in the name of the United States, the Department of Justice is discreetly informed and invited to take control of the proceeding, but even if it does, the case continues as a civil action and the private relator remains a party to be

\begin{flushright}
Stat. 1064. For a compact account of the right to discovery, see MARK DOMBOFF, DISCOVERY (1986).


107  The origins of this unusual tradition are explained in MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876 (1976); F. B. MACKINNON, CONTINGENT FEE FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES (1964). Greece is one country that may also allow contingent fees. ELENI SKORDAKI & DANIELLE WALKER, REGULATING AND CHARGING FOR LEGAL SERVICES: AN INTERNATIONAL COMPARISON 57 (1994).
compensated if it is successful.\textsuperscript{108} And if the Department of Justice does not intervene, the private relator is entitled to maintain the action in the name of the United States and for its benefit. Such a relator, if successful, is then entitled to receive at least twenty-five percent of the trebled damages, plus reimbursement for costs, including attorneys’ fees.\textsuperscript{109} This can be a very substantial reward for the citizen-who comes forward as the relator. More than a few American relators have in recent years been able to retire in wealth after revealing frauds on the government, often those committed by their former employers.

One constraint is that the relator’s claim must be based at least in part on some bit of their personal knowledge. A provision enacted in 1942 requires a relator to be an “original source” of at least some of the information on which the claim rests.\textsuperscript{110} But pursuant to the recent amendment of the Act, a relator is not denied compensation when a case commenced by him or her is won by the government on proof other than evidence that he or she brought to the court.\textsuperscript{111} The relator is also provided with rights protecting him or her from retaliation by

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an employer. But the present law does not empower the relator to sue a corrupt officer who received a bribe.

Examples of successful private actions initiated pursuant to this law abound. In September 2009, the United States settled a claim against the Pfizer corporation for its fraudulent practices in selling medicines to government health care programs for $2.1 billion. The primary whistle-blower, a former officer of Pfizer, was rewarded with a fee of $50 million. In a similar case in April, a relator received $48.7 million of the $325 million paid by Northrup Grumman to the United States to settle a corruption claim arising from a sale of a spy satellite program. The whistleblower had been an engineer for Northrup. The same week, Quest Diagnostics agreed to pay $302 million for selling the government faulty diagnostic kits. In January, Eli Lilly paid $1.42 billion for false advertising of an antipsychotic drug sold to patients spending public funds; nine of its


former salesmen were awarded more than $78 million for blowing the whistle and filing the claim in the name of the United States.\footnote{Eli Lilly Agrees to Settle Zyprexa Marketing Cases, \textit{Wall Street Journal}, January 15, 2009. online.swj.com/article/SB123201838370585347.html. (sitte last visited September 11, 2009).}

Over 10,000 false-claim cases have been filed in American federal courts since the 1986 revision of the law.\footnote{SCAMMELL, supra note 98, at 304–05.} Although historically, the bulk of the false claims actions were directed at those who provide goods or services to the military, other industries have become frequent targets for claims. Now, as illustrated by the 2009 examples noted above, four out of five current false-claims cases are brought against health-care providers accused of overpricing goods or services paid for by the United States Department of Health and Human Services.\footnote{Marcia Coyle, \textit{High Court Vets False Claims Act}, \textit{National Law Journal}, Nov. 27, 2006, 13. The Department of Justice has now taken a heightened interest in frauds committed by medical doctors and health care executives. 76 BUREAU OF NATIONAL AFFAIRS LEGAL NEWS 2344, Dec. 11, 2007.}

In 2006, Congress enacted a provision to reward states that enact similar laws if applicable to health care providers.\footnote{See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified at 42 U.S.C. § 1398h). Section 6031 provides that the federal contribution to Medicare programs are to be increased to ten percent for states enacting appropriate false claims laws applicable to health care providers. Section 6032 requires states to include provisions notifying health care employees of their right to become whistle blowers.}
as thirty states have done so, as have the cities of New York and Chicago.\textsuperscript{120}

