

The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism

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**The 1998 Foreign Corrupt Practices Act Amendments:
Moral Empiricism or Moral Imperialism?**¹

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¹ This work is dedicated to small corporate counsels throughout the United States and abroad for providing the experience and insight that inspired this comment.

I. INTRODUCTION

Transnational corruption, or the bribery of government officials by foreign business interests,² is extremely harmful to national economic and political systems, especially within those nations that “host” the corrupt practices.³ Transnational corruption promotes financial inefficiency by adding an extra and unwarranted level of cost to routine government functions.⁴ Additionally, corruption undermines governmental legitimacy by damaging public confidence in the national bureaucracy.⁵

Characterizations of corruption, however, vary among nations. Such characterizations commonly flow from the political, economic, and cultural realities present in a particular nation.⁶ As a result, though multilateral action to control transnational corruption may represent a positive step toward eliminating the harms mentioned above, care must be taken to avoid generalizing the nature of corruption in a way that offends less economically developed and less politically powerful nations.⁷

² See Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL’Y INT’L BUS. 53, 53-54 (1999). “Illegal payments come in many forms, including bribes, facilitating or grease payments, extortion payments, political contributions, and kickbacks.” Robert S. Levy, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 71 n.1 (1985).

³ See, e.g., Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 275-279 (1999) (stating that corruption causes economic, systemic, and social damage to host nations); Lisa Harriman Randall, Note, *Multilateralization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657, 658-659 (1997) (stating that recognition of governmental corruption causes political tumult within a nation’s populace and overall inefficiency within a nation’s economy). For an insight into how global corruption harms American economic interests, see U.S. Trade Representative Mickey Kantor, Remarks on Bribery and Corruption in International Trade, Address Before ECAT (Mar. 6, 1996) (claiming that Americans are ultimately hurt by lost confidence in the global trading system that may accompany widespread bribery in many areas of the world), reprinted in Steven R. Salbu, *Bribery in the Global Marketplace: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 250 n.141 (1997).

⁴ See Zagaris & Ohri, *supra* note 2, at 53.

⁵ See David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT’L L. 455, 457 (1999); see also Olukonyinsola Ajayi & Simisola Ososamii, *On the Trail of a Spectre--Destabilisation of Developing and Transitional Economies: A Case Study of Corruption in Nigeria*, 15 DICK J. INTL. L. 545, 546-547 (1997).

⁶ See *id.* at 461-462.

⁷ See generally David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 J. INTL. L. BUS. 457 (1998) (stating that multilateral efforts to combat corruption help both to enhance fairness and competitiveness in the international marketplace and to promote

One example of such a generalization is the Organization for Economic Cooperation and Development's (OECD) legal standard of corruption, which was formulated at the OECD's recent Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997 OECD Convention).⁸ The OECD is a multinational organization representing the economic interests of many of the world's most prosperous nations.⁹ Not surprisingly, the legal standard of corruption created at the 1997 OECD Convention reflects the political, economic, and cultural interests of the developed, "Westernized" nations of the OECD.¹⁰

In 1998, the United States adopted the OECD Convention's legal standard of corruption into American law through the International Anti-Bribery and Fair Competition Act of 1998 (1998 Amendments),¹¹ which amended the Foreign Corrupt Practices Act of 1977 (collectively 1998 Amended FCPA).¹² The 1998 Amended FCPA provides anti-corruption measures that

transparent and accountable governance, and thus are essential elements of an improved international business environment).

⁸ Convention on Combating Bribery of Foreign Officials in International Business Transactions, Organization for Economic Cooperation and Development, OECD/DAFFE/IME/BR(97)16/FINAL, signed 18 Dec. 1997, entered into force 13 Feb. 1999, *reprinted* in 37 I.L.M. 1 (1998) [hereinafter OECD Convention].

⁹ *Id.* According to the OECD's website, the OECD "is rich, in that OECD countries produce two-thirds of the world's goods and services[.]" The website also notes that "membership is limited by a country's commitment to a market economy and a pluralistic democracy." See OECD Online, *What is OECD?* (visited Mar. 27, 2000) <<http://www.oecd/about/general/index/htm>>.

¹⁰ See OECD Online, *Membership* (visited Mar. 27, 2000) <<http://www.oecd.org/about/general/member-countries.htm>>. All twenty-nine member countries signed on to the OECD Convention. Listed alphabetically, these countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. The five non-member signatories are: Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic. See *id.* Of the entire thirty-four signatories, other than the five non-member states, who signed on without having participated in OECD working groups on the OECD Convention's development, only Japan, Korea, Mexico, and Turkey have national cultural perspectives that are not principally derived from "European" traditions. Moreover, as one scholar notes of the convention, "[b]ecause the nations who become parties are all capital importing nations, it might have been more significant if the demand side as well as the supply side of foreign bribery were covered by the OECD Convention." Gantz, *supra* note 7, at 492.

¹¹ International Antibribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3202 (1998) [hereinafter 1998 Amendments].

¹² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, *amended* by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 5001-03, 102 Stat. 1415, 1415-1425, as *amended* by the International Antibribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3202

arise from the distinctly supply-side perspective of developed countries,¹³ and correspondingly frames corruption in line with Western morality.¹⁴ Additionally, the 1998 Amendments now allow for expanded extraterritorial FCPA application by allowing the prosecution of foreign nationals.¹⁵ The moral basis and expanded extraterritorial application of the 1998 Amended FCPA create a potential for tension between the FCPA and foreign anti-corruption legal regimes.¹⁶ The potential for tension is especially acute within the borders of non-Western nations with developing or transitional economies,¹⁷ which the FCPA primarily targets for governmental corruption.¹⁸

(codified as amended at 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78dd-3, 78ff (1998)) [hereinafter 1998 Amended FCPA].

¹³ See Commentaries on the Convention on Combating Bribery of Foreign Officials in International Business Transactions, Organization for Economic Cooperation and Development, adopted by the Negotiating Conference 21 Nov. 1997 [hereinafter OECD Convention Commentaries], General 1. According to the OECD Convention Commentaries, the Convention is explicitly limited to what, in the law of some countries, is called “active corruption” or “active bribery,” meaning the illegal offense committed by the person who gives the bribe, as opposed to “passive bribery,” which is the illegal offense committed by the official who receives the bribe. See *id.* While this distinction may seem obvious given the membership in the OECD, it is important to note that on its face the OECD Convention makes no attempt to address the corruption problem from the receiver side of the transaction, a quality which necessarily eliminates most “corrupting” nations, such as Indonesia, from active participation in formulating the OECD Convention’s provisions. See *id.*

¹⁴ See Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Conditions of the Late Twentieth Century?: Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INTL L. 223, 252-253 (1999). As Salbu notes, “[M]ultilateral efforts, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, cannot avoid cultural imperialism simply by virtue of their multilateralism.” *Id.*

¹⁵ See 15 U.S.C. § 78dd-3.

¹⁶ See generally Kenneth U. Surjadinata, Comment, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT’L L. REV. 1021 (1998).

¹⁷ At this point, although both developing and transitional economies consistently rank amongst the most corrupt in the annual “Corruption Perception Index” put out by Transparency International (TI), an international anti-corruption NGO started in Berlin in 1994, it should be noted that this comment will feature almost exclusively issues dealing with developing economies. For the purposes of this comment, countries with “developing economies” as contrasted with countries with “transitional economies” are those most commonly springing from colonial roots in which independence was gained within the last few hundred years and for which economic progress has been steady but relatively slow. Most “developing economies” are situated in Africa, South America, and Southeast Asia. The example used in this comment is Indonesia. “Transitional economies” are most frequently those with Communist or Marxist roots for which transition or attempted transition to capitalism is a relatively new phenomenon. A commonly used example would be Russia. Though the distinction between economic systems is slight, it is valid and effective. For an excellent discussion of FCPA compliance strategies in regards to Russia and other transitional economies, see generally JEFFREY P. BALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES* (1997).

¹⁸ See Kennedy, *supra* note 5, at 458.

Tension arises from the variant national ideologies underlying the nations' legal approaches to controlling corruption. In regard to the 1998 Amended FCPA, this variance is demonstrated by the Act's failure to address demand-side issues,¹⁹ such as the Asian tradition of gift giving during business transactions.²⁰ For nations like Indonesia,²¹ which this comment uses to demonstrate dynamics common to developing nations, application of U.S. law within their borders and towards their citizens may clash with domestic practices and impede the development of effective domestic anti-corruption methods.²² Because the 1998 Amended FCPA is premised on a different value system than that of a typical developing state, it may be met with confusion and indifference and offer little guidance in domestic corruption prevention within the developing state.²³ Additionally, many nations find the extraterritorial application of foreign anti-corruption laws intrusive and disrespectful.²⁴ In particular, developing nations such as Indonesia are naturally antagonistic towards extraterritorially applied foreign laws. Moreover, extraterritorial enforcement of anti-corruption laws may infringe on the rights of a developing

¹⁹ See Randall, *supra* note 3, at 679.

In contrast to the United States' multilateralization attempts, which concentrate on the flow of bribes from developed countries, a "demand side" approach would provide support for anti-bribery campaigns in developing countries. By helping these countries discover strategies that will keep their officials from accepting bribes, the U.S. can lessen the demand for these corrupt payments.

Id.

²⁰ See also Surjadinata, *supra* note 16, at 1086. "The United States' continued insistence on taking the moral high ground is perplexing, given that an alternative mechanism, the market, can define in a superior manner those practices which tend to destroy aggregate utility for all parties and those which tend to maximize it." *Id.* See generally LESLIE PALMER, THE CONTROL OF BUREAUCRATIC CORRUPTION: CASE STUDIES IN ASIA (1985).

²¹ See Transparency International, *The 1999 Corruption Perceptions Index (CPI)* (visited Mar. 27, 2000) <<http://www.transparency.de/documents/cpi/index.html>> [hereinafter *TI CPI*]. In the 1999 Corruption Perception Index published by Transparency International, Indonesia was ranked ninety-sixth out of ninety-eight developed and developing nations in terms of the degree to which it was perceived as corruption-free. See *id.* The only nations included which were perceived of as more corrupt were Nigeria and Cameroon, while the least corrupt was Denmark. See *id.* The United States was eighteenth. See *id.* The Corruption Perception Index (CPI) Score is computed using input from international business people from around the world. See *id.*

²² See E-mail from Professor Albert Wijono to author, University of Jakarta (Apr. 5, 1997) (on file with the author) [hereinafter *Wijono E-mail*]. Indonesia has neither legislated nor clarified virtually any new anti-corruption laws since 1977, the same year in which the FCPA was enacted. While subsequent laws were enacted at late as 1980, they are general in their coverage and are rarely enforced. See *id.*

²³ See generally Surjadinata, *supra* note 16.

nation's business people who may be held accountable under the 1998 Amended FCPA despite complying with their own nation's anti-corruption laws.²⁵

This comment analyzes the 1998 Amended FCPA and focuses on the effectiveness of applying a Western, morals-based standard of corruption in non-Western countries. Further, this comment examines the potential effects of expanded extraterritorial FCPA jurisdiction on the economy, politics, and culture of developing nations such as Indonesia. The comment concludes that the 1998 Amended FCPA will be ineffective in fighting corruption overseas, and, therefore, proposes that the United States take diplomatic steps giving greater deference in corruption prevention to globally-respected Non-Governmental Organization's (NGOs) and emphasizing a morally neutral, market-based legal standard of corruption.

Part II examines the impetus for and rationale behind the FCPA and presents an overview of developments prior to the 1998 Amendments. Part III analyzes the 1998 Amended FCPA, highlights the areas amended, and points out problems that the 1998 Amended FCPA may cause when applied in developing nations such as Indonesia. Part IV examines the impact that expanded jurisdiction has on the application of the 1998 Amended FCPA's "corruptly" standard²⁶ and explains the standard's arguably negative effects on U.S. commercial interests and on the effectiveness of anti-corruption programs in developing countries. Finally, Part V suggests alternative steps that may be taken by the United States to avoid damaging U.S. business interests abroad and to more effectively combat corruption overseas.

II. DIFFERENT BASIS FOR ANTI-CORRUPTION LAWS

Anti-corruption laws are generally based on either economic principles or moral values. Many developing nations, such as Indonesia, have chosen to base their domestic anti-corruption laws on economic principles, a policy that reflects the inefficiency of corruption on the national economy. In contrast, the United States, and recently many other Western nations, have chosen

²⁴ See Salbu, *supra* note 14, at 227.

²⁵ See Transparency International, *The TI Sourcebook, Executive Summary*, ¶ 2 (visited Mar. 27, 2000) <<http://www.transparency.de/documents/source-book/summary.html>> [hereinafter *TI Executive Summary*]. As Transparency International explains, "[a] single-minded focus on corruption prevention can also have a negative impact on personal freedoms and fundamental human rights." *Id.*

²⁶ See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

to base their extraterritorial anti-corruption laws on moral values, which emphasizes the immorality of committing a corrupt act. Because an understanding of why nations choose between economic principles and moral values as the basis for their anti-corruption laws is necessary, this comment will briefly describe the advent of Indonesia's economy-based anti-corruption laws before examining how moral values were established as the basis for the U.S. FCPA.

