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Regulating Transnational Bribery in Times of Globalization and Fragmentation

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Regulating Transnational Bribery in Times of Globalization and Fragmentation

Philip M. Nichols†

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I. INTRODUCTION

Bribery is a transaction in which an official misuses his or her office “as a result of considerations of personal gain, which need not be monetary.”¹ In a legal sense, this general concept is articulated in specific statutes. The Navajo Nation Code, for example, prohibits the conferral of “any benefit upon a Tribal official, Tribal judge or employee with the intention of influencing such person’s vote, opinion, judgment, exercise of discretion or other action in his or her capacity as a Tribal official, Tribal judge or employee.”² Halfway around the world geographically—and even farther culturally—Saudi Arabian law deems a bribe to have occurred when an official “has solicited for himself or a third party, or accepted or received a promise or a gift to perform any duties of his function.”³ Completing the circle geographically, but even farther still culturally, the United States defines bribery as the giving “of anything of value to any public official . . . with intent to influence any official act” or to cause the official “to do any act in violation of the lawful duty of such official or person.”⁴ The statutes of the Navajo Nation, Saudi Arabia, and the United States do not exhaust the list of statutes criminalizing bribery—every country in the world prohibits the bribery of its own officials.⁵

The most recent efforts to contain bribery, however, have been multilateral. A number of international organizations have coordinated among or required of their members the criminalization of a specific type of bribery—transnational bribery.⁶ Transnational bribery occurs when persons from one country bribe public officials of another country.

Prohibition of transnational bribery is also accomplished through specific statutory measures. A hypothetical statute would first set out the parameters of the conduct it intends to regulate. The statute would state that

². Navajo Nation Code tit. 17, § 360(A)(1) (Equity 1995). Punishment for bribery of Tribal officials may include both prison and fines. Id. § 360(B). A Tribal official who accepts bribes may also be removed from office. Id. § 365.
⁶. The Organization of American States and the Organization for Economic Cooperation and Development have undertaken the most comprehensive efforts, which are discussed infra at text accompanying notes 50–65.
it applies only to its own citizens or residents (or their agents, officers, or employees), and that it regulates only the conferral of benefits on a foreign official for the purpose of causing that official to misuse his or her office. Within the pan-cultural concept of bribery, however, specific laws may differ. Therefore, the hypothetical statute would go on to state that it criminalizes only that conduct which is illegal in the country to which the foreign officials belong. The extraterritorial nature of the criminalization of transnational bribery therefore operates in two directions: the courts of the businessperson’s home country reach conduct that occurs outside of the home country’s physical borders, and the laws of the bribed official’s country are given effect in courts outside of the borders of the host country.

The fact that the prevailing climate favors the criminalization of transnational bribery does not in and of itself mean that such a policy decision is correct. This Article participates in an ongoing debate concerning both the viability and desirability of a policy choice prohibiting transnational bribery. The Article concludes that, given the current global conditions, criminalization of transnational bribery is not only viable and desirable, but also moral.

At the outset, however, it is important to clarify what a debate about prohibiting transnational bribery is not about. First, such a debate is not about the viability or desirability of the United States’s Foreign Corrupt Practices Act, which at one time was the only law in the world that effectively prohibited transnational bribery. The Foreign Corrupt Practices Act is one example of the types of legislation that could be used to effectuate a prohibition, but it is the prohibition itself, not the legislation, that is at issue. Second, the debate is not about whether criminalization is the only action that is necessary. Effective policing of transnational bribery will require a number of policies, ranging from transparent decision-making in host countries to voluntary codes of corporate conduct.

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7. The difference is not necessarily great. This Article is not intended as a compilation of the statutes condemning bribery throughout the world. A project of that sort was undertaken by the U.S. Library of Congress in 1976. See LIBRARY OF CONGRESS, A COMPILATION OF BRIBERY AND EXTORTION LAWS IN OPIC COUNTRIES (1976). Although some of the statutes undoubtedly have been rewritten, the compilation is very interesting, not least for the degree of similarity among the statutes.

8. For the sake of clarity, this Article will borrow terminology commonly used to describe foreign investment. “Home country” will refer to the country of the private business party, while “host country” will refer to the country in which the business activity occurs.


Finally, this debate is not about a simple economic transaction. As Martin Davies forcefully put it, "We delude ourselves if we think bribery to be purely economic conduct incapable of leading to fear, cruelty and humiliation." Although it may appear worldly to adopt a cynical attitude with respect to bribery, the human face of the practice must not be forgotten.

This Article's conclusion—that practical and moral considerations require prohibition of transnational bribery—stems from the anomaly of current global conditions. As part of a process called globalization, economic relationships increasingly involve persons in more than one polity. At the same time, as part of a process called fragmentation, lawmaking is becoming more localized. Thus, the economic communities created through globalization do not enjoy the support of institutions normally associated with economic activity. Such institutions—including law—must be cobbled together from the institutions of various countries.

This Article analyzes transnational bribery in the context of the above-described anomaly. In particular, this Article examines the growth in and harms attendant to transnational bribery. The Article then evaluates alternatives to home country prohibitions, and determines that these alternatives alone are insufficient. Finally, this Article evaluates arguments against prohibitions of transnational bribery, and determines that these arguments do not detract from the attractiveness of such laws as a policy choice under current global conditions.

II. CONDITIONS AT THE BEGINNING OF THE MILLENNIUM:
GLOBALIZATION AND FRAGMENTATION

At least two concepts are embraced by a number of theoretical disciplines as descriptive of global conditions at the turn of the millennium: globalization and fragmentation. Although precise definitions vary among schools of thought, globalization usually refers to economic and

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12. See infra Section II.A.
13. See infra Section II.B.
14. See infra Section II.C.
15. See infra Part III.
16. See infra Part IV.
17. See infra Part V.
18. See IAN CLARK, GLOBALIZATION AND FRAGMENTATION: INTERNATIONAL RELATIONS IN THE TWENTIETH CENTURY 17 (1997) ("There is pervasive resort to the twin themes of globalization and fragmentation in a wide variety of literature."); Boutros-Boutros Ghali [sic], 50th Anniversary of the United Nations, VITAL SPEECHES, Nov. 15, 1995, at 66 (stating that globalization and fragmentation are the two great forces that will shape the world in the 21st century).
commercial integration. Fragmentation, on the other hand, generally refers to political devolution. These two concepts set the stage for a discussion of home country criminalization of transnational bribery.

A. Globalization

Globalization is perceived by many to be the most powerful force shaping the world as it enters the twenty-first century. While the concept of globalization is somewhat amorphous, the most narrow and often used meaning of the term globalization is economic globalization. Jeffrey Sachs posits that globalization occurs along four paths: trade, finance, production, and a growing web of economic treaties and institutions. Similarly, Stephen Kobrin suggests that globalization consists of deep economic

20. See, e.g., Barbara Fliess & Anthony Kleitz, Trade Policy in 2000, OECD OBSERVER, Apr.-May 1998, at 7 ("Perhaps the most commented-on feature of the international economy during the last two decades has been the accelerated globalization of production and markets."); Alex Y. Seita, Globalization and the Convergence of Values, 30 CORNELL INT'L L.J. 429, 429 (1997) ("Globalization is one of the great forces shaping the world today."); see also Laura B. Pincus et al., Legal Issues Involved in Corporate Globalization, 1991 COLUM. BUS. L. REV. 269, 269 (noting "the unmistakable trend towards superregionalism and globalized market economies").

21. Roland Robertson, for example, argues that globalization consists of a shift from predominantly local consciousness to a consciousness that includes a global orientation. See ROBERTSON, supra note 19, at 113; see also CLARK, supra note 18, at 16 (suggesting that the fact that globalization involves conscious perspective causes the concept to be both pervasive throughout various disciplines and difficult to define). Anthony Giddens, on the other hand, speaks of globalization as the technological compression of time and space and the concomitant lifting of relationships from the local context. See ANTHONY GIDDENS, CONSEQUENCES OF MODERNITY 21 (1990).

22. See CLARK, supra note 18, at 21 ("The vast majority of globalization theorists present it as a characteristic of economic activity."). For examples from a variety of disciplines, see Daniel Drezner, Globalizers of the World, Unite!, WASH. Q., Winter 1998, at 209, 212 (discussing the role of nation-states within the economic logic of globalization); Roger Hayter & Sun Sheng Han, Reflections on China's Open Door Policy Towards Foreign Investment, 32 REGIONAL STUD. 1 (1998) (attributing China's economic policies in part to economic globalization); Richard C. Jones, Remittances and Inequality: A Question of Migration Stage and Geographic Scale, 74 ECON. GEOGRAPHY 8 (1998) (discussing economic globalization's effect on transnational wage earners); and S.M. Roberts, What About the Children?, 30 ENV'T & PLAN. 3 (1998) (examining the role of children in economic globalization). The pervasiveness of an economic definition of globalization is also evidenced in a variety of non-scholarly venues, ranging from Mother Jones magazine to the speeches of the Pontiff of the Catholic Church. See Jeffrey Klein, As the World Turns, MOTHER JONES, Mar.-Apr. 1998, at 3, 3 ("Most of us know that economic globalization will affect our lives whether or not we buy more foreign stuff or even pay attention."); Pope, In Message, Urges a Just Globalization, N.Y. TIMES, Jan. 2, 1998, at A6 (reporting statement of the Pontiff that peace should accompany economic globalization).

The majority of legal scholarship also describes globalization as primarily an economic phenomenon. The benefits of economic globalization are clear. David Ricardo’s theory of comparative advantage predicts that international trade will allow countries to specialize in the production of goods and services that they are the most efficient at producing: countries do not need to produce goods or services that they are less efficient at producing because they can purchase those goods and services from other countries. The channeling of resources to their most efficient uses results in greater wealth for all trading countries. This phenomenon underlies the predictions for increased global wealth that accompanied the trade liberalization introduced by the Uruguay Round of Multilateral Trade Negotiations, predictions that ranged from 212 billion U.S. dollars per year to over 274 billion U.S. dollars per year starting in the year 2002. If, as the economic definitions of globalization


26. But not undisputed. See Sachs, supra note 23, at 97-98 (noting that skeptics suggest that the linking of rich and poor countries through globalization will increase inequality in the rich countries and will cause dislocation in the poor countries).


28. See ROOT, supra note 27, at 38; see also EDWIN MANSFIELD, ECONOMICS: PRINCIPLES, PROBLEMS, DECISIONS 358 (7th ed. 1992) (discussing wealth creation through international trade).

29. See INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK: MAY 1994, at 86-87 (1994) (summarizing four different studies on the predicted increase in global wealth that would be caused by increased trade due to trade liberalization introduced by the Uruguay Round); see also John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, 49 WASH. & LEE L. REV. 1227, 1231 (1992) (stating that “the basic policy underlying” the world trading system is “to pursue the benefits described in economic theory as ‘comparative advantage’”).
suggest, globalization does increase transnational trade, then Ricardo’s
typey suggests an increase in global wealth.
A simple increase in global wealth is not the only benefit of economic
globalization. An increase in transnational trade will increase the amount and
variety of goods and services available to consumers.30 Transnational
commerce accelerates the diffusion of knowledge and technical innovation;
accelerating trade will accelerate the pace of the world’s technological
growth.31 Moreover, while the reasons are debated, there is an observable
link between trade and economic development.32 Globalization should bring
more developing countries into the network of global commerce and thus
hasten the growth of their economies.