A non-profit organization, Taxpayers Against Fraud (TAF), provides tips, information, and support to a variety of relators.\textsuperscript{121} It has complained that the Department of Justice does not invest sufficient resources in the enforcement of corruption law, even failing to spend funds that have been appropriated specifically for that purpose. TAF also complains that many government contractors are not providing their employees with information about the law so that they are aware of opportunities to serve as a whistle-blowing relator.\textsuperscript{122} Public notice of the 2009 cases might supply that need. But even despite this failing, the false claims laws serves as a useful incentive to private enforcement of the law, and the result is that corrupt practices are subject to strong deterrence in the United States. Not enough, to be sure, to prevent corrupt practices altogether, for, as Ben Franklin affirmed, the temptations are very great, perhaps especially to officers of vast commercial enterprises who are expected to concentrate on short-term profits.

\textsuperscript{120} Thirteen of these laws are listed by Taxpayers Against Fraud Education Fund, Resources, State False Claims Act, http://www.taf.org/statefca.htm (last visited July 10, 2009).

\textsuperscript{121} See generally Taxpayers Against Fraud Education Fund, Home Page, http://www.taf.org (last visited Apr. 11, 2007).

\textsuperscript{122} See http://www.taf.org/TAF-testimony-Judiciary-White-4-1-09.pdf
THE POSSIBILITY OF PRIVATE ENFORCEMENT OF INTERNATIONAL CORRUPT PRACTICES LAW IN NATIONAL COURTS

Might the international institutions seeking to deter transnational corruption usefully advance the idea of enabling similar private enforcement of transnational corrupt practices laws in the courts of all nations, or at least those of the “developed nations” of OECD? The nations of that organization could imaginably agree to enact versions of the American laws offering handsome rewards to those who blow whistles on transnational corrupt practices of their local firms, in the hope that the deterrent effect of such law would be spread among firms in all the “developed” nations. Thus, citizens of a victimized state might be authorized in the name of their government to invoke the jurisdiction of any signatory state to assert corruption claims against any firms or individuals who are within that state’s jurisdictional reach. Such empowerment of private enforcement might significantly enhance the deterrent effect of the laws enacted pursuant to the present Conventions.

The culture shock resulting from such an international agreement could be less than a reader might suppose. American false claims laws are not entirely unique. The United Kingdom, Korea, and the Netherlands, and perhaps some other nations, have laws to reward and protect whistle-blowers who alert prosecutors to frauds on their
India empowers its citizens to prosecute corrupt public servants, but only with the sanction of the appropriate higher official, or to secure a writ forbidding continuation of corrupt practices. The idea of private claimants representing the English monarchy has an ancient history. And European high courts are not strangers to political roles.

Possible Enforcement of International Law in US. Courts. As a possible first step to consider, the United States could alone simply amend its foreign corrupt practices law to enable a citizen of another nation such as Kazakhstan to take on the role of a relator to bring suit in an American court in the name of his government against those oil companies who have allegedly bribed his president. Such a plaintiff might recover for the government of Kazakhstan treble damages from oil companies that paid such a bribe, and the relator might receive a substantial share as a reward for useful public service.

123 Gunter Heine & Thomas O. Rose, Private Commercial Bribery: A Comparison of National and Supranational Legal Structures 81 (United Kingdom), 161-262 (Korea), 311 (Netherlands), and 648 (2003). And at 230, it is reported that Japan has the beginnings of a movement to enact legislation protecting whistle-blowers.