A. *Economic-Based Anti-Corruption Laws*

Indonesia is one example of a developing country that has economy-based anti-corruption laws. Indonesia, just as many other developing countries, has a strong cultural acceptance of gift-giving practices. Though foreigners may have perceived such practices as corruption, many have had little effect on the national economy. As a result of this perception, Indonesia legislated an anti-corruption law that would eliminate the negative effect that non-culturally-accepted corruption had on the national economy and that would promote a more efficient bureaucratic apparatus. Indonesia's main anti-corruption law, Law No. 3 of 1971 (Law No. 3),²⁷ provides a clear example of an anti-corruption law that is based on economic principles. Law No. 3 of 1971 essentially arose in reaction to the perceived political and economic effects that accompanied the well-entrenched patronage, or gift-giving, tradition of Indonesia.²⁸

The tradition of patronage is largely a vestige of Indonesia's initial colonization by the Netherlands.²⁹ Unlike some other colonial powers, the Netherlands Indies government went to great lengths to "maintain traditional culture," and to "minimi[z]e the exposure of Indonesian society to external influences."³⁰ As a result, Indonesian patronage traditions survived Dutch colonialism intact and subsequently affected the development of indigenous administrative

²⁷ See Undang-Undang Nomor 3 Tahun 1971 Tentang Pemberantasan Tindak Pidana Korupsi [Law No. 3 of 1971] (1971) (Indon.), *translated and reprinted in* PALMER, *supra* note 20 [hereinafter Law No. 3 of 1971].

²⁸ See PALMER, *supra* note 20, at 197-198 (1985) (detailing the steady institutionalization of the patron-client relationship from Indonesia's early years in the 1800's as a Dutch colony to the nation's independence in 1945). See also Willard A. Hanna, *A Primer of Korupsi*, in SOUTHEAST ASIA SERIES, Vol. XIX No. 8 (Indon.) 1, 1-3 (1971).

²⁹ See PALMER, *supra* note 20, at 213.

³⁰ *Id.*

systems in significant, practical ways.³¹ “One needs only to add that one man’s patron may be another one’s client, so the public service, from the highest to lowest, is pervaded throughout by these relationships, which provide clients a security untenable otherwise.”³² Further, the Dutch relinquishment had other collateral effects, such as economic decline, which heightened the need of many government officials to supplement their income.³³ Thus, patronage became even more important, as well as more prevalent, in the bureaucratic framework.³⁴

In 1967, the failing Guided Democracy system of former Indonesian President Sukarno was replaced by the New Order regime of Indonesia’s new President, Suharto.³⁵ To eliminate Sukarno loyalists who were deeply entrenched in the nation’s bureaucratic structure, the new regime sought to eradicate the patronage system that protected them.³⁶ Initially, a “Corruption Eradication Team” (*Team Pembrantas Korupsi*) was established in December 1967 under the direction of the Attorney General, Major-General Sugih Arto.³⁷ As the national press and student groups became more and more disenchanted with Sugih Arto’s regime, however, a “Commission of Four” elder statesmen (“the Commission”) was appointed to the task.³⁸

Even during these tense times, patronage continued to be strongly accepted within Indonesian society as a whole, as exemplified by the common *Bahasa* (Indonesia’s major language) phrase of the time, *tahu sama tahu*, literally “know with know,” which connoted a

³¹ *See id.*

³² *Id.* at 214.

³³ *See id.*

³⁴ *See id.* For a somewhat different view on the subject, see Jon S. T. Quah, *Bureaucratic Corruption in the ASEAN countries: A Comparative Analysis of their Anti-Corruption Strategies*, 13 J. SOUTHEAST ASIAN STUDIES 154, 155 (1982) (stating that widespread corruption within Indonesia may have originated within the disgruntled work-force of the Dutch East India Company during colonial times). A link may exist between the two opinions above in the supposition that with Dutch withdrawal, the Indonesians, having viewed the practices of Dutch trading workers, were pressured to use similar means within their own patronage networks to augment their economic positions during a difficult time.

³⁵ *See PALMER, supra* note 20, at 214.

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* at 215.

silent agreement between those participating in an illegal transaction.³⁹ Popular sentiment, however, held that the fledgling government of Indonesia could not survive politically or financially if kickbacks to government officials were allowed to continue unregulated.⁴⁰ Therefore, the Indonesian government, focusing on the economic harm done to the State rather than private commercial interests, developed an economy-based anti-corruption legal regime.⁴¹

The Indonesian legislature passed Law No. 3 largely to subdue public pressure for a law that would affect those “at the top” more so than the general public but would clarify the uncertainties as to which sorts of patronage were illegal and which were not.⁴² It was commonly understood that “the spread of corruption was due either to need, because of poor salaries, or to the abuse of opportunities or power.”⁴³ Moreover, it became clear that “the powerful and rich were adept at sophisticated methods of corruption and at destroying evidence.”⁴⁴ Disappointing statistics regarding actual prosecutions, as opposed to secretive out of court settlements, only reinforced these beliefs.⁴⁵ “There was a moral confusion present; nobody was quite sure what was right or wrong.”⁴⁶

In response to this confusion, no conception of the immorality of alleged acts was contemplated in the drafting of Law No. 3.⁴⁷ The process through which business interests made payments to government officials was itself an acceptable, though inefficient, cultural reality.⁴⁸ According to Law No. 3, a corrupt act is simply an illegal one, not a morally unsound one.⁴⁹ It is

³⁹ *See id.* at 210.

⁴⁰ *See id.* at 221.

⁴¹ *See generally* Law No. 3 of 1971, *supra* note 27.

⁴² *See* PALMER, *supra* note 20, at 220.

⁴³ *Id.*

⁴⁴ *Id.* at 221.

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *See generally id.*

⁴⁹ *See id.*

illegal for “injuring the finances of the state” and that alone.⁵⁰ Importantly, there is not even an indigenous *Bahasa* word for the English moral terms “corrupt” or “corruptly,” though the modern vernacular term *korupsi* is commonly recognized as a close equivalent to the English word corruption.⁵¹ Ironically, “the word *korupsi* itself is the ‘corruption’ of a Western word adopted into the Indonesian language” at the dawn of the New Order.⁵²

B. *Morals-Based Anti-Corruption Laws*

The impetus behind the Foreign Corrupt Practices Act (FCPA), the main extraterritorial anti-corruption law of the United States, was moral indignation. This feeling resulted in created a broad, vague act based on Western principles of morality. In 1988, the FCPA was amended to clarify ambiguities in the 1977 FCPA and reduce the liability of American businesses. In the mid-1990s, however, the FCPA’s limited coverage of foreign businesses led the United States to engage in multilateral negotiations concerning alternate means of curbing corruption on a transnational level.

1. *1977 Foreign Corrupt Practices Act*

In 1976, the Securities and Exchange Commission (SEC) published a report disclosing that over 400 U.S. companies, including 177 Fortune 500 companies, had admitted, through voluntary disclosure sessions, to having made “questionable payments” to foreign officials.⁵³ The extensive nature of the disclosures came as a tremendous shock to Congress, which was still

⁵⁰ Law No. 3 of 1971, *supra* note 27.

⁵¹ See Wijono E-mail, *supra* note 22.

⁵² Hanna, *supra* note 28, at 2.

⁵³ See generally Senate Comm. on Banking, Housing & Urban Affairs, 94th Cong., 2d Sess., SEC Report on Questionable and Illegal Corporate Payments and Practices (Comm. Print 1976) [hereinafter SEC Report]. Specifically, the SEC Report confirmed over \$300 million in payments, including \$56.7 million by Exxon, \$30.7 million by Northrup, and \$25 million by Lockheed. See *id.* Lockheed’s bribes attracted tremendous attention due to the fact that Lockheed had recently been given federal loan guarantees, creating the perception that the federal government had, in fact, subsidized Lockheed’s bribes. See *id.* For a further discussion of the surprisingly vast extent of bribery uncovered by the SEC during its voluntary disclosures, including the Lockheed Case (known as Lockheed I), see DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 1-4 (1999); JYOTI N. PRASAD, IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT ON U.S. EXPORT 35-37 (1993).

reeling from the Watergate Scandal.⁵⁴ In 1977, after months of consultation with the SEC,⁵⁵ the central U.S. government sanctioning body for illegal financial activities, Congress unanimously enacted the FCPA (1977 FCPA).⁵⁶ The legislation was essentially an effort by Congress to stem the loss of public confidence in the integrity of American businesses associated with the 1976 voluntary disclosures.⁵⁷ In conjunction with the overriding moral tone of the Carter Administration,⁵⁸ the stage was set for legislation that would solidify the commitment of the United States government to imposing per se ethical ideals on the financial activities of American multi-national corporations as they became increasingly active on the global front.⁵⁹ Thus, from its drafting, the 1977 FCPA was the product of empirically-derived “moral outrage,”⁶⁰ rather than the result of economic concerns over the inefficiency of corrupt acts, the latter of which is a more common impetus for anti-corruption legislation within developing countries than the former.⁶¹

⁵⁴ See S. REP. NO. 105-277, at 1 (1998).

⁵⁵ See Judge Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 19 J. INTL. L. BUS. 269, 271-276 (1998) (discussing the SEC's suggestions to Congress and Congress's concerns leading up to the enactment of the FCPA).

⁵⁶ See Pub. L. No. 95-213, 91 Stat. 1494-98 (1977) (codified as 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1982)).

⁵⁷ See BIALOS & HUSISIAN, *supra* note 17, at 24; see also GEORGE C. GREANIS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE* 17-31 (1982); S. REP. NO. 105-277, at 1 (1998).

⁵⁸ See Gantz, *supra* note 7, at 459.

⁵⁹ See *id.* For a brief explanation of why ethics played such an important role in the passage of the FCPA, see S. REP. NO. 105-277, at 1 (1998).

⁶⁰ The FCPA has been called “a ‘byproduct of the Watergate scandal’ to combat the ‘morally repugnant’ practices found overseas”. See S. REP. NO. 114, *reprinted in* 1977 U.S.C.C.A.N. at 4108. The word “empirical” refers to “that which is based on experience, experiment, or observation.” BLACK’S LAW DICTIONARY 362 (6th ed. 1990). The term “moral empiricism” used in this comment, therefore, refers to the act of crafting moral standards on the basis of experience and observation. Because empirical studies have been used to determine the ill effects of corruption on national governments, the importance of the term relates to its legitimacy as a U.S. government defense of the FCPA’s moral characteristics. See Ajayi & Ososamii, *supra* note 5, at 546-547.

⁶¹ As suggested by one scholar, “The FCPA essentially reflects the view that corruption, and in particular, its subset bribery, is so immoral that not even the loss of business by American companies could justify it.” Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT’L L. 121, 123 (1996).

The anti-bribery provisions of the 1977 FCPA⁶² essentially held U.S. corporations and business persons⁶³ accountable for payments⁶⁴ made to foreign government officials⁶⁵ that influenced any such officials to confer an improper economic advantage to a U.S. corporation or business person.⁶⁶ Though the jurisdictional scope of the 1977 FCPA was extraterritorial,⁶⁷ it limited liability to corporations registered or principally acting in the United States and to U.S. citizens.⁶⁸ Further, the 1977 FCPA included a provision requiring the actor to have a “reason to know”⁶⁹ of questionable actions undertaken by its agents to be vicariously liable.⁷⁰ The 1977 FCPA also included a “corruptly” provision⁷¹ that emphasized Congress’s view concerning the immoral nature of an illegal payment under the FCPA.⁷²

2. 1988 Amendments

Congress designed the 1977 FCPA to emphasize broad ideals regarding the immorality of “corrupt” acts, and its provisions reflect these somewhat ambiguous moral concepts through rather vague standards.⁷³ In the early to mid-1980s, American companies began to criticize the

⁶² See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 103-04, 91 Stat. 1494 (1977) (amended 1998).

⁶³ §§ 103(a), 104(a).

⁶⁴ §§ 103(a), 104(a).

⁶⁵ §§ 103(a), 104(a)(1-3).

⁶⁶ §§ 103(a), 104(a).

⁶⁷ §§ 103(a), 104(a).

⁶⁸ §§ 103(a), 104(a).

⁶⁹ §§ 103(a), 104(a)(3).

⁷⁰ §§ 103(a), 104(a).

⁷¹ §§ 103(a), 104(a).

⁷² See S. REP. NO. 105-277, at 1 (1998). The term “corruptly” seems to carry no other force within the FCPA’s provisions other than to clarify that an actor’s intent must have been “corrupt.” Therefore, it seems logical to conclude that the inclusion of the term “corruptly,” in light of Congress’s ethical objectives, was meant to reinforce the moral turpitude of a FCPA violation.

⁷³ “The lack of judicial action under the FCPA has been attributed to its ambiguous language.” Levy, *supra* note 2, at 77.

uncertain vicarious liability provisions⁷⁴ of the 1977 FCPA that created negative economic effects.⁷⁵ These companies claimed that uncertainty over potential FCPA liability stemming from foreign business partners was leading to major corporate losses to foreign business competitors, many of whom were not subject to extraterritorial anti-corruption laws.⁷⁶ According to U.S. companies, these losses came in the absence of the economic benefits stemming from a restoration of popular confidence in the integrity of American businesses, the reciprocal gain that Congress promised when it passed the 1977 FCPA.⁷⁷ In response, Congress attempted to ease the burden on U.S. businesses by amending the FCPA in 1988.⁷⁸ The 1988 Amendments,⁷⁹ however, did little to clarify the vicarious liability standards of the 1977 FCPA,⁸⁰ and corporate law practitioners widely viewed these amendments as “anti-climactic” for having little to no practical effect on the statutes’ provisional structure or usage.⁸¹

The 1988 Amendments altered two areas of the FCPA: (1) the modification of the knowledge standard of vicarious liability⁸² and (2) the addition of a new exception⁸³ and two

⁷⁴ See Foreign Corrupt Practices Act of 1997 §§ 103(a), 104(a)(3).

⁷⁵ See Bartley A. Brennan, *Amending the Foreign Corrupt Practices Act of 1977: “Clarifying” or “Gutting” a Law?*, 11 J. LEGIS. 56 (1984) (quoting 127 CONG. REC. S 2126 (daily ed. Mar. 12, 1976)).

⁷⁶ Levy, *supra* note 2, at 71-72.

⁷⁷ See generally UNITED STATES GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: TO THE CONGRESS (1981) [hereinafter GAO Report]. The GAO Report included a survey containing comments and criticisms made by members of the legal and business communities concerning the detrimental affects of the FCPA on international business. See *id.* The report noted significantly that 30% reported that the FCPA had caused a decrease in overseas business, and none of those surveyed thought the FCPA had a positive impact on general business relations. See *id.*

⁷⁸ See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, Subtitle A, Part I, 102 Stat. 1107, 1415-25 (amended 1998).