Finally, economic relations also have beneficial political effects.
“Countries that trade with each other are less likely to go to war than are
countries that erect trade barriers to prevent foreign goods from crossing
their borders.”33 The relationship between transnational commerce and peace
has been observed by philosophers such as Immanuel Kant,34 Charles
Montesquieu,35 and John Stuart Mill.36

By consensus, globalization is one of the most powerful forces
affecting the world and one of the most accurate descriptions of conditions at
the close of the millennium. Globalization suggests that commercial
transactions are more and more likely to include parties from more than one
country. Economic globalization offers many benefits, ranging from

30. See Junichi Goto, Labor in International Trade Theory: A New Perspective on
Japanese-American Issues 82 (1990) (summarizing empirical and theoretical work supporting the
conclusion that international trade increases the availability of consumer goods).
1980, at 288, 289-90 (explaining how, due to technological factors, export promotion may spur
growth in less developed countries).
32. See James Riedel, Trade as an Engine of Growth: Theory and Evidence, in Economic
Development and International Trade 25, 26-29 (David Greenaway ed., 1988) (discussing both
the “supply-oriented” school of thought, which argues that trade allows developing countries to
acquire foreign reserves that can be used to purchase technology that will make labor more
productive, and the “demand-oriented” school of thought, which argues that trade allows developing
countries to absorb surplus labor and thus break the cycle of poverty). Strict neoclassical theory
suggests that trade permits developing countries to be more efficient, allowing them to accumulate
savings that can be invested in development. See id. at 26-27.
33. Robert W. McGee, An Economic Analysis of Protectionism in the United States with
Implications for International Trade in Europe, 26 GEO. WASH. J. INT’L L. & ECON. 539, 551
(1993).
34. See Immanuel Kant, To Perpetual Peace: A Philosophical Search, in PEACE AND OTHER ESSAYS 107, 125 (Ted Humphreys trans., Hackett Publishing 1983) (1795) (“The
spirit of trade cannot coexist with war.”).
(quoting Montesquieu’s statement that “peace is the natural effect of trade”).
36. See John Stuart Mill, Principles of Political Economy, in 3 COLLECTED WORKS OF
John Stuart Mill 594 (John M. Robson ed., 1965) (1884) (stating that trade is “the principal
guarantee of the peace of the world”).
increased global wealth to greater standards of living and the possibility of real global peace.

B. Fragmentation

The other dominant description of extant conditions, "fragmentation," stands in sharp contradistinction to globalization. "Fragmentation" refers to the devolution of decision-making to the local level. Fragmentation is linked to globalization, although political and social scientists debate the exact nature of the link, suggesting that fragmentation may be an anachronism that survives globalization, a dialectical reaction to globalization, or a complementary aspect of the same phenomenon as globalization.

37. See Ghali, supra note 18, at 66 (characterizing fragmentation as one of the dominant forces in the world); Sol Picciotto, Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism, 17 Nw. J. Int'l L. & Bus. 1014, 1021 (1997) ("[T]he major characteristic of global governance in the current period is fragmentation into a complex and multi-layered network of bodies and institutions.").

38. See Teresa Ter-Minassian, Decentralizing Government, Fin. & Dev., Sept. 1997, at 36 (noting a worldwide trend in the last few decades of devolving decision-making responsibilities to subnational levels of government). More malign definitions cast fragmentation in a nationalist or disintegrative light. See, e.g., Elie Kedourie, A New International Disorder, in The Expansion of International Society 347, 349 (Hedley Bull & Adam Watson eds., 1984) (referring to national self-determination as "a principle of disorder, not of order"). James Mayall, however, points out that this is simply a matter of perspective:

In the West, nationalism is very often considered to be a curse, whereas in the South it is thought of as a blessing. The explanation of this difference in perception can only be historical: in the one case nationalism is associated with war, destruction and irrational intolerance; in the other with progress, the transcendence of parochial loyalties and development.

JAMES MAYALL, NATIONALISM AND INTERNATIONAL SOCIETY 111 (1990).

39. See Anthony D. Smith, Nations and Nationalism in a Global Era 2–3 (1995) (noting that "[i]n the era of globalization and transcendence, we find ourselves caught up in a maelstrom of conflicts over political identities and ethnic fragmentation"). In the most dismissive analysis, some portray fragmentation as an atavistic remnant of past structures that survives in an era of globalization. According to this argument, "nations and nationalism are the epigoni of their illustrious predecessors, survivals from another epoch, which are destined to pass away once they have run their course in each part of the globe." Id. at 3. Smith himself does not agree with this portrayal. See id. at 5. Eric Hobsbawm embraces this position in the extreme, by characterizing nationalism and ethnic groupings not only as a survival of European attempts to order the world but also—in the scheme of world history—as relatively meaningless. See E.J. Hobsbawm, Nations and Nationalism Since 1870, at 181–82 (2d ed. 1992); see also Smith, supra, at 3 (noting the argument that fragmentation is a survival from an earlier age). On the other hand, others argue that fragmentation is a dialectical response to globalization. According to this argument, globalization is not always perceived as a benign or advantageous force, and in fact "globalization stimulates forces of opposition which may just as readily lead to an increasingly fragmented world." Anthony G. McGrew et al., Introduction to Global Politics: Globalization and the Nation State 1, 23 (Anthony G. McGrew et al. eds., 1992). Reasons for opposition would include resistance to the perceived Western cultural hegemony in economic globalization, and the self-interest of political and other factions that could become losers in an economically globalized world. See Robertson, supra note 19, at 18–19 (suggesting that many of the particularist ideologies that shaped the 20th century were engendered by concern over the Western nature of globalization); Immanuel Wallerstein, Geopolitics and
The more sophisticated of these competing views is that of globalization and fragmentation as complementary components of the same phenomenon. From a sociological perspective, Robertson perceives fragmentation as "an aspect—or, indeed, as a creation—of globalization" because "identity declaration is built into the general process of globalization." Legal scholars such as Oscar Schachter and Sol Picciotto echo Robertson's analysis.

Economic globalization and political fragmentation comport with underlying economic and democracy theories. Economic globalization offers a clear and discernible advantage, in the form of specialization and the consequent allocation of resources to their most efficient uses. On the other hand, the advantage to political globalization is not so clear. Indeed, Robert Dahl identifies the conundrum that accompanies large democratic institutions:

In very small political systems a citizen may be able to participate extensively in decisions that do not matter much but cannot participate much in decisions that really matter a great deal; whereas very large systems may be able to cope with problems that matter more to a citizen, the opportunities for the citizen to participate in and greatly influence decisions are vastly reduced.

40. ROBERTSON, supra note 19, at 174–75 (acknowledging that the general process includes room for fragmentation "as reaction or resistance" to globalization).

41. See Picciotto, supra note 37, at 1021 (noting that increasing economic integration reveals an increasingly fragmented political structure); Oscar Schachter, The Decline of the Nation-State and Its Implications for International Law, 36 COLUM. INT'L TRANSNAT'L L. 7, 17 (1997) ("The fact that a trend toward localism has occurred when the world has become more interdependent and integrated... [is] a natural response to globalization, which leaves people with a sense that remote anonymous forces control their lives.").

42. Indeed, some empirical evidence suggests that decentralization of decision-making authority is advantageous. See, e.g., James Anderson et al., The Effects of Government Decentralization During Transition: Evidence From Enterprise-State Relations in Mongolia, 38 POST-SOVIET GEOGRAPHY & ECON. 230, 244–45 (1997) (finding that devolution has benefits for government similar to those that privatization creates for enterprises).

It is predictable, therefore, that even as economic entrepreneurs create a global commercial network, citizens will demand that important political decisions must be dealt with at a more localized level. Fragmentation need not occur along national lines; indeed, some of the more interesting questions regarding fragmentation involve local polities. The recent devolution of decision-making power from the British government to newly-created parliaments in Scotland and Wales is but one example. In the United States, devolution occurs when decision-making moves from the federal to the state and city level. In some newly-created countries, decision-making power has devolved to ethnic groups. For the purposes of analyzing the need to criminalize transnational bribery, however, the locus of fragmentation need not be identified. What is more critical is the observation that economic globalization is not accompanied by political globalization.

It would be easy to mistake the various international organizations that coordinate economic policy as a global centralization of power, but this is not the case. International attention to transnational bribery illustrates this point. The Organization for Economic Cooperation and Development and the Organization of American States have undertaken the most vigorous anti-bribery efforts to date. The Organization of American States, which is

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44. See Ter-Minassian, supra note 38, at 36 (stating that devolution is democratic because it allows participation).

45. However, in many respects, the carving out of countries such as Eritrea, Kazakhstan, and Slovenia from larger countries represents a form of devolution along national lines. See generally Tom Nairn, Faces of Nationalism: Janus Revisited 143-49 (1997) (discussing the creation of “micro-states”).


47. See Peter Eisinger, City Politics in an Era of Federal Devolution, 33 URB. AFF. REV. 308, 308 (1998) (noting that the increasing frequency of devolution is changing the tenor of city politics); Helen A. Garten, Devolution and Deregulation: The Paradox of Financial Reform, 14 YALE L. & POL’Y REV. 65, 65-68 (1996) (discussing devolution of financial regulation to state governments); Scott Mackey, Devolution: Part II?, STATE LEGISLATURES, April 1998, at 20 (listing decision-making responsibilities that have devolved to the state level).

48. See Charles King, Minorities Policy in the Post-Soviet Republics: The Case of the Gagauzi, 20 ETHNIC & RACIAL STUD. 738, 738-56 (1997) (describing Moldova’s devolution of power to ethnic Gagauzi in the Yeri region as a very successful example of devolution of centralized authority to local units).


50. In addition to the OECD and the Organization of American States, the United Nations and the International Chamber of Commerce have condemned transnational bribery and have asked their constituencies to eschew bribery. See Declaration Against Corruption and Bribery in International Commercial Transactions, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex, Agenda Item 12, at 1, U.N. Doc. A/RES/51/191 (1997); Extortion and Bribery in International Business
comprised of over thirty countries in North and South America, promulgated in 1996 a treaty that requires its members to take certain actions with respect to transnational bribery. Specifically, the treaty requires signatories to criminalize the bribery of foreign officials. The treaty further requires signatories to allow extradition of bribe-givers and bribe-taking officials and contains a pledge that signatories will not invoke bank secrecy laws to impede investigations into corruption. The treaty also requires signatories to make it a crime for a government official to possess or acquire assets "that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions." Twenty-three members of the Organization have signed the treaty.
The Organization for Economic Cooperation and Development also promulgated, at the close of 1997, a treaty requiring its members to take certain actions with respect to transnational bribery. Again, the treaty requires signatories to criminalize the bribery of foreign government officials, and penalties for such bribes must be proportionate to the penalties for domestic bribery. Signatories are required to assist one another in the investigation of bribery, and to allow extradition of bribe-givers. Each of the twenty-nine members of the Organization, as well as five nonmembers, signed the treaty.

The treaties promulgated by the Organization of American States and the Organization for Economic Cooperation and Development do not constitute the criminalization of a behavior by a supranational body. Rather, the treaties coordinate acts of criminalization by various countries. Paul Taylor's excellent taxonomy of international organizations, which marks a sophisticated departure from the practice of dividing such organizations on the basis of governmental participation, classifies international organizations according to the theory underlying each. Taylor proposes three main groupings: “adjustment theories,” which explain the responses of national governments to changes in the global environment; “integration theories,” which anticipate a refashioning of the traditional state-centered system of international relations; and “constitutional

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58. See id. art. 1.1. Stanley Arkin criticizes the OECD Convention for its failure to include political parties among those who may not be bribed, for its failure to require the amendment of tax laws so as to remove the deductibility of bribes, and for its failure to impose accounting provisions that would mitigate the ability of companies to hide bribe payments. See Stanley S. Arkin, Bribery of Foreign Officials: Leveling the Playing Field, N.Y. L.J., Feb. 19, 1998, at 3, 3.

59. See OECD Convention, supra note 57, art. 3.2.

60. See id. arts. 9, 10 (discussing assistance and extradition); see also Dominic Bencivenga, Anti-Bribery Pact: 34 Nations Agree to Prosecute Business Payoffs, N.Y. L.J., Jan. 15, 1998, at 5, 5 (characterizing these provisions as “critical”).

61. The 29 members are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The five signing nonmembers are Argentina, Brazil, Bulgaria, Chile, and Slovakia. See Ayesha Qayyam, New Anti-Bribery Treaty Analyzed, INT’L COM. LITIG., Mar. 1998, at 27, 27. A number of signatories have already submitted enabling legislation to their legislatures. See, e.g., Bribery Rife in Foreign Trade, CANBERRA TIMES, Apr. 13, 1998, at 9 (discussing legislation in Australia); Colin Brown, Bribery Overseas Will be Offence in Britain, INDEPENDENT (London), Mar. 19, 1998, at 13 (discussing legislation in Britain); New, Higher Fine to Cover Overseas Bribery, NIKKEI WKLY., Apr. 13, 1998, at 4 (discussing legislation in Japan); Jennifer Sullivan, Firms Liable for Overseas Deals, OTTAWA SUN, June 25, 1998, at 26 (discussing legislation in Canada).