125 See supra note 97.

As noted, the plaintiff suing on behalf of his government could in an American court be represented by a lawyer serving for a fee contingent on success. And, as noted, an advantage of treating the matter as one fit for resolution in a civil proceeding in an American forum is that the relator or the foreign government (if it took over its case in order seriously to pursue it) would not be required to prove the bribery or the resulting damages “beyond a reasonable doubt.” A “preponderance of proof” would, if credited, suffice to support a civil judgment against the defendant. Furthermore, a foreign nation or its citizen-relator pursuing a corruption claim in the American court could make full use of the right to conduct discovery. Any evidence available in the United States or in the possession of an American citizen could be presented at trial. Foreign government claimants would also share the right to compel disclosure of possible evidence by the accused firm ¹²⁷ and to compel non-party witnesses to supply their evidence as well.¹²⁸ And discovery of evidence from witnesses and their files in other nations is available in the United States and assisted by many foreign governments, or at least by those committed to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.¹²⁹ And a defendant refusing to provide

documents or other evidence upon demand might be subjected to an adverse judgment on the merits of the dispute because an American court might reasonably infer that the evidence the defendant refuses to produce on request would prove the allegation of the adversary.\textsuperscript{130} And if either the relator or his government is unsuccessful in proving the case, they would ordinarily bear no liability for the legal expenses of the defense.

In one respect, this idea of invoking the jurisdiction of American courts is less radical than an international reader might suppose. In the 18\textsuperscript{th} century, the first Congress of the United States conferred jurisdiction on its federal courts to hear claims by foreign citizens alleging violations of international law.\textsuperscript{131} While the history of that provision is dim, it seems likely that its authors were attentive to the problems of protecting foreign diplomats and assisting foreign plaintiffs seeking to recover their ships or cargo from pirates.\textsuperscript{132}


\textsuperscript{131} 1 \textsc{Stat.} 73, 28 U.S.C. §1350: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

\textsuperscript{132} “Uppermost in the legislative mind appears to have been offenses against ambassadors; violations of safe conduct were probably understood to be actionable and individual actions arising out of prize captures and piracy may well have also been contemplated.” \textit{Sinochem Int’l Co. v. Malay Int’l Shipping Corp}, 549 U.S. 422 (2007).
Whatever the 18\textsuperscript{th} century concern, the statute is in the 21\textsuperscript{st} century invoked by diverse foreign plaintiffs invoking human rights recognized internationally.\textsuperscript{133}

Many foreign governments might welcome the opportunity to take over or present such cases in American courts. For the reasons stated, it might in all respects be less expensive and more effective for a foreign government or its citizens to proceed in a civil case against a firm guilty of corrupt practices in an American court than to conduct civil actions in their own forum. Recall the pertinent observation of judicial member of the House of Lords who some years ago observed that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States”.\textsuperscript{134} And there is the special attraction of such private enforcement that no public official is required to take personal responsibility for what may be an impolitic action but which might enrich their nation’s treasury.

There is no strong reason for the United States to withhold its judicial services from foreign relators or foreign governments in need of an effective forum in which to present suits to enforce corrupt practices laws. The private lawyers retained to conduct such cases in


an American court are exposed to substantial income tax liability by the United States, so that it is not unlikely that the United States would show a net profit on the sale of judicial services to foreigners bringing such cases to its courts on behalf of their governments. And even if the United States alone were to amend its law along the suggested line, to provide for such private enforcement of the foreign corrupt practices act in other lands, the reform would not be without some deterrent effect.

But, as with the original Foreign Corrupt Practices Act, the deterrent effect of such an employment of American jurisdiction to enforce international law would be most felt by firms that are subject to that jurisdiction. There would thus be a cause for concern for the uneven impact on business competitors.

A second problem with simply extending the present American law and legal process to relators representing foreign governments is that the present law assures the victimized government of the opportunity to relieve the relator and take over the conduct of the litigation. It would be unlikely, to say the least, that public lawyers employed by the government of Kazakhstan, for example, would

135 This would not be true for American jurors summoned to sit on such cases, especially given the potential complexity of the evidence that might be presented. On that account, legislation authorizing foreign citizens to sue should perhaps employ the diction “suit in equity” to bar application of the Seventh Amendment right to trial by jury.
vigorously pursue claims arising from bribes allegedly paid to the president of their republic. They might well, if permitted, seek to exercise control to defeat the claim without regard to its merit.