⁷⁹ See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, Subtitle A, Part I, 102 Stat. 1107, 1415-25.

⁸⁰ See Omnibus Trade and Competitiveness Act of 1988 §§ 103(a), 104(a)(3).

⁸¹ Homer E. Moyer, Remarks at The ABA/CLE Conference on the Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention, in Marina del Rey, CA. (Feb. 19, 1999) [hereinafter Moyer Remarks].

⁸² See Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

⁸³ See §§ 5003(a), 5003(c).

affirmative defenses.⁸⁴ First, Congress replaced the “has reason to know” standard of the 1977 FCPA with a “knowing” standard in determining vicarious liability for U.S. businesses for the acts of their foreign or domestic business associates.⁸⁵ Congress may have modified the standard to limit vicarious liability to actions by foreign business associates of which American businesses had “actual” knowledge, thereby eliminating liability for those actions of which the American business should reasonably have known. One scholar, however, has questioned whether the modification made any real difference: “[C]orporations should be wary, because it is quite possible that the same facts and circumstances that gave rise to having reason to know that a payment would be made under the FCPA . . . could meet the knowing standards under the [1988] Amendments.”⁸⁶

Second, Congress added an exception for “facilitating” payments⁸⁷ and two affirmative defenses: one for actions legal under foreign law⁸⁸ and one for reasonable and bona fide expenditures.⁸⁹ These additions may have been intended to aid U.S. businesses by exempting small and genuinely innocent payments. It has been noted, however, that difficulties in retroactively demonstrating the innocence of “questionable” transactions makes reliance on these “safety” provisions tenuous at best.⁹⁰

The “facilitating” payments exception⁹¹ technically gives some leeway to American corporations.⁹² It allows small payments to lower foreign government officials to secure performance of duties that those officials would eventually perform or were bound to perform

⁸⁴ See §§ 5003(a), 5003(c).

⁸⁵ §§ 5003(a), 5003(c).

⁸⁶ Dale C. Turza, Remarks at The ABA/CLE Conference on the Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention, in Marina del Rey, CA. (Feb. 19, 1999).

⁸⁷ See Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

⁸⁸ See §§ 5003(a), 5003(c).

⁸⁹ See §§ 5003(a), 5003(c). See also *infra* Part III.D.

⁹⁰ See BIALOS & HUSISIAN, *supra* note 17, at 42-49. See also *infra* Part III.D.

⁹¹ See Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

⁹² See BIALOS & HUSISIAN, *supra* note 17, at 43.

anyway.⁹³ The reality that American corporate competitiveness would be severely hampered if they were not allowed to grant these small payments made the exception popular initially, especially for its potential use in foreign nations where lower government officials regularly requested such payments to supplement their own income.⁹⁴

The limited practicable use of the “facilitating” payments exception, however, eventually led U.S. business interests to criticize the exception often. In response to such criticism, the U.S. Department of Justice (DOJ) modified its interpretation of the exception. While following the 1988 Amendments⁹⁵ the DOJ had attempted to distinguish between lower-level and higher-level officials in deeming applicability of the exception,⁹⁶ the new focus was on the action requested, rather than the level of the official accepting the bribe.⁹⁷ Thus, the FCPA currently exempts “any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of routine governmental action.”⁹⁸ This exception is narrowly tailored, and the DOJ has used the value of the payment conferred as its central criteria for prosecution.⁹⁹ As a result of the DOJ’s positions, proving the innocent nature of a “borderline” transaction is inordinately difficult, because the specific circumstances of particular transactions made abroad may be virtually impossible to evidence after the fact.¹⁰⁰

⁹³ See *id.* at 42.

⁹⁴ See *id.*

⁹⁵ See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, Subtitle A, Part I, 102 Stat. 1107, 1415-25 (amended 1998).

⁹⁶ See § 104(d)(2).

⁹⁷ See BIALOS & HUSISIAN, *supra* note 17, at 43.

⁹⁸ Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

⁹⁹ DOJ officials have refused, however, to provide the precise monetary amounts that they use as criteria. As such, there is little certainty regarding what amount of payment is allowed prior to DOJ investigation. See AMERICAN BAR ASSOCIATION, CENTER FOR CONTINUING LEGAL EDUCATION, THE FOREIGN CORRUPT PRACTICES ACT: HOW TO COMPLY UNDER THE NEW AMENDMENTS AND THE OECD CONVENTION § D-33 (1999) [hereinafter ABA/CLE FCPA MANUAL].

¹⁰⁰ See BIALOS & HUSISIAN, *supra* note 17, at 44 n.67. In applying such an exception in countries such as Indonesia, where a strong patronage tradition exists, it can be extremely difficult to distinguish between payments made to secure performance, which is within the bounds of the exception, and payments made for legal purposes, such as insuring an atmosphere of mutual trust and loyalty. In setting the bounds for legal versus illegal patronage, is it not better for all in the long-run to rely on globally accepted market forces? Theoretically, market forces apply equally “across the board,” while culturally specific norms naturally favor those cultures in which they were

Resulting in the removal of potential conflicts between the FCPA and foreign laws, the “actions legal under foreign law” affirmative defense exempts from liability payments that are “lawful under the *written* laws and regulations of the foreign official’s . . . country.”¹⁰¹ The availability of this defense, however, is perhaps even more tenuous than that of the facilitating payments exception for two reasons. First, not only is the burden of proof substantial, but foreign countries also rarely sanction payments to their officials through written public law.¹⁰² In addition, “in transitional economies, it is risky to rely on constantly changing and uncertain local laws.”¹⁰³

The reasonable and bona fide expenditures affirmative defense, which is more widely used than the foreign-law-based affirmative defense,¹⁰⁴ sanctions payments that are “reasonable and bona fide expenditure[s], such as travel and lodging expenses incurred by or on behalf of a foreign official.”¹⁰⁵ Expenditures must be “directly related” to either “the promotion, demonstration, or explanation of products and services”¹⁰⁶ or “the execution or performance of a contract with a foreign government or agency thereof.”¹⁰⁷ American corporations should be extremely wary of relying on this affirmative defense, however, because the DOJ takes a retrospective look at such transactions and has acknowledged its willingness to investigate any instance in which a foreign official with decision-making power receives something of

derived. *See* Surjadinata, *supra* note 16, at 1087. In addition, the applicability of the exception is virtually impossible to be sure of ahead of time. *See supra* Part II.B.1. The exception is limited only to payments in which no attraction or the payer desires retention of business. “[T]his limitation on the exception makes its application uncertain and limits its usefulness.” BIALOS & HUSISIAN, *supra* note 17, at 44. Such difficulties in making distinctions have the potential to produce adverse economic effects as corporate decision-making is inhibited. *See* Gantz, *supra* note 7, at 461-462.

¹⁰¹ Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

¹⁰² *See* Moyer Remarks, *supra* note 81.

¹⁰³ BIALOS & HUSISIAN, *supra* note 17, at 46.

¹⁰⁴ *See id.* at 47.

¹⁰⁵ Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

¹⁰⁶ §§ 5003(a), 5003(c).

¹⁰⁷ §§ 5003(a), 5003(c); *see also* BIALOS & HUSISIAN, *supra* note 17, at 46.

significant value from a U.S. company.¹⁰⁸ As a result of such broad discretion, even those expenditures made transparently in relation to the genuine travel expenses of a foreign official may create liability if deemed excessive by the DOJ.¹⁰⁹

In sum, the 1988 Amendments did little to alleviate the financial concerns of American businesses. Though intended to clarify the ambiguities of the 1977 FCPA, the 1988 Amendments simply created new ambiguities by replacing one broad knowledge standard of vicarious liability with an equally broad standard and by adding an exception and two affirmative defenses, the vagueness of which makes them proactively unusable. Further clarification of the ambiguities addressed by the 1988 Amendments has not been attempted since, and they are still present in the Act.

3. *Recent multilateral anti-corruption efforts by the United States*

In 1996, the United States government secured some multilateral support for the FCPA's anti-corruption principles. The United States pursued multilateral involvement to aid U.S. businesses where the 1988 Amendments could not do so by placing foreign businesses on an equal playing field to that of U.S. businesses.¹¹⁰ First, the United States participated in the Inter-American Convention Against Corruption (IACAC),¹¹¹ which became the first ever multi-lateral anti-corruption initiative when twenty-one of the thirty-four countries from the Organization of American States (OAS) signed it in March 1996.¹¹² Second, the United States was closely

¹⁰⁸ See Verbal statements by Peter B. Clark, Deputy Chief, Fraud Section, U.S. Department of Justice, made at the ABA/CLE Conference on the Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention, in Marina del Rey, CA. (Feb. 19, 1999) [hereinafter Clark Statements].

¹⁰⁹ In nations such as Indonesia, where government salaries are low and gift exchanges and travel amenities are more the rule than the exception, this affirmative defense could result in the perpetuation of doubt and uncertainty as to what expenditures will be allowed and what will be punished. Clarification of the specific requirements for usage of the reasonable and bona fide expenditures affirmative defense, as well as the "facilitating" payments exception and actions legal under foreign law affirmative defense might eliminate this uncertainty. Moreover, since these provisions now apply to foreign nationals with only an ancillary understanding of U.S. legal theories and limited access to historical case law, it may be the time for these limited and confusing exceptions/defenses to be eliminated altogether. See *infra* Part III.C.3.

¹¹⁰ See Zagaris & Ohri, *supra* note 2, at 53-54.

¹¹¹ See generally Inter-American Convention Against Corruption, Mar. 29, 1996, Organization of American States, reprinted in 35 I.L.M. 724 (1996) [hereinafter IACAC].

¹¹² See Zagaris & Ohri, *supra* note 2, at 54. For background on the signing, see Thomas W. Lippman, *After 20-Year Campaign, U.S. Balks at OAS Pact Against Business Corruption*, WASH. POST, Apr. 7, 1996, at A1.

involved in the 1997 OECD Convention.¹¹³ Through its Working Group on Bribery in International Business Transactions, the 1997 OECD Convention produced a comprehensive agreement (1997 OECD Anti-bribery Agreement)¹¹⁴ that describes general legal principles regarding corporate corruption of foreign officials and calls on all signatories to implement domestic laws that embody these principles.¹¹⁵ To enact those provisions, as the United States was obligated to do as a signatory, Congress passed the Anti-Bribery Act of 1998, thereby amending the FCPA in accordance with the OECD Convention.¹¹⁶

The United States became the twenty-second nation to sign the IACAC on June 2, 1996. *See* Zagaris & Ohri, *supra* note 2, at 54. The United States, however, has not taken any steps as yet to implement IACAC provisions into the FCPA, instead choosing to focus on the OECD Convention, discussion of the IACAC will not continue beyond this point. *See id.* Nonetheless, it is interesting to note that the IACAC apparently addresses many of the proposed shortcomings of the OECD Convention highlighted and discussed in this note, most notably including direct developing country involvement in multilateral agreement formulation. *See generally id.*

¹¹³ OECD Convention, *supra* note 8.

¹¹⁴ *See id.*

¹¹⁵ *See id.* arts. 9, 12. A specific explanation of the OECD Articles is beyond the scope of this comment. The provisions affecting American interests are discussed in Part III, which details the changes requiring the FCPA to comport with the OECD Convention.

¹¹⁶ *See* Memoranda from Ann M. Harkins, Acting Assistant Attorney General, to Speaker Newt Gingrich and Vice-President Albert Gore, May 4, 1998 (visited Mar. 27, 2000) <<http://www.usdoj.gov/criminal/fraud/fcpa/tranlet.htm>> (explaining that the International Anti-Bribery Act of 1998 contains legislative proposals designed to implement the OECD Convention).

Both the DOJ and SEC are pleased with the amended FCPA, as well as the OECD Convention, especially in light of the potential of both expanded jurisdiction and mutual legal assistance programs to remove enforcement barriers. *See generally* United States Departments of Justice and Commerce (DOJ-DOC) Electronic Brochure, *Foreign Corrupt Practices Act: Anti-bribery Provisions* (August 1999) (visited Mar. 27, 2000) <<http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>> [hereinafter *DOJ-DOC Brochure*].

Unfortunately, it is also safe to say that further development of Indonesian corruption law since 1971 has been virtually non-existent, though a desire for change within the populace has largely remained constant. *See* PALMER, *supra* note 20, at 240. In late 1971, the prosecution of cases under No. 3 of 1971 peaked. *See id.* This desire has culminated in the draft legislation of a controversial new anti-corruption bill in Indonesia. *See* Wijono E-mail, *supra* note 22. As of the date of this writing, the bill had not yet been passed. *See id.* Prosecutions since that time have remained consistently low. *See id.* According to some scholars, this low prosecution rate does not reflect “the general feeling in Indonesia on the prevalence of corruption.” *See* E-mail from Peter Rooke to author, Transparency International Chapter Representative for Australia (Feb. 20, 1999) (on file with author) (stating essentially that there are a number of anti-corruption law developments in Indonesia at present) [hereinafter Rooke E-mail]. *See also* PALMER, *supra* note 20, at 240.

III. ANTI-BRIBERY PROVISIONS OF THE 1998 AMENDED FCPA

Knowledge of the scope, elements, exception/affirmative defenses, penalties and consequences, and enforcement measures of the 1998 Amended FCPA is essential to understanding how the 1998 Amendments modified the Act's extraterritorial application. The 1998 Amended FCPA expanded the scope of the 1977 to include foreign, as well as U.S., business entities. Although the Act's elements, exception and affirmative defenses, penalties and consequences, and enforcement measures were not modified, their significance may change now that they are applied to foreign business entities. The end result of these changes is that the 1998 Amended FCPA makes international business more inefficient for both American and foreign business entities.