62. Indeed, if such were possible, the treaties would be unnecessary.

63. The classic division of international organizations includes “intergovernmental organizations,” “transgovernmental organizations,” “international nongovernmental organizations,” and “business international nongovernmental organizations.” See CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 36–42 (1992).
Theories,” which completely abandon the state-oriented system and look to new methods of ordering the world. The corruption treaties clearly fall within the first grouping. These treaties represent a reaction by countries rather than an integration of countries, and they certainly do not represent a non-state-centered system of ordering international relations. Indeed, each of the treaties specifies that it is to be implemented by each signatory in accordance with that signatory’s legal systems and principles.

C. The Anomaly of Globalization and Fragmentation

Institutional analysis is useful when examining, from a legal perspective, the confluence of globalization and fragmentation. Institutions are “principles, norms, rules and decisionmaking procedures around which actor expectations converge in a given area.” Institutions range from cognitive patterns such as alphabets to adjudicatory bodies, property

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65. See OECD Convention, supra note 57, arts. 4.2, 4.4.; Inter-American Convention Against Corruption, supra note 52, art. 8; see also Low et al., supra note 53, at 248 (expressing concern regarding this “potentially significant condition”). Neither convention prohibits signatories from taking exception to provisions, which would allow signatories not to apply or adhere to these provisions.


67. Stephen Krasner, Structural Cause and Regime Consequences: Regimes as Intervening Variables, in International Regimes 1, 1 (Stephen Krasner ed., 1985); see also Peter A. Hall, Governing the Economy: The Politics of State Intervention in Britain and France 19 (1985) (defining institutions as “the formal rules, compliance procedures, and standard operating practices that structure the relationships between individuals in various units of the polity and economy”); Barbara P. Thomas-Slayter, Structural Change, Power Politics, and Community Organizations in Africa: Challenging the Patterns, Puzzles and Paradoxes, 22 World Dev. 1479, 1480 (1994) (defining institutions as “previously established sets of guidelines within which a given group of people relate to one another”). Note that though Krasner was defining the term “regime,” see Krasner, supra, at 1, later international relations scholarship found this term to be equivalent to “institution.” See John K. Setear, An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law, 37 Harv. Int’l L.J. 139, 140 (1996).

68. See W. Richard Scott, Institutions and Organization: Toward a Theoretical Synthesis, in Institutional Environments and Organizations 55, 56 (W. Richard Scott & John W. Meyer eds., 1994) (including as institutions symbols, cognitions, and norms that organize the human condition and are considered mandatory). Of course, the various disciplines each suggest different definitions of “institution.” See Hall & Taylor, supra note 66, passim (comparing differing definitions.
systems, and the law. In Institutions facilitate many things, including commercial relations.

One expression of globalization is the creation of commercial relationships without regard for national boundaries. The communities formed by these relationships are as legitimate as any other community, and by facilitating specialization, such relationships benefit the world in general. As is true of any community, transnational economic relationships rely on institutions, including and particularly the law.

Even as economic relations extend further outward, however, the bodies that create law break down into more localized entities. Transnational communities do not enjoy counterparts to domestic institutions. There is no single transnational body that can, by its own acts, criminalize any type of commercial behavior. There is no body that can act as a cross-border international police. Nor is there a global body to try those whose economic crimes cross borders.

The need for prohibition of transnational bribery must be evaluated in the context of this anomaly and with a sensitivity to increased transnational activity. In simple terms, it can be argued that globalization has caused the amount of transnational bribery to increase and that fragmentation has limited the viability of host country regulation. In order to explore this argument, it is first necessary to examine the nature, increase in, and attendant harms of transnational bribery.

III. TRANSNATIONAL BRIbery

Increased economic integration has brought with it an increase in transnational bribery. As noted in the Introduction, bribery is a transaction of institutions among different disciplines).

69. See Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 Am. J. Int'l L. 205, 222 (1993) (noting that the concept of institutions is broader than but includes international law); Thomas-Slayter, supra note 67, at 1480 (stating that legal codes and property systems are institutions).

70. See Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 1 (1975) (noting that markets require institutions); Niel Fligstein, Markets as Politics: A Political-Cultural Approach to Market Institutions, 61 Am. Soc. Rev. 656 (1996) (noting that markets are inseparable from institutions). Williamson is an economic institutionalist and Fligstein is a sociological institutionalist; their observations illustrate that virtually all of the schools of institutionalism agree that commercial transactions require institutions.

71. See Jessica Matthews, Power Shift, Foreign Aff., Jan.-Feb. 1997, at 50, 50 (noting that globalization has led to the creation of relationships with little regard for national boundaries).

72. See supra text accompanying notes 27-29 (discussing the benefits of specialization).

73. See supra note 70 and accompanying text.

in which a bribe-giver gives something of value in exchange for a benefit conferred through abuse or misuse of the bribe-taker’s office.75 In transnational bribery, the transaction stretches across borders.

Philip Oldenburg divides the benefits conferred on bribe-givers into two categories: according-to-rule benefits and against-the-rules benefits.76 According-to-rule benefits are benefits that the bribe-giver should have received pursuant to the rules; the bribe-taker takes action that he or she should have taken anyway. The abuse of office therefore occurs when the bribe-taker acts on the bribe-giver’s request before the requests of others, or when the bribe-taker refuses to use his or her office in the absence of extralegal payments. Common examples include matters such as routine government approvals or the provision of basic government services.77 Bribes paid in order to obtain these benefits are often referred to as “facilitating payments.”78

75. See supra text accompanying notes 1–5; see also James Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815, 823 (1988) (“[W]hen a briber corruptly pays off a public official, he is paying to get some results for himself or those he favors. He is seeking preferential treatment.”); Frank J. Sorauf, Politics, Experience, and the First Amendment: The Case of American Campaign Finance, 94 Colum. L. Rev. 1348, 1350 (1994) (stating that “quid pro quo” is “the vital element of any definition of bribery”). Bribery is only one of many forms of corruption; it is, however, the most prevalent and prominent form of government corruption. See Susan Rose-Ackerman, Corruption: A Study in Political Economy 4 (1978) (“I shall always keep bribery in the analytical foreground.”); Bruce E. Cain, Moralism and Realism in Campaign Finance Reform, 1995 U. Chi. Legal F. 111, 113 (“Bribery defined in the traditional sense, the performance of public duty in exchange for something of personal value, is the paradigmatic instance of political corruption.”); Graham Wood, Ethics at the Purchasing/Sales Interface: An International Perspective, Int’l Marketing Rev., no. 4, 1995, at 7, 16 (“Bribery is seen as being the most significant problem, particularly, though not exclusively, in trade between North and South.”). For a discussion of the varieties of corruption, see Rose-Ackerman, supra, at 4. Note must be made regarding the distinction between bribery and extortion. Under domestic law, bribery occurs when the bribe-giver initiates the transaction, whereas extortion occurs when the bribe-taker demands the transaction. See Lindgren, supra, at 823–26. Multilateral efforts to regulate transnational bribery, however, do not draw this distinction, and this Article will treat both as transnational bribery. Bribery also may occur between private parties. See Ronald H. Conse, Payola in Radio and Television Broadcasting, 22 J.L. & Econ. 269, 270–74 (1979) (discussing bribery in the private sector). The type of bribery that this Article discusses is limited to bribery of government officials. Multilateral efforts to date have dealt only with bribery of public officials.

76. See Philip Oldenburg, Middlemen in Third-World Corruption: Implication of an Indian Case, 39 World Pol. 508, 523 (1987). Oldenburg does not use the phrase “against-the-rules benefits;” he refers instead to “illegal and improper work.” Id.

77. See, e.g., Husted, supra note 1, at 20–21 (describing bribe payments made to expedite issuance of driver’s licenses in Mexico); Salim Rashid, Public Utilities in Egalitarian LDC’s: The Role of Bribery in Achieving Pareto Efficiency, 34 Kyklos: Int’l Rev. for Soc. Sci. 448, 448–55 (1981) (describing bribe payments made to obtain telephone lines and to place overseas and domestic calls in India).

According-to-rule benefits can also include the award of a large contract that the bribe-giver should have won in the absence of a bribe. More likely, however, a bribe will result in the award of a contract to a party who should not have won—an against-the-rules benefit. In either case, the abuse of office, usually for large sums of money, involves the discretion of the public official. This type of bribery is often referred to as grand corruption when large sums of money are involved.

A. The Amount of Transnational Bribery Has Increased

Quantitative treatment of bribery is virtually impossible: bribery is illegal in every country in the world and is thus chronically difficult to observe. Therefore, anecdotal, nonquantitative data must be used. Nonetheless, several observations can be made, including the observation that the incidence of transnational bribery has increased greatly over the last few decades.

Globalization has exposed a number of persons to transnational commerce for the first time. Those whose only exposure has occurred under present conditions might believe that the current pervasiveness of grand corruption has existed for a long period of time. In fact, bribery as a phenomenon is as old as bureaucratic systems. Those who have worked in international commerce for long periods of time, however, observe that the prevalence of large-scale transnational bribery is a recent occurrence:

79. As discussed infra, corrupt systems reward those who divert resources from the quality of the good or service to the payment of the bribe. See infra text accompanying note 107.
81. See HEMANN, supra note 5, at 2 (noting that every country in the world criminalizes bribery of its own officials). By their very nature, bribes must be paid in secret, and officials are generally reluctant to discuss bribes. See id. at 7 (noting that "bribes have to be paid in secret everywhere" and that "officials receiving bribes have to resign in disgrace if the bribe is disclosed").
The incidence of grand corruption has increased tremendously during the last decade. What used to concern a relatively small number of people working in a relatively small number of countries has now become a major South-wide problem. . . . By general consensus, there has been a tremendous deterioration in the last ten years, with grand corruption becoming the general rule, rather than the exception, in major government-influenced contracts in the South.

The perception that corruption is increasing is not limited to businesspersons working with transition economies. In a survey of 150 elite persons from sixty-three developing countries, almost half believed that corruption had increased in their countries over the past ten years. Many factors contribute to corruption in general. The World Bank suggests that opaque regulatory systems combined with weak enforcement institutions create an environment in which persons are more likely to offer bribes and public officials are more likely to yield to the temptations offered them. Patrick Glynn, Stephen Kobrin, and Moisés Naím suggest that “systemic political change has weakened or destroyed social, political, and legal institutions, opening the way to new abuses.” Others emphasize the role that law plays in checking corruption.

These factors undoubtedly contribute to transnational bribery. With respect to transnational bribery, however, the offer and supply of bribes by investors from industrialized countries also constitutes a significant contributory factor. Ibrahim Shihata notes that “[f]oreign business,
especially in developing countries, often contributes to the spread of corruption by assuming that pay-offs and connections are inevitable facts of doing business—an attitude which often turns out to be a self-fulfilling prophecy."90 The Speaker of the South African Parliament, noting "that international corruption is often tacitly supported and actively encouraged by Western countries," concluded "that attributing corruption to our [African] cultures is both arrogant and racist, as well as convenient and self-serving."91

In short, while quantifiable data is impossible to obtain, reliable observations indicate that transnational bribery is widespread and that the incidence of transnational bribery is probably increasing. There are several possible reasons for the recent explosion in transnational bribery. Clearly, the offer of bribes and export of corruption by investors from Western countries is among those reasons.

B. Transnational Bribery is Harmful

The overwhelming consensus in both the economics and political science literature is that bribery is harmful.92 In order to justify home

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91. Anvers Versi, On Corruption and Corrupters, AFR. BUS., Nov. 1996, at 7 (quoting Dr. Frene Ginwalla, Speaker of the South African Parliament). Indeed, the significance of bribe suppliers to the spread of transnational bribery is of such concern that the most prominent nongovernmental organization dealing with bribery plans to publish an index ranking countries in terms of the frequency with which their citizens supply or offer bribes. See Transparency International, Frequently Asked Questions (visited Oct. 8, 1998) <http://www.gwdg.de/-uwvw/faqs97.htm>. Transparency International and its current survey are discussed infra text accompanying notes 123-127.
92. Occasionally, of course, echoes of Nathaniel Leff's famous "speed money" argument bubble up into the current literature. See Nathaniel Leff, Economic Development Through Bureaucratic Corruption, AM. BEHAV. SCIENTIST, Nov. 1964, at 10–11 (arguing that bribes act as "speed moneys" that allow investors to avoid bureaucratic delays, and that bribes induce government workers to work harder). The weakness of these and similar arguments, see e.g., Bayley, supra note 1, at 719 (arguing that corruption in developing nations is not necessarily antipathetic to the development of modern economic systems), is that they take a very static or isolated (or both) view of corruption and fail to take into account its cumulative effects. As the World Bank points out, [a] small side payment for a government service may seem a minor offense, but it is not the only cost—corruption can have far reaching externalities. Unchecked, the creeping accumulation of seemingly minor infractions can slowly erode political legitimacy to the point where even noncorrupt officials and members of the public see little point in playing by the rules.