And a third problem with invoking the international law in the courts of the United States is that even if jurisdiction over the foreign defendant were assured, effective enforcement in other nations of the resulting judgment would not be. While one might hope that foreign courts would lend a hand in enforcing the judgments rendered pursuant to such legislation and against firms that are within the constitutional reach of American courts, experience suggests that this is unlikely unless a change could be made in the governing transnational law to commit foreign courts to enforce judgments rendered in the United States. Recent experience with efforts at The Hague to reach agreement about the enforcement of foreign judgments lends scant encouragement to such a hope.136 A serious threat to enforcement of an American judgment in a transnational false claims case is a longstanding international tradition that the

courts of one nation do not enforce the public revenue or punitive laws of another.\textsuperscript{137}

A fourth consideration is that it might be impolitic for the United States alone to venture forth to provide private enforcement of a global anti-bribery and fair competition act that could have no more than limited effect. Some Europeans, Asians, and Africans may already resent the pretentiousness of American courts sitting as “world courts” as they are sometimes prone to do.\textsuperscript{138} For these four reasons, the United States is not here encouraged to go forward alone.

\textbf{Private Enforcement in Courts of Other Nations.} Perhaps more effectively, international law might establish a model law extending to other national courts the empowerment of private citizen-relators to sue in the name of their governments those guilty of corrupt practices, invoking jurisdiction wherever the offender or its assets might be found. Such a law might be established by an amendment to

\begin{itemize}
\item[\textsuperscript{137}] E.g., \textit{Planche v. Fletcher}, 99 Eng.Rep. 164, 165 (1779); \textit{Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson}, 597 F. 2d 1161 (9\textsuperscript{th} cir. 1979); but cf. \textit{Pasquantino v. United States}, 544 U.S. 349 (2005).
\end{itemize}
the OECD Convention on Civil Consequences requiring similar amendments to national laws. 139

Such an international law might also explicitly empower a party paying a bribe to recover for the state the sum paid to its corrupt official. A relevant example of frustration in the private enforcement of the present international law deterring corruption is the 2006 decision of an arbitration panel denying compensation to Nasir Ali for a clear breach of contract by the government of Kenya. 140 Nasir Ali had bribed the President of Kenya to acquire a place of business at the Nairobi airport for his duty-free shop. But under a successor President, the Republic revoked the contract and leased the space to a rival foreign owner. The arbitrators declined to enforce the corrupt contract of Nasir Ali and expressed frustration that the President who received the bribe was permitted to keep it. Nothing indicated that the successor business had not also paid a similar bribe to the president’s successor in order to secure the repudiation of the contract with Nasir. A more effective international law would at least empower Nasir Ali to recover the bribe he paid.

139 1 STAT. 73, 8 U.S.C. §1350: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

If the OECD or the Civil Law Convention were modified to include an endorsement of such laws rewarding citizen-plaintiffs representing their governments in matters of transnational corruption, there would remain the problem that most national courts who would be asked to hear such claims are less hospitable to plaintiffs bringing such civil tort cases. And perhaps many would be especially unreceptive to foreign claimants invoking international or foreign tort law against a domestic defendant.

It is certain that the numerous features of American law facilitating private enforcement would in most national courts be unavailable. Few nations’ courts adhere to “the American rule” that a plaintiff who advances a tort claim but loses is not liable for the defendant’s expenses, including attorneys’ fees. While there are variations on laws governing attorneys’ fees, plaintiffs in most national legal systems would not be likely to be permitted to retain counsel for a fee contingent upon his or her success in the case.¹⁴¹ And while European courts often conduct penetrating factual inquiries, private plaintiffs are rarely empowered to conduct private