A. Overview

The 1998 Amended FCPA prohibits the bribery of foreign officials by corporations and persons for the purpose of influencing official decisions to obtain business benefits. The 1998 Amended FCPA is comprised of two sections: (1) anti-bribery provisions and (2) accounting provisions. While the anti-bribery provisions represent direct prohibition of corrupt acts by focusing on the illegal transaction, the accounting provisions represent indirect prohibition through regulation of proper and accurate books and records.¹¹⁷ This comment limits its analysis to the anti-bribery provisions of the 1998 Amended FCPA.

B. Scope

The 1998 Amended FCPA covers three types of entities: (1) issuers,¹¹⁸ (2) domestic concerns,¹¹⁹ and (3) certain persons other than issuers or domestic concerns.¹²⁰ Each of the three categories has distinct qualifications, though some entities may fall into more than one of the three. U.S. jurisdiction is established over the three types of entities through varying

¹¹⁷ See Sporkin, *supra* note 55, at 270. As changes to the anti-bribery provisions are of tantamount importance to the issues presented in this note, the accounting provisions will not be addressed here. For information concerning the accounting provisions of the FCPA, see generally CRUVER, *supra* note 53.

¹¹⁸ See 15 U.S.C. § 78dd-1.

¹¹⁹ See 15 U.S.C. § 78dd-2.

¹²⁰ See 15 U.S.C. § 78dd-3.

international law doctrines.¹²¹ Consequently, the United States has a long reach in prosecuting transnational corrupt practices.

1. *Issuers*

A corporation can be considered an issuer under the FCPA if it (1) has a class of securities registered under Section 12 of the Securities and Exchange Act of 1934 (1934 Act) or (2) is required to file reports under section 15(d) of the 1934 Act.¹²² This “issuers” provision covers not only American corporations that may be subject to periodic reporting under securities laws, but also foreign corporations that issue securities on the New York Stock Exchange.¹²³ Significantly, prior to the 1998 Amendments, jurisdiction over issuers was contingent on the use of “the mails or any means or instrumentality of interstate commerce.”¹²⁴ Under this theory, jurisdiction existed, because any act using an American commercial mechanism, such as a wire transfer from an American bank to a foreign bank, implicated the Commerce Clause of the U.S. Constitution.¹²⁵ The 1998 Amended FCPA explicitly authorizes alternate jurisdiction over

¹²¹ There are five theories of extraterritorial jurisdiction recognized under international law: territorial, nationality, protective, universal, and passive personality. See H. Lowel Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INTL & COMP. L. REV. 407, 419 (1999). The first two theories, territorial and nationality, are much more accepted throughout the international legal community than the last three. See *id.* at 419-420.

Territorial jurisdiction is based on the place where the offense is committed. See *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter *Harvard Research*]. Nationality jurisdiction is based on the nationality or national character of the person committing the offense. See *id.* Protective jurisdiction is based on the national interest injured by the offense. See *id.* Universal jurisdiction is based on the custody of the person committing the offense. See *id.* Passive personality jurisdiction is based on the nationality or national character of the person injured by the offense. See *id.* These five theories of jurisdiction are recognized in the Restatement, a body of law that attempts to present the current state of law, as well as the law as it could be. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS 402 cmts. c-g (1986).

The fact that U.S. jurisdiction is established over “issuers,” “domestic concerns,” and “persons other than issuers and domestic concerns” through different international law doctrines is central to the discussion, *infra* Part IV.A, concerning the overall utility of expanded extraterritorial jurisdiction. A reason for this may be that as jurisdictional reach becomes more attenuated between nation and actor, it becomes less legitimate as well.

¹²² See 15 U.S.C. § 78dd-1(a).

¹²³ See 15 U.S.C. § 78dd-1(a).

¹²⁴ Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

¹²⁵ See U.S. CONST. art. I, § 8. This extension of jurisdiction is most closely in line with the theory of protective jurisdiction. See *supra* note 121.

issuers based on their U.S. nationality status alone, even in the absence of a Commerce Clause connection.¹²⁶

2. *Domestic concerns*

The term “domestic concern” includes either any U.S. citizen, national, or resident or any entity whose principle place of business is within the United States or who is incorporated under the laws of any U.S. state, commonwealth, territory, or possession.¹²⁷ This includes officers, directors, employees, agents, and shareholders acting on the company’s behalf.¹²⁸ Additionally, the 1998 Amendments authorized alternate jurisdiction based on nationality.¹²⁹ Such jurisdiction includes those domestic entities that are either U.S. nationals as defined in section 101 of the Immigration and Nationality Act¹³⁰ or business entities organized under the laws of the United States or its states, territories, possessions, or political subdivisions.¹³¹

3. *Persons other than issuers or domestic concerns*

Jurisdiction over “persons other than issuers or domestic concerns” is new to the 1998 Amended FCPA.¹³² Under the 1998 Amended FCPA, this “persons” category extends jurisdiction extraterritorially to those entities that do not constitute issuers or domestic concerns.¹³³ Such entities may be civilly or criminally accountable if, while in the territory of the United States, they commit any act in the furtherance of a corrupt act including, but not

¹²⁶ See 15 U.S.C. § 78dd-1(g). This extension of jurisdiction follows the theory of nationality jurisdiction. See *supra* note 121.

¹²⁷ See 15 U.S.C. § 78dd-2(h)(1). See also Levy, *supra* note 2, at 75.

¹²⁸ See ABA/CLE FCPA MANUAL, *supra* note 99, at § A-2.

¹²⁹ See 15 U.S.C. § 78dd-2(i)(1). This extension of jurisdiction follows the theory of nationality jurisdiction. See *supra* note 121.

¹³⁰ See 8 U.S.C. § 1101.

¹³¹ See 15 U.S.C. § 78dd-2(i)(2).

¹³² See 15 U.S.C. § 78dd-3.

¹³³ See CRUVER, *supra* note 53, at 79-80.

limited to, the use of “an instrumentality of interstate commerce.”¹³⁴ As such, jurisdiction over these entities, which may be either foreign nationals or business entities organized under the laws of a foreign state,¹³⁵ rests entirely on the implication of the Commerce Clause, just as issuers and domestic concerns had prior to the 1998 Amendments.¹³⁶

This new provision represents a significant expansion of the extraterritorial jurisdiction of the FCPA. Prior to the 1998 Amendments, only U.S. corporations and persons could be prosecuted for a corrupt act undertaken by a foreign business partner, and these persons could only be held accountable if they had the requisite knowledge.¹³⁷ Now, the foreign business partner itself can be held accountable under U.S. law. Thus, newly covered entities could include any foreign agent, foreign distributor, foreign subsidiary, foreign joint venture partner, or other foreign business partner that commits some act, no matter how insignificant, that implicates U.S. authority and furthers corruption. For example, an Indonesian businessman and his Indonesian company are now potentially accountable under the 1998 Amended FCPA for a corrupt payment that the businessman authorized to an Indonesian official while he was in Indonesia if part of the payment comes from funds held in a U.S. bank.¹³⁸

C. *Elements*

The rule setting forth what the DOJ must show to prove a criminally corrupt act under the 1998 Amended FCPA can be divided into nine elements.¹³⁹ A violation of the Act’s anti-bribery provisions occurs if:

¹³⁴ 15 U.S.C. § 78dd-3(a).

¹³⁵ See CRUVER, *supra* note 53, at 79-80.

¹³⁶ This extension of jurisdiction is most analogous to the theory of protective jurisdiction. See *supra* note 121. A difference arises in the context of foreign persons and entities, however, because they may lack the significant contacts with the United States that issuers and domestic concerns could be presumed to have. See *infra* note 184.

¹³⁷ See Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

¹³⁸ This result is absurd, because the actions of the Indonesian business entities involved have almost no connection with the United States. Admittedly, some commentators argue that the 1998 Amended FCPA requires foreign nationals to have undertaken an act “while physically present in the United States.” CRUVER, *supra* note 53, at 80. The “persons other than issuers of domestic concerns,” however, contains no language pertaining to the physical location of the actor. 15 U.S.C. § 78dd-3 (1998).

¹³⁹ See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

- (1) an issuer, domestic concern, or any person other than an issuer or domestic concern;¹⁴⁰
- (2) uses the mails or any other means or instrumentality of interstate commerce;¹⁴¹
- (3) corruptly;¹⁴²
- (4) in furtherance of;¹⁴³
- (5) a payment, offer, promise to pay, or authorization of a payment, promise or offer;
- (6) of money or anything of value;¹⁴⁴
- (7) to (a) any foreign official,¹⁴⁵ (b) any foreign political party or party official, (c) candidate for foreign political office, or (d) any person while

¹⁴⁰ See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). See also *supra* Part III.B.

¹⁴¹ See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). “Instrumentality of interstate commerce” includes e-mail, internet, telephone, facsimile, air transportation, or the mails. See CRUVER, *supra* note 53, at 19. This element now applies only to “any other person” and to domestic concerns who are not U.S. nationals or businesses organized under U.S. laws. See *supra* Part III.B.

¹⁴² 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The “corruptly” provision is discussed extensively *infra* Part IV.B.

¹⁴³ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). Verbal statements by Peter B. Clark, Deputy Chief, Fraud Section, U.S. Department of Justice, indicate that the “in furtherance of” standard will likely be construed very broadly, e.g., emails and other electronic communication devices employing Internet and satellite technologies. See Clark Statements, *supra* note 108. As such, the “in furtherance standard ‘significantly broadened the jurisdictional scope of the FCPA’ such that under this standard, the use of an interstate facility need only be incident to an official part of the scheme.” DONALD ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 4-7 (1998).

¹⁴⁴ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). Peter Clark also stated that “anything of value” will be construed broadly as well. See Clark Statements, *supra* note 108. The phrase “anything of value” is contained in other U.S. criminal statutes and “has been broadly construed to encompass both tangible and intangible benefits, which an official subjectively believes to be of value.” ZARIN, *supra* note 143, at 4-23.

¹⁴⁵ 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2). The term foreign official was expanded in scope by the 1998 Amendments to apply to those employed by “public international organizations,” as well as per se government entities. See *id.* This change could be an indication of the growing role that such international organizations, including Transparency International, may play in the international marketplace of the twenty-first century. See *infra* Part V.

“knowing”¹⁴⁶ that the payment or promise to pay will be passed on to one of the above;

- (8) for the purposes of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit to do any act in violation of his or her lawful duty, or (c) securing any improper advantage;¹⁴⁷
- (9) to obtain or retain business, or direct business to any person.¹⁴⁸

Of all these, the “corruptly” element raises the most significant international issues, because its basis in American moral values highlights the cultural differences that arise in defining transnational corrupt acts. Therefore, this comment focuses on the appropriateness of “corruptly” as the standard to evaluate actions in foreign lands.¹⁴⁹

D. *Exception and Defenses*¹⁵⁰

As noted above at Part II.B, changes in 1988 Amendments included the addition of exception for “facilitating” payments¹⁵¹ and affirmative defenses for actions legal under foreign

¹⁴⁶ See 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3). For further information on the 1988 repeal of the “reason to know” standard and an analysis of the FCPA’s present “knowing” standard, see ZARIN, *supra* note 143, at 4-30.

¹⁴⁷ 15 U.S.C. §§ 78dd-1(a)(2)(4), 78dd-2(a)(2)(4), 78dd-3(a)(2)(4). Although the addition of the phrase “securing any improper advantage” is new to the FCPA with the 1988 Amendments, it is not expected to have a major effect on the Act’s application. The section does, however, link the act to business practices within the provision devoted to the performance sought by a payoff. The act previously focused the language in this element on the political arena. Language relating to business was, and still is, located in the following element, which concerns the ultimate result desired from the payoff. Along those lines, it is also interesting to note that the “improper advantage” language, which was borrowed from the OECD Convention, is located in a different location within the elements of the latter. While “securing any improper advantage” is located within the element dealing with the action done by a government official in the FCPA, in the OECD Convention, that language appears in the following section dealing with the ultimate result desired. It is unknown what difficulties, if any, may occur from this variance when the FCPA and other national laws in line with the OECD Convention are to be reconciled during an internationally sponsored prosecution. Compare 15 U.S.C. §§ 78dd-1(a)(2)(A)(iii), 78dd-2(a)(2)(A)(iii), 78dd-3(a)(2)(A)(iii) with OECD Convention art. 1, § 1. See also Moyer Remarks, *supra* note 81.

¹⁴⁸ 15 U.S.C. §§ 78dd-1(a)(2)(B), 78dd-2(a)(2)(B), 78dd-3(a)(2)(B).

¹⁴⁹ See *infra* Part IV.B on the extension of the 1998 Amended FCPA extraterritorially.

¹⁵⁰ See 15 U.S.C. §§ 78dd-1(b, c), 78dd-2(b, c), 78dd-3(b, c).

¹⁵¹ See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

law¹⁵² and reasonable and bona fide expenditures.¹⁵³ The “facilitating” payments exception covers small payments made for routine governmental functions. The affirmative defenses provide relief from culpability for payments that would be FCPA violations, but are either legal by written instrument in the foreign country where they occurred or are reasonable expenses made to a foreign official during the promotion of a product or service. Although the exception/affirmative defenses were originally intended to ease the burden on U.S. companies by allowing certain small or fringe payments made innocently to foreign officials, their vagueness has produced more uncertainty than satisfaction.¹⁵⁴

E. *Penalties and Consequences*

Although the most damaging long-term consequence of an FCPA violation may be the negative publicity that could result from a semi-open prosecution by the United States government,¹⁵⁵ the FCPA provides for reasonably severe monetary and non-monetary penalties. Fines can be as high as \$2 million per violation, and other penalties can include difficulty in acquiring import and export licenses.¹⁵⁶

¹⁵² See 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

¹⁵³ See 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

¹⁵⁴ See Levy, *supra* note 2, at 80-81. In light of the expansion of FCPA jurisdiction to foreign person’s and companies, a new breed of potentially liable corporate actors with a limited grasp of U.S. laws, it may be time to remove these exceptions. A currency-based exception, which allows all payments under a certain value, would eliminate any doubt in the minds of both foreign and domestic executives as to whether a payment was unlawful without jeopardizing the central objectives of the FCPA.