WORLD BANK, supra note 86, at 102. Indeed, in a study of bribes paid to obtain telephone service in India, Salim Rashid concluded that while at first the bribes may have served to differentiate preferences among customers in an officially egalitarian system, in a relatively short period of time
country criminalization of transnational bribery as a policy choice, however, the harms must be briefly reviewed. Transnational bribery causes economic, systemic, and social damage.

1. Transnational Bribery Causes Economic Damage

In the most basic sense, corruption causes economies to operate in ways other than the way economies are supposed to work. "A fundamental tenet of a free market system is that economic transactions should be based solely on the price and quality of a product and the service provided by the seller."93 In a corrupted transaction, the decision is based not on price and quality, but instead on which supplier is able to pay the largest bribe.94

Bribery also has specific effects on an economy. A growing body of empirical work demonstrates a negative correlation between perceived levels of corruption and foreign direct investment. Paolo Mauro's statistical study of the relationship between corruption and private investment finds that corruption lowers private investment, thereby reducing economic growth.95 "The negative association between corruption and investment, as well as growth, is significant, both in a statistical and in an economic sense."96 In a later study, Mauro finds that a measurable decrease in the level of corruption in a country would raise its investment to gross domestic product ratio by almost four percent and the annual growth of its gross domestic product per capita by almost half a percent.97

Bribery has other specific economic effects. Large-scale bribery distorts relative prices by causing an excessive amount of money to flow into the government without engendering any corresponding output by the government.98 Bribery also lowers the tax base by allowing potential taxpayers to bribe away tax requirements.99


[94] See Alam, supra note 81, at 450 (noting not only that the quality of the good is disregarded, but also that suppliers who cheat on the quality of the good in order to pay larger bribes will be "successful" in such a transaction).


[96] Id. at 705.

[97] See Paolo Mauro, The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross Country Analysis, in CORRUPTION AND THE GLOBAL ECONOMY, supra note 10, at 83, 91. Considering the fact that the average annual growth rate in world domestic product is between 2.5 and 3.0 percent, half a percentage point represents a considerable improvement.

The economic damage caused by transnational bribery has in turn damaged millions of lives. Mauro's work demonstrates that corruption, of which bribery is a major part, decreases growth in gross domestic product.  

Low growth rates are directly correlated with deteriorations in living conditions; in particular, low growth rates affect health, mortality rates, and environmental quality.

Indeed, while economic studies demonstrate that bribery damages economies, the experiences of millions of people demonstrate that, left unchecked, bribery can savage an economy. The once vibrant middle class of Nigeria has watched its wealth disappear, its neighborhoods turn into slums, and its children grow up in hardship due to the corruption of the economy. In Kenya, the already poor are violently forced from their land by persons who acquire title through bribes. All Zaireans suffered as their country sank into "a Zaire-shaped hole in the middle of Africa. It has been sold, bought, appropriated, stolen."

2. Bribery Causes Systemic Damage

Bribery damages systems on two levels: the level of discrete transactions and the level of administrative systems. At the level of discrete transactions, bribery creates an incentive not to fulfill the terms of a contract. In a corrupt transaction, a contract is not awarded on the basis of quality or price but instead on the basis of the bribe paid. Thus, there is no incentive to provide goods or services as specified in the contract. There is, however, a strong incentive to divert resources from fulfilling the contract in

Q.J. Econ. 599, 600 (1993).
100. See supra text accompanying note 95.
101. See Morris D. Morris, Book Review, 39 Econ. Dev. & Cultural Change 667, 668-69 (1991) (“Although cautions occasionally are noted, there is a general acceptance of the correlation between declining economic growth rates and deteriorating social conditions.”).
102. See Tord Kjellstrom et al., Current and Future Determinants of Adult Ill-Health, in The Health of Adults in the Developing World 209, 211-13 (Richard G.A. Feacham et al. eds., 1992) (discussing the relationship between poverty and ill health and concluding that improved health requires decreases in poverty); Patrick Low, Trade and the Environment: What Worries the Developing Countries, 23 Envtl. L. 705, 706 (1993) (“If poor societies fail to improve the living standards of their people, persistent poverty may turn out to be the most aggravating and destructive of all environmental problems.”); Christopher J.L. Murray et al., Adult Mortality: Levels, Patterns and Causes, in The Health of Adults in the Developing World, supra, at 23, 50 (finding a “statistically significant” positive correlation between higher incomes and lower mortality in adults and children).
103. See Dele Olojede, Nouveau Poor: Middle Class is Gone in Nigeria, Newsday (New York), June 9, 1995, at A22.
106. See Bader & Shaw, supra note 93, at 627 (noting that distortion of “the relationship between price and quality” results from bribery).
order to pay larger bribes. On its face the object of a transaction may appear to be the transfer of a good or a service, but bribery corrupts the transaction so that in practice the object is the transfer of an illicit payment.

Bribery also degrades administrative systems. Pervasive corruption tends to drive out honest and effective bureaucrats, leaving only the dishonest and ineffective. Resources are diverted from productive purposes to efforts to hide bribery. Bureaucrats may hold back resources or information in an effort to extract larger payments from bribe-givers. Indeed, one of the observable effects of a bribe-taking administrative system is that persons who deal with such a bureaucracy tend to discount all information given by it as false or misleading.

3. **Bribery Causes Social Damage**

Not only does bribery distort economies and debilitate administrative systems, it also corrodes societal structures. The myth that bribery is acceptable in some cultures finds no empirical support. To the contrary,

107. See Alam, supra note 81, at 450; Kaufmann, supra note 85, at 118 (noting the incentive to cheat).

108. See OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 1 (1985) (defining a transaction as the transfer of a good or a service “across a technologically separable interface”).

109. See Johnson, supra note 98, at 57 (noting that efficient potential government employees will avoid government work for moral reasons when corruption is pervasive); Tanzi, supra note 99, at 26 (“Some individuals will try to get jobs not in the areas in which they might use their particular ability for productive use but in areas that provide scope for taking advantage of their special positions.”). The author of this Article has spoken with numerous young persons in Central and Southeast Asia who expressed fear that working in government would corrupt them morally.

110. See M.S. Alam, A Theory of Limits on Corruption and Some Applications, 48 KYKLOS: INT’L REV. FOR SOC. SCI. 419, 431 (1995) (stating that “there will be waste of resources used in the cover-up of illicit activities”).

111. See Alam, supra note 81, at 449 (explaining how “bribery may impose costs because of the official’s efforts to maximize the offers of bribes” by creating false uncertainties).

112. One of the most comprehensive observational studies of bribery is that of the Irrigation Department in a southern Indian state conducted by Robert Wade. After several periods of observation between 1976 and 1981, Wade concluded that virtually the entire system was corrupt. See Robert Wade, The System of Administrative and Political Corruption: Canal Irrigation in South India, 18 J. DEV. STUD. 287, 287, 291 (1982). Among other things, officials extracted bribes, called ayacut, from farmers for extra water or for the water already allocated to those farmers. See id. at 314. Wade found that officials actively created uncertainties among farmers in order to generate greater ayacut. Wade also found that the credibility of the Irrigation Department had deteriorated to the point that farmers did not believe warnings about impending water shortages. See id. at 314–15; see also Robert Wade, Irrigation Reform in Conditions of Popular Anarchy: An Indian Case, 14 J. DEV. ECON. 285 (1984) (discussing Wade’s observational study further).

113. Judge Noonan, in his authoritative treatment of the subject, dismisses the myth as an example of cultural arrogance: “[I]t is often the Westerner with ethnocentric prejudice who supposes that a modern Asian or African society does not regard the act of bribery as shameful in the way Westerners regard it.” NOONAN, supra note 83, at 703; see also Versi, supra note 91, at 7 (“[A]ttributing corruption to [African] cultures is both arrogant and racist, as well as convenient and self-serving. It says more about the culture of the North, than our own.” (quoting Dr. Frene
the empirical work uniformly demonstrates that even persons who live in polities plagued by endemic bribery regard bribery as objectionable.114 Every major religion or school of moral thought, including Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Sikhism, and Taoism, specifically condemns bribery.115 "That bribes have to be paid secretly everywhere, and that officials receiving bribes have to resign in disgrace if the bribe is disclosed, makes clear that bribery violates the moral standards of the South and the East, just as it does in the West."116 Granted, the precise boundaries of what constitutes a bribe may differ; nonetheless, the concept of bribery is universally condemned.117

Ginwalla, Speaker of the South African Parliament). Ginwalla nicely answers Robert Solomon's question, upon which Salbu bases his own assertion of global pluralism with respect to bribery: "Bribery is illegal and unethical here because it contradicts our notion of a free and open market. But does the same apply in the third world, where business (and social life) have very different presuppositions?" ROBERT C. SOLOMON, THE NEW WORLD OF BUSINESS: ETHICS AND FREE ENTERPRISE IN THE GLOBAL 1990s, at 63 (1994); see Salbu, supra note 89, at 233 n. 55 (citing Solomon).

114. The best example is a study conducted in Sierra Leone under the supervision of Sahr John Kpundeh. Even though bribery is commonplace in Sierra Leone, 89 percent of those surveyed stated that bribery was doing a great deal of harm to Sierra Leone, and 97 percent suggested that reducing bribery should be a priority for the government. See SAHR JOHN KPUNDEH, POLITICS AND CORRUPTION IN AFRICA: A CASE STUDY OF SIERRA LEONE 109, 115 (1995); see also Kaufmann, supra note 85, at 125 (noting that in a survey of 150 persons from developing and transition countries, corruption was both condemned and rated as the most severe obstacle to development). A story related to the author of this Article by a Greek colleague might shed some light on the genesis of the myth that corruption is culturally acceptable in some societies. The Greek scholar noted that many years ago a visit to a doctor was usually followed up with a gift of some tangible item, such as a chicken or a basket of vegetables. This voluntary gift was meant as a sincere token of respect and gratitude. Over several years, however, doctors came to expect side payments, and demanded ever larger payments, often in the intermediary form of money. Now side payments are an institutionalized requirement for much medical care. According to the scholar who related the story, most Greeks find the required side payments objectionable and obstructive. Nonetheless, these payments originated as a voluntary and culturally acceptable expression of gratitude and respect. Joongi Kim and Jong Bum Kim recount a similar story with respect to \textit{ttokkap}-rice cake expenses—that were once offered in Korea for the sake of hospitality or as tokens of gratitude, but which have now degenerated into improper payments. See Kim & Kim, supra note 74, at 561.


116. HEIMANN, supra note 5, at 7. Heimann concludes the obvious: "There is no country in the world where bribery is either legally or morally acceptable." Id.; see also Richard T. De George, Competing With Integrity in International Business 104 (1993) ("In no country do high government officials openly practice and publicly justify the acceptance of large sums of money for preferential treatment.").

117. See Shibata, supra note 90, at 453 ("Societies may differ in their views as to what constitutes corruption, although the concept finds universal manifestations."). The core concept of bribery is a payment as quid pro quo for abuse of office. See supra note 75 and accompanying text. This core concept facilitates multilateral efforts. Indeed, even the Foreign Corrupt Practices Act, which is characterized by some as a "sledgehammer," see Salbu, supra note 9, at 266; Salbu, supra note 89, at 236, uses this concept to avoid criminalizing gifts. See DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 6-19 (1995) (noting that a gift "generally lacks the element of a quid pro quo" and therefore does not constitute a bribe). Freshly drafted legislation could
The dissonance and corrosion caused by transnational bribery are obvious. Bribery is illegal and socially condemned, and yet is practiced by those in positions of authority. The ability of law enforcers to dispense with the law and of bribe-givers to buy their way around the law renders the system meaningless. Corruption also results in inequitable distributions of wealth, further adding to social tensions. Ultimately, bribery "undermines the legitimacy of governments, especially democracies . . . . Citizens may come to believe that the government is simply for sale to the highest bidder. Corruption undermines claims that government is substituting democratic values for decisions based on ability to pay. It can lead to coups by undemocratic leaders."