¹⁴¹ Conditional fees are allowed in the United Kingdom and in the European Commission of Human Rights, but these are modest in amount and limited to personal injury or insolvency cases. See Michael Zander, Where are we now on Conditional Fees? Or why the Emperor is Wearing Few, if any, Clothes, 65 MODERN L. REV. 919 (2002); Winand Emons & Nuno Garupa, US-style Contingent Fees and UK-style Conditional Fees: Agency Problems and the Supply of Legal Services, 27 MANAGERIAL AND DECISION ECONOMICS 379 (2006).
investigations of the sort permitted by the discovery rules in use in American courts. It is also doubtful that a plaintiff in most nations’ courts would have access to government records of the sort opened to plaintiffs by “Freedom of Information” or state “sunshine” legislation in the United States. And few judges are empowered to issue injunctions enforceable by fines or imprisonment for those who fail to produce needed information or documents. Such limits on private access to evidence increase the risk to the relator of a costly defeat of the claim.

**REWARDING PRIVATE ENFORCEMENT IN INTERNATIONAL ARBITRATION**

Given the difficulties of adapting many national courts to the role of enforcing the rights of a foreign state at the behest of one or more of its citizens, attention ought be given to the possibility of an international tribunal commanding the respect and acceptance of all the governments willing to subscribe to the principle that citizens are entitled to protect their governments from bribes paid by foreign firms. Such an international tribunal might also hear claims by firms presenting evidence that they could and would have provided goods and services of equal quality at lower prices than those a state agreed to pay in response to a defendant’s corrupt practices.
Special dispute-resolving schemes have been incorporated in numerous multilateral agreements,\textsuperscript{142} including some bearing on environmental controversies.\textsuperscript{143} And there is an existing model for an international forum in which corruption claims might be heard and decided. Such a forum could be established and empowered with the usable features of the American practice empowering private law enforcement by relators or whistle-blowers.

The model is the International Center for the Settlement of Investment Disputes (ICSID), an autonomous international institution established by the World Bank under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.\textsuperscript{144} ICSID provides an arbitral forum whose jurisdiction is conferred by the contracts made between member governments and the foreign firms with whom they deal. The Nairobi airport case mentioned above was decided by an ICSID panel.


There are 143 member states that have ratified the ICSID Convention and are thus subject to the Center’s jurisdiction. Presently, there are about 120 cases pending on its docket; all involve disputes between firms engaged in international trade and the member governments with whom they have made contracts. While, as with other tribunals, one may be concerned about the independence of the judges, the Center’s monetary awards are enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards that has been ratified by all but a very few nations. Thus, its decisions are much more widely enforceable than mere civil judgments rendered by national courts.

Given the absence of alternatives and the widely recognized utility of arbitral tribunals in resolving private disputes arising in


international trade, the ICSID model is not only the best available, but one worthy of a measure of public confidence.\textsuperscript{149} Cautions have been expressed such as that uttered by Cesare P. R. Romano that while arbitration “has some merits, it is by and large a vestige of an old world where adjudication was ultimately regarded as a sort of continuation of diplomacy by judicial means, to paraphrase a famous quote from Carl von Clausewitz.”\textsuperscript{150} But ICSID is more than that as a forum in which pre-existing law is respected and enforced.

It must be conceded that ICSID is not universally revered. The Republic of Ecuador, although presently engaged in an ICSID arbitration proceeding with Occidental Petroleum arising from the government’s response to alleged environmental harms resulting from its extractions in Oriente Province, has now withdrawn its consent to future proceedings of this sort.\textsuperscript{151} But if Ecuador seeks future


\textsuperscript{151} On December 23, 2007, Ecuador withdrew its consent to jurisdiction over matters “relative to the extraction of natural resources such as oil, gas, or other minerals.” http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsR
investments in similar enterprises by transnational firms, it will likely find it necessary to submit to a jurisdiction such as that of ICSID, or a different but similar center established by the World Bank.\textsuperscript{152}

Such an international arbitral tribunal could be empowered by contract to resolve corruption claims brought by suitably qualified citizens or non-governmental organizations against firms engaged in corrupt practices. Nations becoming members of a center such as ICSID could be required to include submission to the center’s jurisdiction as a condition of any contract of size made with a foreign national or a transnational firm or its subsidiary for their purchase of goods or services, or their sale of business opportunities or their consent to extractions of minerals. A similar condition of submission to the Center’s jurisdiction could be imposed on those holding high public offices in a signatory state.