At the 1999 ABA/CLE Conference on the Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention, one of the central concerns of the general counsel in attendance was quantitatively how much was too much in terms of applying the facilitating payments exception. In spite of their concern and uncertainty, however, DOJ and SEC officials were unwilling to provide guidance in the form of a monetary amount. As such, it appears that the facilitating payments exception will continue to receive little use. One scholar notes that “[s]ome commentators even suggest that the SEC and DOJ have intentionally avoided providing interpretational guidelines to the FCPA[;] fearing that such aid could foster its circumvention” and that the SEC and DOJ follow “the theory that risk aversion under conditions of ambiguity will ensure the most rigorous possible self-enforcement.” Salbu, *supra* note 3, at 263.

¹⁵⁵ The public’s loss of confidence in the integrity of American businesses and subsequent fears concerning the domestic economic effects resulting from such a loss of confidence constituted one of main concerns for enacting the FCPA in the first place. See CRUVER, *supra* note 53, at 5-6.

¹⁵⁶ See *id.* at 24.

1. *Individual violators*

Individual officers, directors, and the like are subject to criminal fines up to \$100,000 and/or imprisonment up to five years.¹⁵⁷ Individuals are also subject to civil penalties of not more than \$10,000.¹⁵⁸ Importantly, the corporation or other business entity, which is the principle of a guilty or liable agent, may not pay or reimburse these monetary penalties.¹⁵⁹

2. *Business entities*

Business entities may be fined up to \$2 million per violation.¹⁶⁰ Additionally, violations may result in significant non-monetary consequences including, but not limited to: difficulty in obtaining export licenses from the U.S. government;¹⁶¹ loss of the ability to import or export defense products or services by order of the President;¹⁶² the possibility of future anti-trust suits by competitors;¹⁶³ and potential shareholder suits for loss of earnings.¹⁶⁴ Further, both individuals and business entities may be tried concurrently by the SEC or DOJ for violations of alternate federal and state anti-fraud provisions, including mail and wire fraud statutes,¹⁶⁵ RICO statutes,¹⁶⁶ and the Travel Act.¹⁶⁷

¹⁵⁷ See ABA/CLE FCPA MANUAL, *supra* note 99, § B-3.

¹⁵⁸ For a detailed description of how such fines and sentences are calculated, see generally U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5C1.1.

¹⁵⁹ See BIALOS & HUSISIAN, *supra* note 17, at 50.

¹⁶⁰ See ABA/CLE FCPA MANUAL, *supra* note 99, § B-3.

¹⁶¹ See *id.* § A-3. In 1995, Lockheed Corporation admitted paying \$1 million to an Egyptian government official in order to facilitate an aircraft sale. Lockheed was reportedly fined over \$20 million and continues to face vigorous investigation by U.S. authorities in receiving export licenses for high value merchandise. See Salbu, *supra* note 3, at 237. See also Andy Pasztor & Jeff Cole, *Lockheed Martin Faces 3 Federal Probes into Possible Payments for Foreign Sales*, WALL ST. J., Sept. 5, 1995, at A6.

¹⁶² See ABA/CLE FCPA MANUAL, *supra* note 99, § A-3.

¹⁶³ See *id.* §§ A-3, A-4.

¹⁶⁴ See *id.* § A-15.

¹⁶⁵ See 18 U.S.C. §§ 1341, 1343.

¹⁶⁶ See 18 U.S.C. §§ 1661-1665.

¹⁶⁷ See 18 U.S.C. § 1952.

F. *Enforcement*

Two governmental agencies have the authority to enforce the 1998 Amended FCPA. The DOJ has primary authority over criminal enforcement,¹⁶⁸ and the DOJ's Fraud Section will initiate and conduct most prosecutions under the FCPA.¹⁶⁹ Due in large part to the severity of available penalties, rather than a full trial,¹⁷⁰ the vast majority of DOJ prosecutions under the FCPA eventually results in voluntary disclosures by the suspected entity in exchange for anonymity by the DOJ. The SEC also has significant civil enforcement capabilities, which it usually uses to further its inherent interest in patrolling violations of the accounting provisions of the FCPA.¹⁷¹ SEC prosecutions are principally directed through the SEC's Division of Enforcement.¹⁷² Thus, although the DOJ takes a dominant role in prosecuting the 1998 Amended FCPA's anti-bribery provisions, an individual or business entity could face multiple prosecutions for an alleged violation of the 1998 Amended FCPA.

G. *The 1998 Amended FCPA Makes International Business more Inefficient*

The anti-bribery provisions of the 1998 Amended FCPA inhibit the efficiency international business transactions in several ways. First, the jurisdictional scope of the 1998 Amended FCPA includes foreign businesses and business people that have little connection with the United States. This may result in the prosecution of essentially innocent persons and ultimately injure the ability of U.S. businesses to maintain business partnerships abroad. Second, the 1998 Amended FCPA includes the "corruptly" provision, which is grounded in the American moral theory that payments to government officials for service outside their professional duties are morally wrong. This policy represents the imposition of American morals on foreign peoples and could result in anti-American sentiment within foreign nations. Third, the ambiguity of the

¹⁶⁸ See Clark Statements, *supra* note 108.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See ABA/CLE FCPA MANUAL, *supra* note 99, at A-4.

¹⁷² Paraphrase of verbal statements by Paul V. Gerlach, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, made at the ABA/CLE Conference on the Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention, in Marina del Rey, CA. (Feb. 19, 1999).

1998 Amended FCPA's exception and affirmative defenses makes effective legal use of these provisions by businesses extremely difficult. Finally, the severity of the penalties for an FCPA violation makes the avoidance of an international business transaction between U.S. companies and companies from developing countries more economically feasible than fulfillment of an agreement. For example, U.S. and developing country companies may prefer to engage in business transactions where the legal standard applied by either company's government clearer and less threatening. This is an inefficient business practice, because financial decisions are not made on the basis of market principles, such as a cheaper overall cost.

IV. POTENTIAL IMPLICATIONS OF THE 1998 AMENDMENTS ON FUTURE APPLICATION

Due to the 1998 Amended FCPA's expanded extraterritorial reach through the "persons other than issuers or domestic concerns" provision, "corruptly," the most culturally sensitive element of the Act, becomes the most acute. In this context, this comment explains the potential difficulties of applying the morals-based corruption standard of the 1998 Amended FCPA in Indonesia. In addition to this cultural clash, the 1998 Amended FCPA has negative implications for U.S. commercial relations and for the advancement of effective anti-corruption efforts abroad.

A. *Expanded Extraterritorial Jurisdiction*

The 1998 Amendments enhanced the jurisdictional reach of the FCPA in two ways. First, the 1998 Amendments made the FCPA's jurisdiction over U.S. nationals absolute through the addition of an "alternative jurisdiction" section.¹⁷³ The addition of this section removed the territorial nexus requirement,¹⁷⁴ which had previously granted immediate jurisdiction over U.S. nationals regardless of where in the world the national supposedly committed the crime or how long the U.S. national had been abroad.¹⁷⁵ Second, the 1998 Amendments added a new

¹⁷³ See 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

¹⁷⁴ See *supra* Part III.B.1. Thus, no longer would an American national have to have used the mails or another form of interstate commerce in order to fall under U.S. jurisdiction.

¹⁷⁵ Although the addition of the alternative jurisdiction section may have opened the door of jurisdiction to a new class of American nationals who live abroad, it is concededly well within the authority of the United States to implement such a provision. As such, though many of the arguments discussed later hold true for this provision as well, specific effects of the provision will not be discussed in depth. It suffices to say that prosecuting a U.S.

provision covering “persons other than issuers or domestic concerns.”¹⁷⁶ This was the first codification within the FCPA that contemplated holding foreign nationals accountable for extraterritorial violations.¹⁷⁷ Prior to the 1998 Amendments, only American nationals and companies and foreign companies registering U.S. securities could be prosecuted for the extraterritorial actions of a foreign agent or business associate.¹⁷⁸ Now, foreigners themselves may be held accountable. A territorial nexus to the United States, however broadly interpreted, must still support an indictment against a foreign national.¹⁷⁹ These two additions greatly bolster the FCPA’s extraterritorial reach.

Although augmenting the FCPA’s jurisdiction may be viewed as an exercise of jurisdictional authority freely granted under international law,¹⁸⁰ applying the 1998 Amended FCPA to newly covered foreign entities may cause significant difficulties. Prior to the 1998 Amendments, prosecutions were directed towards U.S.-based business entities, which were expected to have knowledge of U.S. laws.¹⁸¹ This was in accordance with legal principles of U.S. foreign relations, which require that the entity covered by an extraterritorially applied law have close connections with the prescribing country and justifiably expect potential culpability.¹⁸² Those subject to the pre-1998 Amended FCPA were usually U.S. citizens or U.S.

national who has lived in Indonesia under Indonesian laws for twenty years for actions done in Indonesia with no territorial nexus to the United States seems patently unreasonable.

¹⁷⁶ 15 U.S.C. § 78dd-3.

¹⁷⁷ This extension came in response to the OECD Convention mandate that the “territorial basis for jurisdiction should be interpreted broadly so that extensive physical connection to the bribery act is not required.” OECD Convention Commentaries, *supra* note 13, ¶ 24.

¹⁷⁸ See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, Subtitle A, Part I, §§ 5003(a), 5003(c), 102 Stat. 1107, 1415-25 (amended 1998).

¹⁷⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1986); see also *supra* Part III.B.3.

¹⁸⁰ As discussed earlier, the five bases by which international law recognizes prescriptive jurisdiction are: (1) territory, (2) nationality, (3) protective, (4) universal, and (5) passive personality. See *supra* note 120. While some methods are more commonly accepted as persuasive within the international community, a nation is free to argue for the use of any of them under circumstances that are in some way connected to that nation. See Brown, *supra* note 121, at 419-422; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1986).

¹⁸¹ See Omnibus Trade and Competitiveness Act of 1988 §§ 5003(a), 5003(c).

¹⁸² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1986).

Limitations on Jurisdiction to Prescribe:

corporations that had committed some act in furtherance of a corrupt deed within U.S. territory.¹⁸³ Due to this close connection with U.S. interests, extraterritorial jurisdiction was legally legitimate, and notice and comprehension of the FCPA's provisions could be expected.¹⁸⁴ Conversely, as a connection to U.S. interests becomes more tenuous, i.e., a foreign national acting abroad, jurisdiction becomes less legitimate, and awareness and understanding of the FCPA's provisions likewise becomes less certain to presume.¹⁸⁵ Thus, as jurisdiction expands to

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- (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
- ***
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- ***
- (d) the existence of justified expectations that might be protected or hurt by the regulation.

Id.

¹⁸³ See Moyer Remarks, *supra* note 81.

¹⁸⁴ U.S. jurisprudence has often acknowledged that though the Commerce Clause granted Congress the ability to prescribe jurisdiction outside the territory of the United States, extraterritorial jurisdiction not be allowed absent clear Congressional intent. See Brown, *supra* note 121, at 449. This presumption against extraterritoriality has been noted by the U.S. Supreme Court:

It is a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . We assume that Congress legislates against the backdrop of the presumption against extra-territoriality. Therefore, unless there is the affirmative intention of Congress clearly expressed, . . . we must presume it is primarily concerned with domestic conditions.

Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); see also, e.g., *Smith v. U.S.*, 507 U.S. 197 (1993) (stating that the presumption against extraterritoriality means that any doubt over Congressional intent be resolved against jurisdiction). That presumption having been met with FCPA legislation, jurisdiction still must be limited to actors with connections to the United States, and must not be unreasonable. See Brown, *supra* note 121, at 450-451 n.163; see also *supra* note 180. These requirements are intended to ensure that actors fall within such jurisdiction have the knowledge necessary to form criminal intent. See Brown, *supra* note 121, at 450-451 n.163.

¹⁸⁵ Limits on the extent to which the United States may extend its jurisdiction were imposed with the protection of foreign sovereignty interests in mind. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, Part IV, Ch. 1, intro. note (1986). When either the nationality of the person or people involved in an apparent violation is no

cover those with only a peripheral connection with the United States, violations of the FCPA may result more from legal ignorance than from criminal intent.¹⁸⁶ This may be especially true with regard to the morally charged “corruptly” element of an FCPA violation.

B. “Corruptly”

For an FCPA violation to occur, an individual must have acted “corruptly” in distributing an allegedly illegal payment regardless of the act committed.¹⁸⁷ As such, “corruptly” serves as an essential *mens rea* element under the FCPA.¹⁸⁸ In deciphering the meaning of “corruptly,” it is important to distinguish between the level of intent necessary to satisfy the element. Basically, a corrupt payment need only be intended to influence the recipient to “misuse his official position” to direct or obtain business wrongfully.¹⁸⁹

Although this language seems clear enough apply cross-culturally, the word “corruptly” itself creates alternate problems when applied outside of the United States. The English language term “corruptly” involves actions that are distinctly “evil” in a moral sense, a quality

longer American, or the location of the suspected act is no longer within the United States, familiarity with U.S. laws is likely decreased, and the reasonableness standard underlying this legal approach is breached. *See* Brown, *supra* note 121, at 450-451 n.163. Moreover, the parties involved may be under the belief that their actions are subject only to the laws and enforcement powers of their home nation or location, respectively.

Criticism of extraterritorial U.S. law is not new to legal discourse, and has recently arisen especially concerning the Helms-Burton Act, which imposed a trade boycott on Cuba. *See, e.g.,* Andreas F. Lowenfield, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act: Congress and Cuba: The 2 Helms-Burton Act*, 90 AM. J. INT’L L. 419 (1996) (noting the confusion expressed by foreign-based U.S. subsidiaries concerning their coverage under the Helms-Burton Act in relation to Cuba).