IV. HOST COUNTRY REGULATION AND VOLUNTARY CODES CANNOT COMPLETELY REACH TRANSNATIONAL BRIbery

Those who argue against home country criminalization of transnational bribery often suggest that the regulation of bribery should be left in the hands of the host country. Host country regulation of transnational bribery, however, is not sufficient. At least two factors limit the effectiveness of host country regulation: host countries are often experiencing periods of great transition, and bribery tends to corrupt the very administrative systems that are asked to regulate bribery.

A. Host Countries Are Experiencing Transition

The best available data on relative levels of bribery in various countries is provided by a European nonprofit organization, Transparency International. Transparency International correlates data from various surveys of perceived levels of corruption into an index. The countries make this point clear by criminalizing only those payments that are illegal in the host country.

118. See Jerold S. Kayden, Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States, 19 B.C. ENVTL. AFF. L. REV. 565, 573 (1992) ("Why should some individuals observe the law when others can pay to elude it? If the rule of law isn't the rule of law, can anarchy be far behind?"); Herbert H. Werlin, The Consequences of Corruption: The Ghanaian Experience, 88 POL. SCI. Q. 71, 79 (1973) ("The effect of corruption is to generate an atmosphere of distrust which pervades all levels of administration.").


120. Id. at 45 (citation omitted).

121. See, e.g., Salbu, supra note 9, at 286; Salbu, supra note 89, at 236.

122. The Senior Vice President and General Counsel for the World Bank argues that the control of a phenomenon such as transnational bribery will require international collaboration. See Shihata, supra note 90, at 469. Similarly, the Southern African Development Community has asked "the industrialised countries to criminalise the bribery of our citizens." Versi, supra note 91, at 7.


124. The sources used for the 1997 index were two surveys conducted by the Institute for
evaluated in Transparency International's index are given a score: a score of ten indicates that businesspersons perceive transactions in the country to be "perfectly clean," whereas a score of zero indicates that businesspersons perceive transactions to be "entirely penetrated by corruption." 126

In Transparency International's 1997 index, twenty out of fifty-two countries are given a score of less than five, indicating that businesspersons perceive transactions in those countries as more likely corrupt than not corrupt. 127 The twenty countries—Argentina, Bolivia, Brazil, China, Colombia, India, Indonesia, Mexico, Nigeria, Pakistan, the Philippines, Romania, Russia, South Africa, South Korea, Thailand, Turkey, Uruguay, Venezuela, and Viet Nam—are spread over five continents and represent a number of cultures, histories, and political structures. One characteristic is shared, however, by each of these countries: Each is undergoing a period of extensive change and transition. 128

Management Development in Lausanne, Switzerland; a survey conducted by Political & Economic Risk Consultancy, Ltd., in Hong Kong; Gallup International's Fiftieth Anniversary Survey; a risk assessment by DRI/McGraw Hill's Global Risk Service; an assessment by Political Risk Services in Syracuse, New York; and a survey conducted by Göttingen University. See Transparency International, supra note 91. Paolo Mauro suggests that the survey of surveys is accurate:

"The correlation between indices produced by different rating agencies is very high, suggesting a certain consensus in the ranking of countries according to their degree of corruption. In addition, the high prices that the rating agencies charge their customers (usually multinational companies and international banks) for access to these indices are indirect evidence that the information is useful.

Mauro, supra note 97, at 83.

125. The index only ranks those countries that are included in at least four of the surveys used as sources. In 1997, 52 countries satisfied this criterion. See Transparency International, supra note 91, at 1.


127. See id.

One tool for characterizing the change common to these countries is institutional analysis. The changes occurring in all but one of the aforementioned countries include a shift in the commercial institutions from a relational orientation—whether military, mercantilist, socialist, or traditional—to the formal orientation characterized by the Western notion of “rule of law.”

Institutional change of this magnitude is an enormous undertaking for any society, and leaves these countries in a vulnerable position. At a minimum, the newly formed institutions have little experience in enforcing the rules, and persons in such countries have little experience using the newly formed institutions. More troubling, new institutions can fall prey
to outside manipulation.\textsuperscript{134} Indeed, the corruption of newly-created institutions—often by outsiders—has had a measurable negative effect on persons in some of the transition economies, often causing them to embrace less desirable alternatives.\textsuperscript{135}

Placing the responsibility for regulating transnational bribery in newly-created institutions is not likely to be effective. Many of these new institutions take the form of government agencies and bureaucracies that—as likely targets for bribes—would be asked to police themselves. Even under optimal conditions, self-policing is a difficult task.\textsuperscript{136} These institutions are new, inexperienced, and vulnerable, making the task of self-policing even more difficult.

The weakness of some host country institutions exacerbates another difficulty inherent in combating transnational bribery—the fact that the authorization of a bribe may occur thousands of miles away from the receipt of a bribe.\textsuperscript{137} Nascent, inexperienced government agencies cannot be expected to locate, investigate, and extradite bribe authorizers situated far beyond their borders.\textsuperscript{138} Indeed, this reason alone militates in favor of multilateral efforts to proscribe transnational bribery.\textsuperscript{139}

\begin{footnotesize}

\textsuperscript{135} See Janine Hiller & Snjezana Puselj Drezga, Progress and Challenges of Privatization: The Croatian Experience, 17 U. Pa. J. Int'l Econ. L. 383, 407 (1996) (reporting a survey in Croatia in which the vast majority of respondents recognized and condemned corruption in privatization); see also Meessen, supra note 132, at 1647 ("Corruption both in government and in private business has no little role in discrediting freshly installed democratic procedures and freshly installed free market systems.").


\textsuperscript{137} See David Wilson, Globalization and the Changing U.S. City: Dimensions of Transformation, 551 Annals Am. Acad. Pol. & Soc. Sci. 8, 8 (1997) (noting that globalization has led to decisions being made thousands of miles away from where they will take effect).

\textsuperscript{138} Indeed, the most successful prosecutions of transnational bribery occur when the transaction is criminalized on both ends and both prosecuting governments cooperate with one another. See Scott F. Boylan, Organized Crime and Corruption in Russia: Implications for U.S. and International Law, 19 Fordham Int'l L.J. 2023-24 (1996).

\textsuperscript{139} See Heimann, supra note 5, at 6 ("If we are serious about controlling corruption, it is essential that control be applied from both ends."); Nancy Zucker Boswell, Combating Corruption: Focus on Latin America, 3 Sw. J. L. & Trade Am. 179, 179-80 (1996) (reporting belief of the Organization of American States that transnational bribery can only be controlled through international
B. **Host Country Agencies May Be Corrupted**

Placing the responsibility for regulating transnational bribery on the host country not only burdens nascent institutions, it may also place the decision to prosecute bribery in the hands of those who accept the bribes. Corrupt environments tend to drive out honest bureaucrats, leaving only those who engage in bribe-taking. Indeed, in some corrupt systems positions within the bureaucracy are illicitly sold by superiors, thus effectively screening out those whose integrity would disallow the payment of bribes.

Obviously, "the very factors that encourage corruption prevent any major reforms from taking place." A study of judicial reform in Latin America, for example, found that factors related to corruption in the court system contributed to political inertia in dealing with corruption and bribery. A corrupted system cannot, by itself, effectively regulate transnational bribery.

C. **Codes of Conduct Are By Themselves Not Sufficient**

As a globalized, transnational phenomenon, transnational bribery must be approached through a variety of institutions and policies. Voluntary corporate codes of conduct certainly have value in controlling endemic transnational corruption. Such codes by themselves, however, are not...
sufficient, and simply complement the criminalization of transnational bribery.

Voluntary codes are particularly useful in two different circumstances. The first is when the laws of a host country provide little guidance with respect to or actually facilitate acts contrary to the laws or moral standards of the home country. Apartheid and child labor may be two areas in which such conflicts arise. Clearly, however, transnational bribery does not fall within this category. Every nation in the world prohibits the bribery of its officials, and these laws do not conflict with the laws or social norms of host countries.

The second circumstance is when a company must guide its employees in their compliance with laws imposed on the company. The use of corporate codes in this fashion holds much promise. Unfortunately, the laws are not yet all in place; absent the criminalization of transnational bribery by home countries, such codes will not be completely anchored.

In addition to guiding employees in compliance with the law, voluntary codes are likely to be of use to corporations with respect to payments that are legal in a host country, but that may appear unsavory to the company. Commonplace examples include the giving of gifts or promotional trips. Although legal both in the host and therefore in the home country, a company may find benefit in providing guidance to its employees with respect to payments that it does not wish to make.

While voluntary codes may prove valuable in regulating transnational bribery, their limits must be recognized. By themselves, such codes would not prove effective. First, and most obviously, such codes only reach corporations. Bribery, however, while committed by corporations, is not a crime that is limited to corporations.

Second, the incentives to commit transnational bribery may overwhelm a voluntary code. Fritz Heimann concisely sets out the incentives to bribe: “For corrupt companies, paying bribes is an effective way to win orders. Bribery provides a way to beat competitors who have better technology or lower costs. The cost of bribes can often be built into selling prices . . . . The damage done by corruption hurts others, not the corrupt parties.”


146. See Noonan, supra note 83, at 1 (noting that bribery is universally proscribed).


148. And most probably only those corporations large enough to bear the cost of generating such codes. See Pitt & Groskaufmanis, supra note 147, at 422 (noting the very high cost of generating corporate codes).

149. Heimann, supra note 10, at 147.
Moreover, because bribery is illegal in the host country, it will be hidden from the casual observer.\textsuperscript{150} Weighed against inchoate reputational benefits, companies will have a strong incentive to cheat. Indeed, the lack of enforcement is the source of longstanding criticism of voluntary codes.\textsuperscript{151}

Voluntary codes and host country regulation are valuable but are not the sole answers. Given the weak institutions surrounding and often caused by transnational bribery, and given the real harm caused by transnational bribery, a more aggressive and more comprehensive approach is a better and more viable policy choice. Indeed, Professor Salbu concludes his article with a reference to Robert Lieken’s discussion of means to control transnational bribery.\textsuperscript{152} Lieken does, as Salbu points out, suggest that host country reform is an important component of an anti-bribery strategy.\textsuperscript{153} Lieken goes on, however, to emphasize the need for criminalization of transnational bribery, and flatly states that “the solution to transnational bribery lies not in a futile attempt to repeal the Foreign Corrupt Practices Act but in universalizing it and supporting reforms in emerging countries.”\textsuperscript{154}

V. HOME COUNTRY REGULATION IS REQUIRED FOR EFFECTIVE CONTROL OF TRANSNATIONAL BRIbery

The observable facts are as follows: a growing number of commercial transactions are transnational in nature; globalization offers benefits to all; there is no supranational agency that can create or enforce transnational regulations; transnational bribery is widespread and possibly growing; and transnational bribery is extremely harmful. There is a very strong suspicion that the explosion in transnational bribery is attributable in part to bribe offers from foreign investors, and there is a very strong argument that host country agencies cannot effectively regulate transnational bribery. Given these facts and observations, home country regulation is both pragmatically and morally mandated.

Home country regulation of transnational bribery has proven effective in the United States. Home country regulation of transnational bribery is
also legal with respect to international rules concerning extraterritorial jurisdiction. Finally, home country regulation of transnational bribery does not constitute "moral imperialism," and in fact may be the most moral approach to the phenomenon of transnational bribery.

A. Home Country Regulation Is Effective

The United States's experience with its Foreign Corrupt Practices Act empirically supports the proposition that home country regulation is effective. The Foreign Corrupt Practices Act has had a definite effect on the behavior of U.S. domestic concerns in their conduct of transnational business. United States businesspersons share their foreign counterparts' sometimes mercenary attitude toward the payments of bribes. Nonetheless, a survey of U.S. businesspersons indicated that very few authorized or paid bribes to foreign officials. Almost half of those same businesspersons indicated that the Foreign Corrupt Practices Act is a "very important" or "extremely important" factor in trade. Indeed, the complaints lodged against the Foreign Corrupt Practices Act by U.S. businesses indicate, albeit anecdotally, that the law must have some impact on those businesses' behavior.