As an additional condition of the submission of corruption claims to such an arbitral tribunal, it would seem necessary to require a member state to establish reasonable accounting standards to be observed by its public officials and by those international firms with

whom they might deal. And, as a constraint on the misuse of the investigative power conferred on the party alleging a corruption claim and his or her counsel, it would be appropriate to require him or her at the outset to identify a personal source of information suggesting the likelihood of a corrupt practice worthy of further investigation.

To facilitate effective private law enforcement of international anti-corruption laws in such a center, the civil procedure employed would need to differ from that conventionally employed in the arbitration of contract disputes, or by the present ICSID arbitral panels. The American rules of procedure empowering private investigation surely need not be explicitly incorporated, but they serve to illustrate what would be needed to empower private counsel to investigate and reveal corruption.\textsuperscript{153}

Thus, it would be necessary to include provisions empowering: the parties’ private counsel to expose pertinent records of the government and its contracting parties and to examine witnesses under compulsion to give evidence. And to empower the arbitral panel to render an enforceable monetary award against a firm or person within the represented state’s jurisdiction who failed to

cooperate reasonably with the investigation conducted by counsel for any of the parties.\textsuperscript{154} Official files and records of represented states would be subject to arbitral scrutiny.\textsuperscript{155}

An obvious problem in establishing such a center is the identification of suitable members of the arbitration panels. Finding suitably disinterested decision-makers is not easy and perfection cannot be achieved. But the peer review system employed by OECD suggests a place to begin the search.

The problem of the enforceability of judgments would be substantially diminished when the decision to reward the relator is rendered as an arbitral award. The present Convention on Foreign Awards does vest discretion in any enforcing court to refuse enforcement of arbitral awards offending its notions of local public

\textsuperscript{154} Commission on Legal Empowerment of the Poor Making the Law Work for Everyone (2008) concludes that:

In general, the success of alternative dispute resolution depends on certain standards and practices, such as the right of poor people to appoint judges of their choice for the dispute resolution. But it is equally imperative that the alternative dispute resolution mechanisms are recognized as legitimate and linked to formal enforcement, and that they do not operate totally outside the realm of the legal system.

\textsuperscript{155} On current discourse regarding procedural rules in international commercial arbitration, see Carrie Menkel-Meadow, Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration? Melanges en l'Honneur de Pierrie Tercier (2008).
It is clear that this provision is intended to be read narrowly, and at least in the United States it is. But an award might be denied enforcement by a court persuaded that the arbitral panel was itself corrupt or unqualified.

**CONCLUSION**

The World Bank, at least with the support of the International Chamber of Commerce or the United Nations, could create a legal forum in the ICSID model that could enable and reward effective private enforcement of international anti-corruption law. The complexities of the tasks are not to be understated. But the needs clearly exist and the time has come for serious consideration of the limited possibilities. Others have noted the difficulty as well as the need for transnational institutions that might gain the requisite measure of trust from the humanity whom they presume to govern. If such a legal forum were created, it would need some of the features that cause plaintiffs “like moths to the light” to be attracted to

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156 Convention, note 147, Article V(2)(b).


159 ROBERT A. DAHL, **ON POLITICAL EQUALITY** 87-92 (2006).
American courts. These include a right of audience for contingent fee lawyers representing private citizens or non-governmental organizations empowered to compel witness testimony and disclosures and to examine public and private files. Such a means of private enforcement in an international forum would not cure the infectious disease of corruption, but it would almost surely reduce the suffering.