¹⁸⁶ The “effects doctrine” is an additional method by which states may argue the legitimacy of exerting jurisdiction over foreign actors for acts done abroad. *See* Brown, *supra* note 121, at 445-447. The “effects doctrine” holds that states have the power to exert criminal jurisdiction over actors whose acts were intended to have substantial effects within the United States. *See, e.g., Strassheim v. Daly*, 221 U.S. 280, 285 (1911) (Justice Holmes stating that, “acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power”). Whether the “effects doctrine” can be legitimately applied where purely economic harm is done, however, is arguable. *See* Brown, *supra* note 121, at 446-447.

¹⁸⁷ *See DOJ-DOC Brochure, supra* note 116, *Antibribery Provisions*, § B. *Corrupt Intent*.

¹⁸⁸ *See* Surjadinata, *supra* note 16, at 1032. *See also Depuydt v. FMC Corp.*, No.92-16729, 1994 U.S. App. LEXIS 25256, at *9-*10 (9th Cir. Sept. 7, 1994) (finding corrupt intent prerequisite to commission of crime).

¹⁸⁹ H.R. REP. NO. 640 at 7-8 (1998).

that varies among national cultures.¹⁹⁰ Not surprisingly, the “corruptly” element in the FCPA is specifically tailored for use under an American legal and cultural pretext. “Congress intended the corruptly standard under the FCPA to conform with the ‘corruptly’ requirement under [U.S.] domestic bribery law.”¹⁹¹ Thus, technically, for the “corruptly” element to be satisfied, a violator must not only have intended to purchase some favor from a government official, but must also have done so with the knowledge that this act was evil or bad in an American sense.¹⁹² Whether the DOJ will make this subtle distinction during its prosecutions of foreign nationals is, at present, unknown.

¹⁹⁰ The FCPA’s legislative history illustrates the moral connotations invoked by the use of “corruptly”:

The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to *misuse* his official position in order to *wrongfully* direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation. The word “corruptly” connotes an *evil motive or purpose*, an intent to *wrongfully* influence the recipient.

Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Act of 1977, S. REP. NO. 95-114 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4108 (emphasis added).

¹⁹¹ ZARIN, *supra* note 143, at 4-9. One scholar notes a further difficulty in determining the level of intent required by the FCPA’s “corruptly” element: “although the mens rea element of both the U.S. criminal bribery statute and the FCPA are identical, the two statutes have different statutory language.” Surjadinata, *supra* note 16, at 1032. Compare 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (FCPA anti-bribery provisions) with 18 U.S.C.S. § 201(b) (1996) (U.S. domestic criminal bribery statute), which in pertinent part provides:

Whoever--

- (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . .
 - (A) to influence any official act; or
 - (B) to influence such public official . . . to commit or aid in committing . . . any fraud, on the United States; or
 - (C) to induce such public official . . . to do any act in violation of the lawful duty of such official . . . shall be fined not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both.

18 U.S.C. § 201(b) (1996), reprinted in Surjadinata, *supra* note 16, at 1033.

¹⁹² For example, the person who pays a foreign official to receive a government contract acts with the knowledge that what he has done not only distorts the economic benefits associated with open competition, but is also morally wrong. Other crimes that carry a moral element include murder and rape. See Salbu, *supra* note 3, at 276; see also *Center for Moral Concern, Moral State of the Union* (visited Apr. 21, 2000) <<http://www.usnis.org/moralstateofunion.htm>>.

C. *Implications for Future U.S. Commercial Relations with Developing Countries*

Although the expanded extraterritorial jurisdiction of the 1998 Amended FCPA will have significant short-term effects for American multinational corporation (MNC) corporate counsels,¹⁹³ the most disruptive effect in the long term is that the Act will deter foreign businesses from transacting with the United States, because the risk of prosecution may outweigh the benefits of doing business. In addition, foreign business entities could become confused and frustrated by the 1998 Amended FCPA's morals-based corruptly provision, because compliance with that provision is at odds with their nation's traditional cultural norms.

Indonesian culture for example, "strongly favors gift-giving, particularly as a means of expressing gratitude and loyalty to authority figures or to reward service."¹⁹⁴ Therefore, the DOJ could investigate an Indonesian businessperson for a minor gift-giving practice within Indonesia by the DOJ.¹⁹⁵ That such prosecutions are unlikely is of little consolation to foreign business

¹⁹³ The 1998 Amended FCPA's new jurisdiction over foreign business interests, combined with the Act's continued inclusion of the "corruptly" element, creates practical difficulties for American multinational corporation (MNC) corporate counsel. In the short-term, American corporations will not only be held accountable for the FCPA violations of their foreign partners, but they will also find that the vagueness of the FCPA will make reassuring worried foreign business partners of their own non-culpability virtually impossible. See Nichols, *supra* note 3, at 287. As one FCPA proponent suggests, "[t]he most significant problem associated with vagueness is that the [FCPA] does not create a bright line that divides allowable conduct from prohibited conduct, and thus possibly chills what might be legitimate business activity." *Id.*

Moreover, failure to avoid either violations or lost economic opportunities with foreign partners could be viewed by corporate management as legal incompetence rather than the unavoidable result of an over-extended law. See Michelle Celarier, *What's a Bribe Anyway? U.S. Law Against Foreign Bribery Has Few Teeth*, CFO, Nov. 1998, at 69. "The issue often boils down to whether or not the U.S. partner knew, or should have known, about any illegal activity undertaken by its partner." *Id.* To reduce the likelihood that American MNCs will face liability from their foreign business partners, they must institute a concerted due diligence program. See *id.* In effect, this means taking extensive measures to discover the practices of foreign partners and to express their continued dissatisfaction to corporate management if such practices are uncovered. For a complete discussion of the due diligence aspect of the FCPA, see ABA/CLE FCPA MANUAL, *supra* note 99, § D, 24-31. In light of the distant locations of many foreign partnerships, these measures seem onerous, if not impossible, for U.S.-based corporate counsel to accomplish.

¹⁹⁴ Donna K. Woodward, *Foreigners Fathered RI's Graft*, JAKARTA POST, Dec. 17, 1997, at 4.

¹⁹⁵ One can imagine a situation in which an Indonesian construction contractor presents a gift, perhaps a gold watch, in deference to a high-ranking Indonesian government official prior to bid submission on a large government-sponsored construction project. When the contractor receives the contract for legitimately submitting the lowest bid, a Canadian construction company, spurned by the loss of the contract and having heard rumors concerning the watch, contacts DOJ authorities. After a short investigation, the DOJ discovers that the watch was purchased via telephone from a Rolex dealer in Los Angeles and delivered by Federal Express. Because the use of telephones is considered a "mean or instrumentality of interstate commerce," the DOJ would have jurisdiction under the 1998 Amended FCPA. See CRUVER, *supra* note 53, at 19. The fact that the contractor would have received the

interests. The mere possibility of prosecution may prompt Indonesian businesses to distance themselves from American jurisdiction by rejecting agency or joint venture opportunities with American MNCs, by slowing trade with and investment in the United States, or by transferring liquid assets out of American banks.¹⁹⁶

D. *Implications for the Advancement of Foreign Anti-Corruption Programs*

In addition to the economic damage caused by issuing fines or criminal penalties to potentially “innocent” parties, cultural and political damage results when one nation imposes its values on another through jurisdictional expansion.¹⁹⁷ The legal standard of corruption of the 1998 Amended FCPA reflects the American moral basis under which the 1977 FCPA was enacted.¹⁹⁸ Specifically, the “corruptly” element¹⁹⁹ of an FCPA offense provides that a prohibited transaction between a foreign government official and a foreign businessperson is not only illegal, but is also morally wrong.²⁰⁰ As a result, some practices that are culturally and

contract regardless of the watch transfer is of no import under the FCPA. The Indonesian contractor will have committed a morally reprehensible crime without having known so and could realistically be brought to justice by the DOJ. The fact that this outcome is possible represents the invasive quality of a morally driven American law applied extraterritorially. The harsh reality of this situation becomes clear in light of the high probability that this would not even be a crime under Indonesian law as government finances were not injured. Functional inefficiency further ensues, because the Indonesian contractor may not understand the basis for the illegality of his actions. In his mind, he may simply be showing respect or deference. The scenario breeds confusion over American laws and contempt for their intrusion on a principally Indonesian transaction.

Furthermore, the DOJ has not hidden the fact that their highest priority in supporting the OECD Convention and the 1998 Amendments was the augmented enforcement capability that would accompany such modifications in the form of mutual assistance programs. Peter Clark, Deputy Chief, Fraud Section of the DOJ, has admitted that joint ventures present “complications” in the enforcement process, as does the secrecy of overseas banking procedures. *See Clark Statements, supra note 108.* The DOJ believes that with the amendments, many of these prosecution roadblocks may be eliminated. *See Celarier, supra note 193, at 69.*

¹⁹⁶ The goal of such techniques would be to eliminate any possibility that the territorial nexus component, which is necessary for an FCPA violation by a foreign national, be satisfied. The fallout of such action could be felt severely in the United States, where significant financial relationships and corporate transactions could be lost to American MNCs.

¹⁹⁷ *See generally* Salbu, *supra* note 14, 226-227.

¹⁹⁸ *See supra* Part II.B.1.

¹⁹⁹ *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

²⁰⁰ *See id.*; *see also supra* Part IV.B.

legally acceptable in a developing country, such as Indonesia,²⁰¹ may be deemed illegal under the 1998 Amended FCPA.

The imposition of one sovereign nation's moral values on another sovereign nation through legal means or otherwise, is commonly referred to as moral imperialism.²⁰² Ultimately, moral imperialism harms the imposing state by fostering animosity within the state upon which it is being imposed.²⁰³ Foreign business interests may feel that their legitimate cultural beliefs are being disrespected²⁰⁴ and could reject or attempt to inhibit enforcement of any anti-corruption measure as result.²⁰⁵ Such hostility not only results in strained commercial relations between the two countries, but also in a rejection of and retaliation towards the morals-based norm being imposed.²⁰⁶ In the context of the 1998 Amended FCPA, the legitimacy of a foreign nation's domestic anti-corruption programs, which have goals that are perceived to be similar to those of the FCPA, may suffer as a result of retaliation towards U.S. moral imperialism.²⁰⁷

²⁰¹ For example, a payment to a high-ranking government official in gratitude for years of fine service.

²⁰² See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 204-205 (1994).

²⁰³ See Salbu, *supra* note 3, at 276.

²⁰⁴ A number of cultural values are commonly considered "discretionary," because they may be freely and legitimately negotiated within localized social contracts. See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 260-62 (1994). Discretionary cultural values may be legitimately adopted on a national or supra-national basis. See *id.* These values are contrasted with those associated with universally recognized fundamental rights, which are non-negotiable. See *id.* Because the American moral tenet that corruption is evil is both relatively new and concentrated within Western nations, at least at present, this value is largely "discretionary."

²⁰⁵ See Salbu, *supra* note 14, at 227. Because the 1998 Amendments were only recently passed, there are no examples of how this may eventually be done. It is not unthinkable, however, that influential Indonesian business entities would call on "friendly" government contacts to refuse either to cooperate in DOJ investigations or to make investigations more costly using "well-strung red tape." See Rooke E-mail, *supra* note 116.

²⁰⁶ See Salbu, *supra* note 3, at 276-280.

²⁰⁷ Indonesia has experienced a sustained period of stagnant development in terms of its domestic anti-corruption laws. See *supra* note 116. Although this period coincided closely with the initiation and development of the FCPA, factors other than the FCPA have certainly been involved as well. A complete analysis of the long-term domestic political ramifications of extraterritorial anti-corruption application is beyond the scope of this paper. With the initiation of new anti-corruption legislation in Indonesia in 1999 for the first time in nearly twenty years, however, an examination of Indonesia's two-decade lack of anti-corruption reform is warranted. See generally Christopher John Duncan, Comment, *Re-examining Anti-corruption Legislation in Indonesia: Twenty-Five Lost Years* (forthcoming 2001) (copy on file with author).

The United States must respect the cultural differences existing in developing countries and allow them to construct anti-corruption programs on their own national terms. Although globalization has increased cultural diversity within nation-states,²⁰⁸ they remain the “primary unit of analysis” regarding economic, cultural, and political differences.²⁰⁹ In light of the continued legitimacy of cultural variation between nation-states, “it remains possible to defend domestic anti-bribery laws as acceptable while condemning extraterritorially applied anti-bribery laws as unacceptably morally imperialistic.”²¹⁰ In the wake of the Cold War, developing states are no longer bound to prerogatives set by a “super-power” with which they previously had to align themselves for strategic and economic reasons.²¹¹ Rather, they are free to proceed in the global marketplace as they wish and they should be allowed to develop domestic anti-corruption systems and legal precepts on their own.²¹²

In an era of increasing fragmentation,²¹³ it is imperative that effective domestic means of curbing damaging corruption evolve, especially in developing nations that have both strong traditions of patronage and attractive investment possibilities. Moreover, as demonstrated by the recent conflict in Kosovo, it is increasingly difficult, exhaustive, and not always effective for the

²⁰⁸ See Gary Minda, *Globalization of Culture*, 71 U. COLO. L. REV. 589, 593 (2000).

²⁰⁹ See Salbu, *supra* note 3, at 231.

²¹⁰ *Id.*

²¹¹ See generally John D. Ciorciari, *A Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations*, 22 FORDHAM INTL L.J. 292 (1998).