The superior effectiveness of home country to host country regulation makes sense. Globalization has obviously affected the nature and structure of corporations. Nonetheless, there is no global or transcendent means of creating a corporation—it must be created somewhere and it must exist somewhere. Similarly, a corporate officer may never visit the country in which he or she has authorized the offer or payment of a bribe, but the officer must live somewhere and must keep assets someplace. It is the

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156. See Jyoti N. Prasad, Impact of the Foreign Corrupt Practices Act of 1977 on U.S. Exports 142 (1993) (reporting that only 4.1 percent of the persons surveyed indicated that they had paid or authorized such bribes); see also Paul J. Beck et al., The Impact of the Foreign Corrupt Practices Act in U.S. Exports, 12 Managerial & Decision Econ. 285, 301 (1991) (discussing the effects of the Act).

157. See Prasad, supra note 156, at 121 (reporting that 44.6 percent of businesspersons surveyed responded that the Foreign Corrupt Practices Act is a "very important" or "extremely important" factor affecting U.S. export trade).


159. For a discussion of the proposed European Corporate Statute, see Terence L. Blackhurst, The Societas Europa: The Evolving European Corporate Statute, 61 Fordham L. Rev. 695, 772 (1993). Blackhurst notes the failure of the Commission of the European Community to "create a special European form of business enterprise that differs markedly from national forms of business enterprise." Id.
jurisdiction of the corporation's residence and assets that will have real
leverage over the officer.

Arguments against the effectiveness of home country prohibition of
transnational bribery usually use the Foreign Corrupt Practices Act as their
model. The major criticisms are that the Foreign Corrupt Practices Act is
too vague, and that it either does not inhibit illicit activity or inhibits so
much illicit activity that it makes U.S. businesses uncompetitive.

1. Vagueness

Several persons, both proponents and detractors of the Foreign Corrupt
Practices Act, have at least tacitly suggested that the Act is vague. 160 The
most significant problem associated with vagueness is that the Act does not
create a bright line that divides allowable conduct from prohibited conduct,
and thus possibly chills what might be legitimate business activity. 161 This
problem may not be a problem at all. Bribery is such a harmful practice that
chilling activity that is so close to bribery as to make it difficult to tell
whether it is or is not bribery may be beneficial. 162 It is interesting to note
that the multinational efforts to criminalize transnational bribery have
adopted definitions of bribery that are more comprehensive and far-reaching
than the definition used in the United States's Foreign Corrupt Practices
Act. 163 Apparently, the countries negotiating these agreements, many of
which have long suffered corruption, find benefit in broad definitions of
bribery. 164

Even if the Foreign Corrupt Practices Act is too vague—indeed, even
if the language in that Act is completely unworkable—that does not indict
criminalization of transnational bribery. It simply means that the Foreign
Corrupt Practices Act is poorly written. A statute criminalizing transnational
bribery need not mimic the United States's legislation. The criminalization
of transnational bribery, not the exact replication of the Foreign Corrupt
Practices Act, is what will accrue the benefits suggested in this Article.

160. See, e.g., David A. Gantz, The Foreign Corrupt Practices Act: Professional and Ethical
situations arising under the FCPA that highlight "gray areas" in the statute); Rossbacher & Young,
supra note 89, at 525 ("The Act . . . continues to suffer from vagueness that hinders its
effectiveness."). It should be noted that Gantz believes that ascertaining additional facts often clarifies
"gray areas," and that the Department of Justice's new policy of issuing no-action letters will obviate
problems of vagueness. See Gantz, supra, at 98, 109-10.

161. See Salbu, supra note 9, at 262-63.

162. See supra Section III.B (discussing the harms caused by bribery).

163. See Low et al., supra note 53, at 264 (noting that the Inter-American Convention
reaches more behavior than the Foreign Corrupt Practices Act); Zedalis, supra note 52, at 51 (noting
that the OAS Convention reaches more behavior than the Foreign Corrupt Practices Act).

164. Cf. Thomas F. Burke, The Concept of Corruption in Campaign Finance Law, 14
CONST. COMMENTARY 127 (1997) (criticizing the U.S. Supreme Court's overly narrow definition of
corruption in the campaign finance law context).
For example, a very good argument has been made that the local law exception to the U.S. Act does not accomplish what it should accomplish. As written, however, the exception requires an affirmative statement that the payment is in fact allowable. The vast majority of laws, however, simply state what payments are not allowable. The lack of affirmative language guts the exception.

The solution is relatively simple. A statute criminalizing transnational bribery could simply state that only payments prohibited by the laws of the host country will be actionable under the statute. This construction accommodates differences among countries by using the prohibitory language of each country rather than positing nonexistent affirmative language. At the same time, it retains the benefits of home country prohibition of transnational bribery.

To the extent that the Foreign Corrupt Practices Act is vague, it is vague. Whether or not that is good or bad, it is certainly irrelevant to a discussion of criminalization of transnational bribery. In fact, if the Foreign Corrupt Practices Act is indeed overly vague, then it can serve as a lesson to those in other countries who draft legislation prohibiting transnational bribery.

2. Failure and Uncompetitiveness

The arguments that the U.S. laws against transnational bribery do not inhibit transnational bribery and that they render U.S. companies uncompetitive clearly contradict each other. The contradictory nature of these arguments and their anecdotal roots indicate their lack of soundness. Indeed, the empirical evidence, as discussed above, supports the idea that the Foreign Corrupt Practices Act has circumscribed the behavior of U.S. businesses abroad. Nonetheless, these arguments merit brief discussion in the context of prohibitions on transnational bribery, which is different than the context of the U.S. law.

The U.S. law has been violated, and as other countries enact laws prohibiting transnational bribery, those laws too will be violated. Since its inception in 1978, sixteen bribery allegations, involving seventeen companies and thirty-three individuals, have been prosecuted under the Foreign Corrupt Practices Act. By contrast, 1996 alone saw the

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165. See Salbu, supra note 9, at 279–80.
167. See Salbu, supra note 9, at 279–80.
commission of 19,645 murders and non-negligent manslaughters in the United States, and 95,769 forcible rapes.\footnote{Years, 1 Foreign Corrupt Prac. Act Rep. (Bus. L. Inc.) 102, 102.004 (1998).} Securities laws were violated, antitrust laws were violated, fraud was committed. People and businesses do break laws, but the existence of those laws inhibits countless others from engaging in the proscribed activity. The standard for an effective law cannot be that it is never violated.\footnote{170. \textit{See Federal Bureau of Investigation, Uniform Crime Reports for the United States: 1996}, at 13, 23 (1997).} Using that metric, virtually no law in the entire world would be considered viable.

The converse argument, that the U.S. prohibition is so effective that it renders U.S. firms less “competitive”\footnote{171. The argument that the Foreign Corrupt Practices Act is ineffective because it has not curtailed bribery worldwide merits almost no response. The majority of transnational transactions do not involve the United States or U.S. businesses. The Foreign Corrupt Practices Act cannot be expected to reach those transactions. The fact that incidents of bribery have increased in the face of the Foreign Corrupt Practices Act is not an indictment of that Act but instead highlights the need for other countries to enact similar laws.} than firms not bound by the prohibition, probably has more validity. It is likely that the U.S. law has caused U.S. companies to lose contracts that they otherwise should have won—although the data on uncompetitiveness is somewhat unclear,\footnote{172. Competitive in the sense of beating competition to win business rather than competitive in the sense of offering high quality goods or services at low prices.} and it is not certain whether the U.S. companies would have deserved to win the contracts if they had diverted resources from quality in order to pay bribes. United States companies would also be more competitive if they were allowed to beat any person who refused to award them contracts, or if they could kill their competitors.\footnote{173. \textit{See Kate Gillespie, Middle East Response to the U.S. Foreign Corrupt Practices Act, Cal. MGMT. REV., Summer 1987, at 9, 28 (concluding that the Foreign Corrupt Practices Act's “potential to hurt U.S. exports remains unproved”).}} There is a short-term benefit to breaking the rules, but to suggest that businesses therefore have the \textit{right} to break rules is nonsensical.

Moreover, a lack of competitiveness is predicated on the fact that other countries do not outlaw transnational bribery. As other countries enact similar laws, that noncompetitive effect will be mitigated.\footnote{174. There are businesspersons who use violence, and it does give them an advantage. “When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can be effectively eliminated and customers can be effectively confined to sponsored suppliers.” 115 \textit{Cong. Rec.} 5874 (1969) (statement of Sen. McClellan). In the context of emerging economies, Bernard Black, Reinier Kraakman, and Jonathan Hay suggest that an effective means of enforcing shareholder rights would be for shareholders to shoot directors who violate clear rules. \textit{See Bernard Black et al., Corporate Law From Scratch} 21-22 (Dec. 15-16, 1994) (unpublished manuscript presented at the Conference on Corporate Governance in Central Europe and Russia, on file with author).} Indeed, Paula

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\footnote{172. Competitive in the sense of beating competition to win business rather than competitive in the sense of offering high quality goods or services at low prices.}

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\footnote{175. \textit{See Jeffrey P. Bialos} \\& \textit{Gregory Huisian, The Foreign Corrupt Practices Act: Coping With Corruption in Transition Economies} 164 (1996) (suggesting that once other countries criminalize transnational bribery such legislation will not cause disadvantage to U.S.}
Stern and Alexander Koff suggest that the better means of leveling the playing field is for all countries to criminalize transnational bribery—better economically because it helps developing countries avoid deadweight loss, better politically because it helps economies in transition, and better morally because it underscores the fact that companies will not pay bribes.\(^{176}\)

At bottom, there may be a short-term cost to a country's economy for playing by the rules. If so, that is a cost that should be borne. As a Department of Justice official noted at the inception of the Foreign Corrupt Practices Act, "Compliance with the new act may not be costless for the United States. But living up to one's principles rarely is."\(^{177}\)

B. **Criminalization of Transnational Bribery Comports with International Law**

More often than not, criminalization of transnational bribery will reach conduct that occurs outside the territory of the home country.\(^{178}\) Although extraterritorial application of criminal law is somewhat controversial, it is well within the bounds of what is permitted by international law. The United States's Foreign Corrupt Practices Act again serves as a model. The Foreign Corrupt Practices Act only proscribes the activities of "domestic concerns," meaning U.S. citizens and permanent residents, U.S. corporations and other business entities, or any officer, director, employee, agent, or stockholder working on their behalf.\(^{179}\)

Limiting the proscription to domestic concerns comports with the "nationality principle" as a means of extending jurisdiction beyond a country's physical boundaries. The nationality principle holds that a country has jurisdiction over the behavior of its citizens, and that its jurisdiction follows those citizens when they travel outside of the country's boundaries.\(^{180}\) For purposes of the nationality principle, citizens include business entities as well as natural persons.\(^{181}\)

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\(^{178}\) It is possible, of course, that bribes could be offered to foreign government officials while those officials were physically within the territory of the home country.


Extension of jurisdiction through the nationality principle is not controversial.\textsuperscript{182} Indeed, the nationality principle has been used by a variety of international and domestic tribunals to justify the application of criminal law to acts that occur outside of the territory of the proscribing country.\textsuperscript{183}

Professor Salbu has criticized the application of the nationality principle by the United States with respect to its laws on transnational bribery because these laws apply to employees and agents of U.S. businesses even if these employees and agents are not citizens or residents of the United States.\textsuperscript{184} According to Salbu, the inclusion of employees and agents renders the Foreign Corrupt Practices Act "highly invasive."\textsuperscript{185}

This argument is curious because it raises the question of how the nationality principle could possibly be an effective means of extending jurisdiction if it did not apply to employees and agents. If, for example, the Foreign Corrupt Practices Act excused the conduct of noncitizens or nonresidents, then the means of circumventing the Act would be clear—simply hire foreign persons to make decisions and take action regarding bribes.\textsuperscript{186} Courts have the power to assert jurisdiction over agents and employees simply because they are a part of the company over which the court has jurisdiction. Moreover, as the United States Supreme Court pointed out, "judicial power hardly oversteps the bounds when it refuses to lend its aid to a promotional project which would circumvent or undermine a legislative policy."\textsuperscript{187}

\textsuperscript{182} See BROWNLIE, supra note 180, at 303 (noting that there is no real objection to the nationality principle). Use of the nationality principle to regulate the behavior of foreign subsidiaries of home country corporations is, however, somewhat controversial. See Allan E. Gottlieb, Extraterritoriality: A Canadian Perspective, 5 NW. J. INT'L L. & BUS. 449, 455 (1983) (criticizing the United States for extending jurisdiction to foreign subsidiaries of U.S. corporations).