²¹² For example, much has been said of late concerning the easy availability overseas of U.S. cyberporn Internet sites. In Singapore, the government has taken affirmative steps, with little success, to prevent access within Singapore to these sites, which are considered morally offensive. Were Singapore in an economically dominant position over the United States, as the United States is over Indonesia, it is not difficult to imagine Singapore criminalizing the provision of pornographic site access by an American firm to those within Singapore. Nor is it difficult to imagine the uproar within the United States at the external limitation of an American social freedom. See generally Joseph Rodriguez, Comment, *A Comparative Study of Internet Content Regulations in the United States and Singapore: The Invincibility of Cyberporn*, 1 ASIAN-PAC. L. & POL'Y J. 9 (2000) <<http://www.hawaii.edu/aplpj/1/09.html>>.

Few desire a world in which discretionary cultural values are eliminated in favor of uniformity. A more logical approach to dealing with varying cultural beliefs in the present state of world affairs would be, rather than seeking to “evoke the normative global village,” focusing efforts on better understanding the reasoning behind cultural differences by effectuating increased global interaction. See Salbu, *supra* note 14, at 231-232.

²¹³ “‘Fragmentation’ refers to the devolution of decision-making to the local level.” Nichols, *supra* note 3, at 259, 265.

United States to play “international policeman” in all matters of international tumult.²¹⁴ Foreign nationals with varying conceptions of corruption may make the situation worse due to the potential for counter-measures.²¹⁵ As such, international NGO participation in domestic corruption prevention should be expanded. Not only do these organizations carry no apparent political agenda,²¹⁶ but their involvement also provides an opportunity for developing states to air their concerns, suggest new alternatives, and formulate mutually agreeable standards. These opportunities were largely absent at OECD Convention negotiations.

V. CONCLUSION: ALTERNATE SOLUTIONS

The 1998 Amended FCPA is not an ideal method of limiting the harmful effects of transnational corruption. Two areas of the 1998 Amended FCPA have negative implications by injuring American corporate interests abroad and inhibiting the FCPA’s effectiveness as an anti-corruption device. These two problem areas are: (1) the expanded extraterritorial jurisdiction of the 1998 Amended FCPA, made effective through the “persons other than issuers and domestic concerns” provision;²¹⁷ and (2) the morals-based legal standard of corruption embodied in the 1998 Amended FCPA’s “corruptly” element.²¹⁸ One solution for the United States would be to limit the extraterritorial reach of the FCPA by eliminating the “persons other than issuers and domestic concerns” provision and to defer to NGOs regarding transnational corruption prevention. Another solution would be to remove the 1998 Amended FCPA’s “corruptly” element and replace it with a market-based legal standard of corruption.

²¹⁴ Even eight months after U.S. involvement in Kosovo began, the United States has made little progress in achieving long-term peace, in spite high costs and the risk of many American lives. *See Kosovo is Starting to Look a Lot Like Korea*, TIME, Mar. 7, 2000, available at Time Magazine Website (visited Mar. 27, 2000) <<http://www.time.com/time/daily/0,2960,40446,00.html>>.

²¹⁵ *See Salbu, supra* note 14, at 227.

²¹⁶ *See* Bishwapriya Sanyal, *The Role of NGOs: Charity and Empowerment: NGOs Self-Defeating Quest for Autonomy*, 554 ANNALS 21, 22 (1997) (arguing that though NGO political autonomy provides legitimacy, NGOs must strive to foster a better with national governments). Transparency International states as its agenda to “bring together people of integrity in civil society, business and government to work as coalitions for systematic reforms.” *See* Transparency International, *Our Agenda* (visited Mar. 27, 2000) <<http://www.transparency.de/welcome.html>>.

²¹⁷ *See* 15 U.S.C. § 78dd-3; *see also supra* Part IV.A.

²¹⁸ *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a); *see also supra* Part IV.B.

A. *Limited Extraterritorial Jurisdiction and NGO Development of Domestic Anti-Corruption Schemes*

The extraterritorial jurisdiction of the 1998 Amended FCPA is overly broad, because it allows for the prosecution of foreigners who may have little to no connection with the United States.²¹⁹ The “persons other than issuers or domestic concerns” provision of the 1998 Amended FCPA²²⁰ expands the Act’s extraterritorial jurisdiction to foreign business entities for actions they may have taken in foreign countries without the knowledge that U.S. law was being broken.²²¹ For example, the 1998 Amended FCPA would make illegal a common payment by an Indonesian businessman to an Indonesian government official if authorization of the payment was made using a U.S.-licensed cellular telephone provider.²²² Because potential FCPA violators such as this have a very tenuous nexus with the United States, making them subject to U.S. anti-corruption law would be morally imperialistic and could incite anti-U.S. animus.²²³ Moreover, fearing possible prosecution, these foreign business entities may seek to distance themselves from U.S. business interests. Because such a business decision is not made using economic principles, such as market efficiency, U.S. commercial interests²²⁴ in these countries are damaged by not being allowed to compete effectively. For these reasons, the “persons other than issuers and domestic concerns” provision should be removed, and the FCPA’s extraterritorial reach should be limited to its pre-1998 Amendments form.

In light of the U.S. interest in curbing transnational corruption,²²⁵ however, as well as the FCPA’s poor past achievements in doing so,²²⁶ a return to the FCPA’s pre-1998 form cannot be viewed as an optimal solution. Therefore, a removal of expanded extraterritorial jurisdiction

²¹⁹ See 15 U.S.C. § 78dd-3; see also *supra* Part IV.A.

²²⁰ 15 U.S.C. § 78dd-3.

²²¹ See *id.*

²²² See *id.* § 78dd-3(a). See also CRUVER, *supra* note 53, at 19.

²²³ See Surjadinata, *supra* note 16, at 1021-26.

²²⁴ See *supra* Part IV.D.

²²⁵ See Clark Statements, *supra* note 108.

²²⁶ See Rooke E-mail, *supra* note 116. Peter Rooke of Transparency International’s Australia Branch has stated that unilateral U.S. efforts to stop transnational corruption have been, “at best, ineffective.” *Id.*

must be accompanied by the utilization of a concomitant international anti-corruption mechanism to replace it. NGOs such as Transparency International (TI)²²⁷ may act as such mechanisms.

In light of the growing awareness that creating or augmenting domestic anti-corruption systems in developing nations is the most effective method of battling corruption,²²⁸ TI would certainly be a catalyst to success.²²⁹ With over sixty national chapters and a well-known commission of officers, including former U.S. President Jimmy Carter and former World Bank regional manager Peter Eigen,²³⁰ “Transparency International promises to become a significant player in private sector efforts to combat corruption through its encouragement of national chapter activities that foster anti-corruption programs.”²³¹ TI refers to these anti-corruption programs as “national integrity systems.”²³²

Transparency International, unlike the 1998 Amended FCPA, focuses to a large degree on the “host” or “demand-side” of the corruption equation.²³³ This can be seen in TI’s official starting point for anti-corruption efforts: “[t]he obvious point of entry is to gain an understanding of the underlying causes, loopholes and incentives which feed corrupt practice at any level.”²³⁴

²²⁷ Though a variety of NGOs presently exist that could be helpful in creating new anti-corruption systems, including, but not limited to the World Bank, the International Monetary Fund, and the International Chamber of Commerce, this paper will focus centrally on Transparency International (TI). Not only does TI appear to have the fewest ties to governmental bodies, but TI is also the only major NGO devoted almost exclusively to counter corruption in international business transactions. See Transparency International, *Mission Statement, What Makes TI Different?* (visited Apr. 21, 2000) <<http://www.transparency.de/mission.html>>.

²²⁸ See Randall, *supra* note 3, at 679. “One promising alternative method of reducing corruption is for the U.S. government to work with developing countries that are trying to stamp out bribery on their own.” *Id.*

²²⁹ See *id.* at 653. “The success of programs already underway in developing countries indicates that more of the United States’ focus should be directed toward curbing the demand for—rather than the supply of—bribes.” *Id.*

²³⁰ See Bob Tippee, *Growing Attention to Corruption Forces Companies to Deal with Sensitive Issue*, OIL & GAS J., Nov. 9, 1998, available at 1998 WL 1897714.

²³¹ Gantz, *supra* note 7, at 476.

²³² *TI Executive Summary*, *supra* note 25, ¶ 1.

²³³ See *id.* ¶ 2. Much criticism has been made concerning the failure of the FCPA to account for issues implicated within the “host” or “accepting” country in a transnational corrupt practice. See Gantz, *supra* note 7, at 491. Research indicates that in formulating an extensive anti-corruption program centered around the FCPA, the United States has neither sought nor involved input from developing nations, nor provided incentive for these states to improve their own anti-corruption systems. See *id.*

²³⁴ *TI Executive Summary*, *supra* note 25, ¶ 3.

This outlook conflicts with the stance taken by the United States and the OECD Convention that anti-corruption measures in developing countries should be uniformly imposed on these countries by wealthy and powerful foreign states.²³⁵ Because NGO involvement occurs in the absence of moral and political prerogatives, the more cooperative, less coercive aspects of NGO involvement make it the more legitimate approach to fighting transnational corruption in the twenty-first century.²³⁶

Following its initial evaluation, Transparency International identifies the main types of corruption occurring within the public domain,²³⁷ allowing for greater precision in developing a national integrity system that fits a country's particular needs.²³⁸ Next, TI facilitates an easy and open information transfer such that the public may be informed and aware of the degree to which inefficient government practices are occurring.²³⁹ TI stresses that public support is extremely important and necessary for an anti-corruption program to succeed and calls for the public to refuse to tolerate corrupt practices as they become known.²⁴⁰ Once these opening steps are concluded, TI advocates the development of a serious and concerted reform program.²⁴¹

²³⁵ See *supra* Part I. Communications by the DOJ reveal that a central reason for the OECD Convention, and thus the 1998 Amendments was improved enforcement ability. See Clark Statements, *supra* note 108. This admission demonstrates that FCPA application represents a sort of "shotgun" approach to eliminating corruption that does not take transnational cultural diversity into account. See Salbu, *supra* note 14, at 253-54. This comment argues that such an approach is both economically counter-productive and damaging to foreign anti-corruption efforts. Rather, a cooperative approach should be employed, through which domestic anti-corruption systems are strengthened instead of bypassed.

²³⁶ See *id.* at 254. "Attempts to improve the world's business climate in the late 1990s and early twenty-first century should be attempts at persuasion rather than coercion. Stated differently, the United States and other sympathetic countries would be wise to avoid trying to force cultural monism throughout the world." See *id.*

²³⁷ See *TI Executive Summary*, *supra* note 25, ¶ 4.

²³⁸ See *id.*

²³⁹ See *id.* ¶ 21.

²⁴⁰ See *id.* ¶¶ 20-24.

²⁴¹ See *id.* ¶ 11. These eight reforms are:

- 1) a clear commitment by political leaders to combat corruption wherever it occurs and to submit themselves to scrutiny;
- 2) primary emphasis on prevention of future corruption and on changing systems (rather than indulging in witch-hunts);
- 3) the adoption of comprehensive anti-corruption legislation implemented by agencies of manifest integrity (including investigators, prosecutors, and adjudicators);

Importantly, these and other TI principles are not invasive in character, but rather are complementary to a nation's own anti-corruption programs.²⁴²

For NGOs such as Transparency International to succeed, however, they need funding and support from developed countries like the United States and other OECD members.²⁴³ In spite of these costs, the institutional development of domestic anti-corruption programs fostered by NGOs is the most effective means of transnational corruption prevention in the long-term.²⁴⁴ Moreover, deference to NGOs in the battle against transnational corruption could allow the United States DOJ more opportunity to monitor instances of corruption occurring within the United States, thereby enhancing the domestic anti-corruption enforcement capabilities of the DOJ. Because U.S. government deference to an NGO such as TI involves a far less structured, "hands-on" commitment by U.S. agencies, however, U.S. control over corruption prevention may be perceived by many as unnecessarily limited in extent.²⁴⁵ Nonetheless, in light of both the potential for charges of moral imperialism and the scant progress that has been made in deterring

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- 4) the identification of those government activities most prone to corruption and a review of both substantive law and administrative procedures;
 - 5) a program to ensure that salaries of civil servants and political leaders adequately reflect the responsibilities of their posts and are as comparable as possible with those in the private sector;
 - 6) a study of legal and administrative remedies to be sure that they provide adequate deterrence;
 - 7) the creation of a partnership between government and civil society (including the private sector, professions, religious organizations);
 - 8) making corruption a "high risk" and "low profit" undertaking.

Id.

In its many publications, TI proscribes a number of additional procedures and details the national integrity system on a much more specified scale, all of which closely involve their national chapters. An explanation of this area, however, is beyond the scope of this comment. The important point is that TI offers an alternate method to fight transnational corruption than that offered by the 1998 Amended FCPA.

²⁴² See *id.* ¶ 16. For example, TI promotes an understanding of corruption based on efficiency (market) rather than moral principles. See *id.* "When payments by clients would actually help to improve efficiency and would not violate distributive justice norms--legalize the sale of government services to the highest bidder." *Id.*

²⁴³ See Transparency International, *Mobilising the TI Support Base* (visited April 6, 2000) <http://www.transparency.de/documents/annual-report/ar_99/pages/4_Mobilising.htm> ¶ 3; see also Transparency International, *Income Statement 1998* (visited Apr. 6, 2000) <<http://www.transparency.de/organisation/income.html>>. In 1998, U.S. governmental contributions to TI, through the United States Agency for International Development, totaled \$619,826.94. See *id.*

²⁴⁴ See Salbu, *supra* note 3, at 286-287.

²⁴⁵ See *id.* at 285.

transnational corruption through the FCPA,²⁴⁶ it is time to roll-back the expansive extraterritorial approach presently sponsored through the 1998 Amended FCPA.