\textsuperscript{183} See United States v. Thomas, 893 F.2d 1066, 1068–69 (9th Cir. 1990) (approving jurisdiction based on the nationality principle); In re Di Lisi, 7 I.L.R. 193 (Italy Cass. 1934) (basing jurisdiction on the nationality principle); X v. Public Prosecutor, 19 I.L.R. 226 (Neth. HR 1952) (basing jurisdiction on the nationality principle); The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (applying the nationality principle).

\textsuperscript{184} See Salbu, supra note 9, at 278–79; Salbu, supra note 89, at 254.

\textsuperscript{185} Salbu, supra note 9, at 279. Professor Salbu’s criticism seems not to be echoed by persons actually in host countries. This silence respecting the use of the nationality principle to extend jurisdiction over agents and employees stands in marked contrast to the criticism of its use to assert jurisdiction over subsidiaries. See, e.g., Gottlieb, supra note 182, at 455 (noting that "[c]orporations are creatures of domestic law, and the logic of domestic law supports the view that United States legislation cannot repeatedly invoke the nationality principle for jurisdiction with regard to foreign corporations"). The Foreign Corrupt Practices Act does not apply to foreign subsidiaries, although parents are liable for their subsidiaries' acts. See C. Lowell Brown, Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act, 50 BAYLOR L. REV. 1, 2 (1998).

\textsuperscript{186} Punishing the corporation for the acts of these employees or agents would indirectly assert control over their actions and thus would be "invasive."

\textsuperscript{187} Anderson v. Abbott, 321 U.S. 349, 366 (1944). The Court goes on to say that "[i]f the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then
Criminalization of transnational bribery is permissible under the rules of international law. The nationality principle is accepted by all as a means of asserting criminal jurisdiction, and its use to regulate the conduct of nationals outside the territory of the home country does not constitute an affront to the host country.

C. Home Country Regulation of Transnational Bribery Is Necessary to Preserve the Benefits of Specialization

The theory of comparative advantage suggests that all countries benefit when each produces what it is most efficient at producing. Such specialization allows all of the world’s resources to be used in the most efficient manner. Specialization, however, requires relatively free trade among countries, so that each is able to acquire from the others what it itself does not produce.

Transnational bribery clearly acts as a barrier to free trade. A bribe request is different from a tariff only because it also invokes costs associated with keeping the payment secret. Bribery is also used to create de facto monopolies that preclude trade with nonmembers.

Globalization facilitates the creation of commercial relations with little regard for national boundaries. Commercial relations, however, occur in the context of institutions, of which law is an important example. To the extent that home country regulation of transnational bribery effectively inhibits such bribery, home country regulation can become an important factor in creating institutional support for a phenomenon that promises benefits for many.

D. Gift-Giving Practices Do Not Militate Against Prohibitions on Transnational Bribery

In the current debate, Professor Salbu focuses not on the bulk of behaviors that clearly constitute bribery but instead on those behaviors at the “borderline” between legal and illegal conduct. Salbu illustrates his...
argument with examples of gift-giving behavior and acts undertaken with multiple motives.

The observation of a gray area is not novel. In his own discussion of the differences between gifts and bribes, John Noonan observes that in "[i]ntermediate cases, borderline cases exist. What moral concept is free of them? Gray depends on black and white." Judge Noonan goes on, however, to state that "the difficulty of judgment does not destroy the moral nature of the concept being employed." Professor Salbu's reasons for allowing the gray to subsume the black and white fall into two categories: distinguishing between actionable and acceptable behavior is made more difficult by cultural differences, and ignoring cultural differences incurs perils. The former category is discussed in this Section, the latter in Section V.E.

As is often the case when the parts are allowed to overwhelm the whole, the discussion of gifts overstates the matter. Based on the fact that an automotive company prohibited its employees from accepting gifts, the sociological study of gifts dates back at least to the seminal works of Marcel Mauss and Branslislaw Malinowski, see BRANISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA (1922); MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (Ian Cunnison trans., W.W. Norton 1967) (1923), although in legal scholarship discussions of gift-giving tend to focus on contract or tax issues, see, e.g., Melvin Aron Eisenberg, The World of Contract and the World of Gift, 85 CAL. L. REV. 821, 823-24 & n.14 (1997) (defining the term "world of gift" and distinguishing it from "world of contract"); Marjorie E. Kornhauser, The Constitutional Meaning of Income and the Income Taxation of Gifts, 25 CONN. L. REV. 1, 28-38 (1992) (discussing gifts and arguing that they are income). But see Medrith Lee Hager, Note, The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift, 83 KY. L.J. 197, 199-200 (1995) (discussing the difference between a gift and a bribe).

193. See id. at 234-40. Salbu discusses the symbolic value of gifts, specifically the notion that one understands the business needs of another, see id. at 236-37; the etiquette role of gifts, and the concomitant role in relationships, see id. at 237-38; and the role of gifts in entertainment and hospitality, particularly with respect to eating, see id. at 238-40. The sociological study of gifts dates back at least to the seminal works of Marcel Mauss and Branslislaw Malinowski, see BRANISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA (1922); MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (Ian Cunnison trans., W.W. Norton 1967) (1923), although in legal scholarship discussions of gift-giving tend to focus on contract or tax issues, see, e.g., Melvin Aron Eisenberg, The World of Contract and the World of Gift, 85 CAL. L. REV. 821, 823-24 & n.14 (1997) (defining the term "world of gift" and distinguishing it from "world of contract"); Marjorie E. Kornhauser, The Constitutional Meaning of Income and the Income Taxation of Gifts, 25 CONN. L. REV. 1, 28-38 (1992) (discussing gifts and arguing that they are income). But see Medrith Lee Hager, Note, The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift, 83 KY. L.J. 197, 199-200 (1995) (discussing the difference between a gift and a bribe).

194. See Salbu, supra note 89, at 248-51.

195. NOONAN, supra note 83, at 698. Professor Salbu's contrasting of bribery with torture, in which he finds "a lack of moral ambiguity" and speculates that "middle-ground cases are hard to imagine," is overly simplistic. See Salbu, supra note 89, at 233 n.59. It is quite simple to find disagreement. The European Court of Human Rights, for example, upheld a refusal to extradite a German national to the United States on the grounds that forcing the defendant to face the death penalty would constitute a cruel violation of human rights, see Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 478 (1989), whereas the United States Supreme Court has ruled that the death penalty does not constitute cruel or unusual punishment, see Gregg v. Georgia, 428 U.S. 153, 168-69 (1976). The caning of Michael Fay in Singapore highlighted the debate over corporal punishment. See Firouzeh Bahrampour, Note, The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of International Law?, 10 AM. U. INT'L L. & POL'Y 1075, 1089-93 (1995) (describing the debate). The fact that the boundaries of torture are not as clear-cut as Salbu describes should not detract from efforts to proscribe torture. It simply supports Noonan's point, and points to the fact that bribery is hardly unique in having a gray area.

196. NOONAN, supra note 83, at 698.

197. See Salbu, supra note 89, at 240-41.

198. See id. at 226-27.
Professor Salbu states that “never before in [U.S.] history has the practice of gift-giving come under such stringent scrutiny.” He then goes on to imply that persons in the United States draw no distinction between gifts and bribes. Of course, this is not true. John Noonan, a distinguished U.S. scholar and jurist, writes eloquently of the distinction between a gift and a bribe, noting that a gift “is given in a context created by a personal relations to convey a personal feeling” and concluding that a gift-giver “does not give by way of compensation or by way of purchase.” Nor are U.S. courts incapable of distinguishing between gifts, which may represent “vague expectation of future benefits,” and bribes given “in return for some act of official grace.” Moreover, gift-giving has not vanished from either the general or corporate culture of the United States; indeed, corporate gift-giving remains a vibrant part of U.S. business life. Clearly, the implication that persons in the United States do not understand gifts as “a form of common courtesy or a component of expected relational etiquette” or that the U.S. “cultural lens” cannot distinguish between gifts and bribes is unsupportable.

Similarly, Professor Salbu’s depiction of gift-giving outside the United States may paint too stark a picture. For example, he discusses the tradition of chonji in Korea, pursuant to which a person seeking a favor of another person offers a gift before asking for the favor. In its traditional form, however, gifts given pursuant to chonji are meant only as tokens of respect, and do not create an obligation by the recipient to misuse his or her office. Only the most superficial examination of chonji would lead to confusion

199. Salbu, supra note 89, at 234. Salbu refers to a policy at Opel forbidding employees from accepting gifts from suppliers. See id. at 234 n.60. He also refers to a policy at Dell Computer forbidding employees from accepting gifts from outside counsel. See id. at 234 n.62.

200. See id. at 234. Judge Noonan acknowledges that there are persons who adhere to this extreme thinking, but derides it: “The distinctions on which civilized conduct depends disappear in a raw reductionism.” Noonan, supra note 83, at 695.

201. Noonan, supra note 83, at 695.

202. United States v. Dozier, 672 F.2d 531, 537 (5th Cir. 1982); see also United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980) (stating that a gift must be offered with something more specific than a generalized expectation of ultimate benefit in order to be actionable as a bribe).

203. A very interesting scholarly exchange concerning holiday gifts illustrates the fact that gifts remain a vital part of U.S. culture. Compare Joel Waldfogel, The Deadweight Loss of Christmas, 83 AM. ECON. REV. 1328, 1336 (1993) (stating that in 1992, $38 billion was spent on holiday gifts and calculating that up to one third of that amount was deadweight loss), with Sara J. Solnick & David Hemenway, The Deadweight Loss of Christmas: Comment, 86 AM. ECON. REV. 1299, 1305 (1996) (countering that people value a gift for reasons not necessarily reflected in the gift's price).

204. See Tricia Campbell, Tips for Better Giving, SALES & MARKETING MGMT., Sept. 1997, at 81, 81 (reporting that 54 percent of companies surveyed believed gift-giving “effective” and 14 percent believed gift-giving “very effective” in creating business relations); Hillary Feder, Solving the Gift-Giving Puzzle, POTENTIALS IN MARKETING, July 1998, at 20, 20 (reporting that nearly $1.8 billion is spent each year on business gifts in the United States).

205. Salbu, supra note 89, at 234.

206. See id. at 235.
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between traditional *chonjì* and bribery. Salbu also discusses the traditional gift-giving practices of the Navajo. Again, however, the traditional exchange of gifts is largely limited to relatives and indicates only esteem. It is difficult to argue that the practice is intended to encompass gifts conferred in order to induce an official to abuse his or her office.

Ultimately, Professor Salbu's discussion of gifts is unsatisfying for three reasons. First, his discussion does not prove its own point. With one exception, he never demonstrates that any of the gifts described would be considered bribes under Western law. Nor does Professor Salbu demonstrate that any of the gifts described would not be considered bribes in any of the countries in which they are bestowed. The one exception is illuminating—Professor Salbu describes two Navajo leaders removed from office for accepting bribes. The determination that these men accepted bribes, however, was made not by Western courts applying Western law but instead by Navajo courts applying Navajo law—a determination that Western courts would probably agree with. Absent a demonstration that the courts of various cultures would make different determinations, Professor

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207. Professor Salbu does refer to an editorial in a newspaper in which the editorialist laments the deterioration of *chonjì* into bribery. *See* id. at 235 n.72 (*citing* *Agenda for a New Leader*, *Asiaweek*, Mar. 13, 1998, at 14). Similarly, Salbu refers to a very commendable student note to support his claim of a “cultural rift” between Asia and the West. *Id.* at 235 n.71 (*citing* Daniel Y. Jun, *Note, Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor, 29 Vand. J. Transnat’l L.* 1071, 1084 (1996)). Jun’s note acknowledges Korea’s communal orientation and the importance of gift-giving, but goes on to state that the “Korean people share the same moral standards as the Western culture regarding bribery. They are equally capable of distinguishing between what is intended to be gratuitous and what is intended to wrongfully influence another person.” *Jun, supra*, at 1084–85.