B. *Modification of the FCPA's Standard of Corruption from a Morals-Based to a Market-Based Model*

As an alternative to a restriction on extraterritorial jurisdiction, another solution would be to remove the 1998 Amended FCPA's morals-based "corruptly" element and replace it with a market-based legal standard of corruption. Because the FCPA would still be extraterritorially applied in regards to U.S. businesses, however, it could still be perceived as morally imperialistic. As such, the negative economic implications of a law that is perceived as morally imperialistic²⁴⁷ may demand replacement of the 1998 Amended FCPA's standard of corruption with a market-based model even if expanded extraterritorial jurisdiction is limited as proposed above.²⁴⁸

Morals-based laws reflect the moral value system of the country proscribing the law.²⁴⁹ Although moral values are generally particular to one nation or culture,²⁵⁰ economic forces generally function under a market-based competitive scheme that is applicable to all nations.²⁵¹ For example, in the modern global economy, U.S. shoe companies such as Nike surely do not set up operations in Indonesia, because Indonesians are morally upstanding workers.²⁵² Rather,

²⁴⁶ See *id.* at 236-238.

²⁴⁷ See *supra* Part IV.D.

²⁴⁸ Limiting the FCPA's extraterritorial jurisdiction to U.S. business interests could alleviate many concerns that it is morally-based standards would be imposed imperialistically on foreign citizens. See generally Salbu, *supra* note 14. As a result, though moral imperialism can result from any extraterritorial export of national moral values, limited extraterritorial impact would lessen the extent of the damage caused by such action.

²⁴⁹ See generally Salbu, *supra* note 3. See also *supra* Part II.B.1.

²⁵⁰ See Kent Hodgson, *Adapting Ethical Decisions to a Global Marketplace*, MGMT. REV., May 1992, at 53-54.

²⁵¹ See PAUL A. SAMUELSON, ECONOMICS 37-41 (1970). The effect could be likened to the existence of an economic "rulebook" that all nations must abide by to prosper.

²⁵² See Katharine H. Woodward, *Neo-Colonialism, Labor Rights, and the "Growth Triangle of Indonesia, Malaysia, and Singapore: Who Will Protect the "Hinterland" and Indonesia's Workers*, 15 DICK. J. INTL. L. 171, 194 (explaining that the U.S. government's "soft stance" on labor standards in southeast Asia is largely the result of heavy lobbying by big business interests in the United States that have much to lose from raising labor standards).

these companies operate out of Indonesia, because the country's cheap labor makes production more economical than anywhere else.²⁵³ Similarly, the Indonesian government keeps its labor standards low so as not to lose its competitive advantage, and thus the investment capital of companies looking for inexpensive labor.²⁵⁴ In general, labor capital flows toward the location with the most inexpensive cost of production in accordance with global market forces.²⁵⁵

As a result of this economic reality, developing countries such as Indonesia have devised laws that criminalize unofficial business transactions between government officials and businesspeople only if such transactions cause direct injury to finances of the government.²⁵⁶ By framing the offense in economic rather than moral terms these governments can protect their national economies while at the same time eliminating the implication of moral belief systems. It would be wise for the United States to devise an extraterritorially applicable legal standard of corruption that reflects these rational economic principles. Not only would an economic approach be widely understood and accepted by a foreign populace, but the use of an economic, market-based model would also be more in line with modern global conceptions that transnational corrupt practices are economic, rather than moral, crimes.²⁵⁷

In addition, for extraterritorial laws to be effective, officials from the foreign state government must provide some assistance in their operation.²⁵⁸ In the absence of some competing incentive, it is difficult to believe that the very officials who benefit from corruption will assist in implementing anti-corruption measures.²⁵⁹ To secure the support of extraterritorial anti-corruption measures in key bureaucratic agencies, officials in such agencies must be assured

²⁵³ See, e.g., *Scores Injured in Nike Shoe Factory Protest*, AGENCE FRANCE-PRESSE ENGLISH WIRE, Apr. 26, 1997, available at WESTLAW, Database AFP-ENG-A. The extremely low wages earned by Nike's factory workers at one factory led them to stage a violent protest in demand of at least a "living wage." See *id.*

²⁵⁴ See Woodward, *supra* note 251, at 174; see also *Investment-Capital Will Flow Back to Indonesia*, ANTARA, Nov. 9, 1999, available at 1999 WL 19028304.

²⁵⁵ See SAMUELSON, *supra* note 249, at 37-41.

²⁵⁶ See generally Law No. 3 of 1971, *supra* note 27.

²⁵⁷ See Salbu, *supra* note 3, at 271-277.

²⁵⁸ See Nichols, *supra* note 3, at 283 (noting that a corrupt government will not be capable of rendering the assistance necessary to regulate transnational corruption).

²⁵⁹ See *id.*

that it is in their best financial interests to do so.²⁶⁰ This assurance may be found in the theory that market forces favor transparent, efficient, and most importantly, attractive national economies.²⁶¹

Pressure from international market investors to improve state practices can supplement regulatory controls through inherent disciplinary measures.²⁶² Further, “to ensure favorable results, capital investors tend to choose state behaviors that are efficient and, as an incidental effect, will define efficient and inefficient practices in a manner superior to those attempted under the Western legal norms.”²⁶³ Competition for necessary resources provides an incentive to improve perceived attractiveness to international investors.²⁶⁴ This is especially true with Indonesia and the other Asian “Tiger” developing countries.²⁶⁵ Indeed, with a finite supply of wealth to be distributed, “[m]any Asian countries are now locked into a virtuous circle in which each country, aware of the fierce competition for capital, has to keep struggling to improve its attractiveness to investors.”²⁶⁶ It seems that “[t]hose countries that fail to establish efficient capital markets will find themselves behind in the race to prosperity.”²⁶⁷ As such, the

²⁶⁰ *See id.*

²⁶¹ *See* SAMUELSON, *supra* note 249, at 647-48.

²⁶² In other words, disciplinary action naturally ensues when market investors reduce investments to certain states due to the prevalence of costly overlays, or worries regarding the protection of, and realization of returns on, their investments. *See* Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1223 (1995). “The market institutes a type of disciplinary measure not found in legal codification of culturally specific norms.” Surjadinata, *supra* note 16, at 1086.

²⁶³ Surjadinata, *supra* note 16, at 1076.

²⁶⁴ Public officials in developing countries are well “within the reach of incentives or threats.” *A Global War Against Bribery Has Been Declared*, *supra* note 211, at 22. As a result, increasing numbers of officials have been struck by the “dawning realization that, since corruption usually creates inefficiency, corrupt countries tend to lose out in the global competition for capital and aid; bankers and businessmen bruised and battered by collapsing economies now demand more than a minister’s blessing before they risk their money.” *Id.*

²⁶⁵ *See The Asian Miracle: Is it Over?*, ECONOMIST, Mar. 1, 1997 (discussing the historic growth of the Asian “Tigers,” economies that have gained substantial strength over the last thirty years). The original Asian “Tigers” included Hong Kong, Singapore, South Korea, and Taiwan. *See id.* Now, the group includes China, Indonesia, Malaysia, and Thailand. *See id.*

²⁶⁶ *Competing For Capital*, ECONOMIST, Nov. 12 1994, at 29.

²⁶⁷ *Id.* at 30. One observer has commented that Indonesia, among other Southeast Asian states, needs such capital inflows to fund physical infrastructure, energy, and telecommunications networks. *See* Kokila Doshi, *The Rush to Privatize in the Asia-Pacific Region*, BUS. FORUM, Winter/Spring 1994, at 42-43.

methodology by which capital investors decide where to invest provides an incentive to bring about an efficient, transparent national economy.²⁶⁸ A U.S. anti-corruption law embodying these market principles would only reinforce these incentive-based changes.

The recent Asian financial crisis further invigorates the incentive to eliminate inefficient practices within these developing states.²⁶⁹ The huge financial aid package that the International Monetary Fund (IMF) has provided to Indonesia, for example, came with a variety of mandatory austerity measures.²⁷⁰ According to some observers, if Indonesia fails to comply with the IMF by implementing the necessary reforms, “Indonesia’s stock and currency markets will continue to be pounded by foreign investors,” a result which would be a “fatal blow to Indonesian corporations.”²⁷¹ In light of these economic necessities, there is good reason to believe that the Indonesian government, as well as those of other developing countries in Southeast Asia, will seek to insure bureaucratic and economic efficiency.²⁷²

A market-based standard of corruption provides a superior impetus to reduce corrupt practices than a morals-based model. “[T]he market has the ability to reward efficient regimes

²⁶⁸ There are signs that such a phenomenon has already begun in Indonesia, where a struggling economy and the non-validity of recent large-scale investments, such as the failed Bre-X gold mining expedition, have led investors to question the stability of the nation’s economy. See Michelle Celarier, *The Road to Excess: Joint Ventures and Government Corruption*, CFO, Nov. 1998, at 67. “[I]n Indonesia, as elsewhere, pervasive corruption has led to bad deals that the market, in effect is starting to police.” See *id.*

²⁶⁹ See generally Alex Wang, *The Asian Financial Crisis: Causes, Cures and Systematic Implications*, 31 N.Y.U.J. INT’L L. & POL. 650 (1999).

²⁷⁰ See Bob Davis, *IMF Warns Indonesians: Meet Goals or No Deal*, WALL ST. J., Jan 9, 1998, at A8. Specifically, these mandated measures include the elimination of the inefficient system of cronyism that has plagued its economic system. See *id.*

²⁷¹ Neel Chowdhury & Anthony Paul, *Where Asia Goes From Here*, FORTUNE, Nov. 24, 1997, at 104; see generally Michelle Schrieber, *Beyond the Economic Turmoil of the Asian Financial Crisis: Indonesia’s Struggle to Cope with Insolvency*, 12 TRANSNAT’L L. 353 (1999).

²⁷² This likelihood is made even more probable in Indonesia, where after more than thirty years of rule, Suharto stepped down as Indonesia’s leader in 1998. It is well known that Suharto used his position to reap huge economic rewards for himself and his family through largely illegal means and at the expense of the nation. See *Finish Probe on Soeharto Before Elections: Habibie*, JAKARTA POST, Dec., 1998, available at 1998 WL 22289719; see also Wijono E-mail, *supra* note 22. Anger over the realization of how exactly Suharto compiled so much wealth was one of the central causes that demonstrations pushed him out of power. See *A Global War Against Bribery Has at Last Been Declared*, *supra* note 211, at 22. His absence, coupled with the 1999 election of reform-minded Abdurrahman Wahid as President and improved information distribution throughout the country, leaves open an opportunity for genuine economic reform, especially in the area of corrupt practices. See, e.g., *President to Sign Bill Ratifying ILO Convention on Child Labour*, ANTARA, Mar. 7, 2000, available at 2000 WL 6940233.

and punish inefficient ones,”²⁷³ thus compelling inefficient regimes to reform their institutions.²⁷⁴ Moreover, unlike the 1998 Amended FCPA’s present standard of corruption, a market-based approach is internationally neutral in its application.²⁷⁵ It is globally accepted as an effective means of determining economic efficiency²⁷⁶ and allows both western and developing nations to contribute more or less equally to the battle against transnational corruption.²⁷⁷ As such, a market-based approach by the FCPA would provide the greatest incentive for developing country government officials to create an effective domestic anti-corruption system.²⁷⁸

C. Concluding Remarks

Transnational corruption has had a destructive impact globally by bringing inefficiency to national economies, de-stabilizing political regimes, and causing social discord between the public and its governing officials. Application of unilateral or even multilateral anti-corruption laws extraterritorially, however, is not an effective solution. In almost twenty-five years of use, the FCPA has done little more than spark disdain for morally imperialistic U.S. laws, thereby injuring American business interests abroad. In light of the present state of world affairs, and with the dawning of a new millennium, the time is ripe for alternate solutions to the problem of transnational corruption.

One solution is to limit the FCPA’s jurisdiction and to defer to NGOs with regard to transnational corruption prevention. This solution involves redacting the 1998 Amended FCPA’s “persons other than issuers and domestic concerns” provision, thereby discharging a significant amount of extraterritorial enforcement authority from U.S. federal agencies. This

²⁷³ Surjadinata, *supra* note 16, at 1086-87.

²⁷⁴ *See id.*

²⁷⁵ *See id.*

²⁷⁶ *See id.* at 1069.

²⁷⁷ *See id.* “A market-oriented approach to governing corrupt practices would provide an opportunity for western and developing states to converge their objectives for economic growth.” *Id.* at 1087.

²⁷⁸ This may be due to common perceptions that domestic laws are subordinate to U.S. laws and thus of little worth. In reality, the presence of an over-arching U.S. law in a context of the superior enforcement powers of the United States may relieve Indonesian government legislators of much of the pressure to devise their own laws. Furthermore, a limitation in the FCPA’s scope would prompt foreign officials to implement their own laws to satisfy global perceptions of efficiency and attract investment.

method is superior to the 1998 Amended FCPA's present approach, because it fosters the growth of domestic anti-corruption systems, which is the most effective mode of transnational corruption prevention, and lessens the possibility for charges of moral imperialism, thereby avoiding injury to American business interests.

In the absence of such a limitation on extraterritorial jurisdiction, another solution would be to change the FCPA's legal standard of corruption from a morals-based to a market-based model. This alternate solution involves redacting the "corruptly" element from the 1998 Amended FCPA and focusing culpability on the economic harm done to the state. Because global economic forces affect all countries in a neutral manner, the market-based standard of corruption is more internationally acceptable. Moreover, a market-based approach would eliminate the morally imperialistic aspects of the FCPA, thereby avoiding its harmful effects on American business interests, and would provide the greatest incentive for cooperation and self-regulation on the part of foreign government officials.

As with any discussion of newly legislated material, this comment is highly prospective. The effects of FCPA application in the wake of the 1998 Amendments are uncertain. What is certain, however, is that in the absence of a global consensus on the prevention of corrupt practices, domestic anti-corruption systems, not extraterritorially applied national laws, are the most effective methods of controlling inefficient business practices. With global policing becoming increasingly costly and enjoying less popular support, the United States should turn to a diplomatic strategy that improves, rather than controls, its developing neighbors. In the ongoing fight against transnational corruption, only through cooperation and restraint will come true success.

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