209. *Cf.* BERARD HAILE, PROPERTY CONCEPTS OF THE NAVAJO INDIANS 42 (1954) (“Friends exchange presents in tokens of esteem and women make presents of especially nice weaves to male relatives.”). Haile observed this practice “only among older people.” *Id.*

210. Indeed, the practice almost certainly predates the modern form of Navajo government, which came into existence in the 1940s. *See* DAVID E. WILKINS, DINÉ BIBEEAZ’ÁANí: A HANDBOOK OF NAVAJO GOVERNMENT 52–53 (*describing* the creation of the modern Navajo government).

211. In most cases, such an argument could not be made. For example, a search of several electronic databases revealed no cases in which a person was prosecuted for offering an official a dinner.

212. In fact, several indigenous authors suggest that payments made under the guise of traditional gift-giving do in fact constitute actionable bribery. *See, e.g.*, Shen-Shin Lu, *Are the 1988 Amendments to Japanese Securities Regulations Effective Deterrents to Insider Trading?,* 1991 COLUM. BUS. L. REV. 179, 224–25 (*stating* that a strong tradition of gift-giving is used by some politicians as cover for the receipt of bribes); *JUN, supra* note 207, at 1085 (*stating* that “bribery has become a cultural ritual only in the sense that it is a prevalent practice, but not in the sense that it is a morally accepted practice” and explicating “how the Korean law draws the line between legal and illegal exchanges”); *see also* id. at 1084–97 (*elaborating* his discussion of gift-giving as a cover for bribes).

Salbu’s discussion scarcely demonstrates the “cultural rift”\textsuperscript{214} that he professes.

Second, in describing the difficulty attendant to discerning bribery, Professor Salbu confuses anecdote with judicial inquiry. Again, his Navajo example is illustrative. Based on the statements of an ousted official as reported in a single newspaper story, Salbu weaves a tale of a man attempting to perform rituals for the terminally ill and valiantly clinging to the traditions of the Diné.\textsuperscript{215} The action taken by the Navajo Nation against the official, however, was not based on a single story in the \textit{Arizona Republic} but instead was the result of a six month investigation by a special prosecutor.\textsuperscript{216} Similarly, any prosecutions under laws prohibiting transnational bribery would go beyond a superficial treatment of the facts in any given case. People would not go to jail on the basis of a one paragraph hypothetical.

Third, Professor Salbu’s discussion of gifts misses the point. The issue involved in prohibitions of transnational bribery is not whether a payment given in the host country would be considered bribery under the laws of the home country had it been made in the home country. The issue is whether a bribe was paid, under the laws of the host country, to an official of that host country.

Courts throughout the world—including the United States—regularly interpret and apply the laws of other countries.\textsuperscript{217} Procedural rules in both common law\textsuperscript{218} and civil law\textsuperscript{219} countries allow judges to utilize a wide variety of sources in discerning alien law.\textsuperscript{220} Various international

\textsuperscript{214} See Salbu, supra note 89, at 235.


\textsuperscript{216} See Egan, supra note 213, at A12.

\textsuperscript{217} See Jacob Dolinger, \textit{Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law}, 12 \textit{Ariz. J. Int’l \\& Comp. L.} 225, 225 (1995) ("Application, proof, and interpretation of foreign law are interrelated subjects that sit at the core of international conflict of laws, or, as known in the civil law system, private international law."). Dolinger points out that "German, Italian, Swiss, and Belgian case law and Austrian, Spanish, and Greek statutory law all determine the ex officio application of foreign law," \textit{id.} at 230, and notes that France, for example, litigates an extensive amount of foreign law in its courts, \textit{see id.} at 230–32.

\textsuperscript{218} See, e.g., \textit{FED. R. CIV. P.} 26.1 ("The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under The Federal Rules of Evidence.").

\textsuperscript{219} See, e.g., \textit{Swiss Statute on Private International Law}, art. 16, \textit{reprinted in} 29 I.L.M. 1244, 1256 (1990) ("The contents of foreign law shall be ascertained \textit{ex officio}"). Dolinger notes that "[t]he prevalent rule in continental law is that the judge may call upon the parties to help him discover content and enforceability of the foreign applicable law. This has been established clearly by the legislatures in countries such as Portugal, Spain, Greece and Switzerland." Dolinger, supra note 217, at 235 (citations omitted).

agreements also provide guidance.221 The commonplace of choice of law provisions in contracts ensures that courts are forced to use these sources.222 Clearly, it cannot credibly be argued that courts are not accustomed to or capable of interpreting the bribery laws of other countries.223 Interpreting alien law may be more difficult than discerning domestic law, but courts generally do not shirk their responsibilities simply because of difficulty.224

Indeed, Professor Salbu’s discussion of gifts and other borderline behavior is more paradoxical than persuasive. Salbu suggests that foreign businesspersons learn intimately the nuanced behavior of the cultures with which they do business and must act as does everyone else on the other side of the “cultural rift”—implying that such behaviors can be learned.225 At the same time, he intimates that persons other than businesspersons are for some reason incapable of learning that same behavior and can never cross the “cultural rift.”226 No reason is given for the difference in the learning abilities of these two groups. This paradox in Salbu’s exposition results directly from his insistence that community must rigidly adhere to state boundaries and his failure to recognize transnational communities.227

221. See, e.g., Inter-American Convention on Proof of and Information on Foreign Law, May 8, 1979, 18 I.L.M. 1231; see also Case of Brazilian Loans, 1929 P.C.I.J. (ser. A) No. 20, at 124 (July 12) (“Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country . . . it must seek to apply it as it would be applied in that country.”).

222. See Dolinger, supra note 217, at 246 (stating that the ability of parties to choose the law to be applied to a contract “is presently accepted in practically all legal systems”); Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 293 n.175 (1990) (“The power of parties to rely on foreign law with respect to interpreting their contract is uncontroversial.”). Indeed, a European Community convention requires that parties be allowed to choose foreign law in the interpretation of their contracts. See Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, art. 3, 1980 O.J. (L 266) 1, 2.

223. Similarly, it is difficult to give credence to Professor Salbu’s assertion that interpreting alien bribery laws is “presumptuous and intrusive.” Salbu, supra note 89, at 252.

224. Karl Llewellyn’s famous admonition, although given in a different context, applies: “The court must decide the dispute that is before it. It cannot refuse because the job is hard, or dubious, or dangerous.” K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 40 (1960). Commentators with less scholarly and more real-world interests agree. See Chicago Council of Lawyers, Evaluation of the United States Court of Appeals for the Seventh Circuit, 43 DePaul L. Rev. 673, 777 (1994) (“One role of the courts is to decide difficult, often heated, disputes . . . .”). Interestingly, Salbu’s argument suggests that applying host country law may be easier for home country courts. Salbu suggests that motive is important in bribery laws, and that discerning the motive of a person is best accomplished by others from the same culture. See Salbu, supra note 89, at 241. If Salbu’s argument is correct, it would be easier for home country courts to ascertain the motives of their countrymen than for host country courts examining the motives of foreign businesspersons. The author of this Article repeats, however, that history suggests that both courts would be capable of applying bribery laws.

225. See Salbu, supra note 89, at 235.

226. See id. at 252.

227. Salbu does recognize the possibility of some cultural diversity within a country, but unequivocally posits that “states are today’s primary global units of analysis.” See Salbu, supra note 89, at 231.
The fact that some cases are factually difficult does militate for the prohibition of transnational bribery. Cases at "the borderline," which present factual patterns that render bribery impossible to prove either will not be prosecuted or will be lost by the prosecutor.228 At the same time, the existence of a law prohibiting transnational bribery acts as a cautionary note to those engaging in borderline activities not to push those activities too far, thus avoiding the degradation of indigenous practices that Salbu's own authorities lament.

E. Home Country Regulation of Transnational Bribery Is Moral

Home country regulation of transnational bribery is moral. Indeed, home country regulation of transnational bribery may be morally required. First, bribery has a very destructive effect on host countries. At least some, and probably a great deal of, transnational bribery is initiated by foreign businesspersons. The home countries of those businesspersons have the ability to circumscribe the harmful behavior of their citizens and residents. Not to exercise that power is an affront to the many persons harmed by corruption.229

Second, globalization theoretically produces benefits for all. Practically, however, most of the early benefits have been enjoyed by the industrialized countries. At the same time, globalization has spread corruption and its attendant harms to the emerging and developing countries. The industrialized countries enjoy the benefits of globalization, while others pay the cost. Such a construct is clearly exploitative.230

Criminalization of transnational bribery is sometimes characterized as "moral imperialism."231 Such an accusation, while striking a grand posture, must be carefully examined.232 In the first place, those making the accusation are often persons in positions to accept bribes;233 their statements must be weighed against the mass of persons who do not accept bribery as a means

228. A point made by Salbu himself. See Salbu, supra note 89, at 248.
229. In essence, countries that do not proscribe the bribery of foreign public officials are forcing other countries to shoulder externalities generated by the actions of the former countries' citizens.
230. See Stephen R. Munzer, A Theory of Property 171 (1990) ("Persons are exploited if (1) others secure a benefit by (2) using them as a tool or a resource so as (3) to cause them serious harm.").
231. See Pines, supra note 93, at 204–05 n.123 (discussing such changes). Pines himself finds the charge of moral imperialism meritless.
232. See Ann Scales, Feminist Legal Method: Not So Scary, 2 UCLA Women's L.J. 1, 9–10 (1992) ("The air is too thick these days with charges of... moral imperialism .... Though each of these charges has a legitimate place, more often their invocation keeps the discussion from digging deeper.")
233. Salbu cites a statement by the Minister of Trade of Indonesia. See Salbu, supra note 9, at 276–77.
of conducting business. Respecting cultural differences does not mean respecting only the practices of the most corrupt level of a society.\textsuperscript{234}

In the second place, discussion of moral imperialism often grossly mischaracterizes the prohibition of transnational bribery. Professor Salbu states that the world “acknowledges cultural pluralism” with respect to bribery.\textsuperscript{235} He is wrong. Every society in the world condemns the bribery of its officials.\textsuperscript{236} What Salbu means to say, and what his examples attempt to illustrate, is that different cultures might perceive different events to constitute those universally condemned bribes.\textsuperscript{237} This is an important distinction.\textsuperscript{238} It is important because Salbu’s characterization of transnational bribery prohibitions as “the ubiquitous transnational application of . . . one set of laws”\textsuperscript{239} is also wrong. A benefit conferred on an official only constitutes bribery if the law dictates that the conferral is bribery. If the law renders such a conferral lawful, then the conferral does not constitute bribery. The prohibition of transnational bribery, therefore, must make reference to local law, and in fact gives voice to that law by allowing for its enforcement in the home country of a bribe-giving businessperson.\textsuperscript{240} An apt comparison can be made with contract. The concept of contract exists in each of common law, civil law, socialist law, and traditional law.\textsuperscript{241} In each of those legal systems, however, a contract is formed in different ways. A U.S. court asked to determine whether a contract had been formed in

\textsuperscript{234} For an exposition of this precise point, see Hudson P. Rogers et al., \textit{Ethics and Transnational Corporations in Developing Countries: A Social Contract Perspective, in ETHICAL ISSUES IN INTERNATIONAL MARKETING} 11, 20 (Nejdet Delener ed., 1995).

\textsuperscript{235} Salbu, \textit{supra} note 89, at 231.

\textsuperscript{236} See \textit{Heimann}, \textit{supra} note 5, at 7 (“There is no country in the world where bribery is either legally or morally acceptable.”).

\textsuperscript{237} Salbu does not establish that the behavior described in his examples actually would be considered bribery in any court. Nonetheless, it is probably true that various legal systems differ as to events that constitute bribery.

\textsuperscript{238} Indeed, in his seminal work on international business ethics, Thomas Donaldson emphasizes that in order for cultural relativism to be a valid construct, “some transcultural ethical disagreements [must] exist such that their resolution cannot be achieved through the resolution of factual misunderstandings.” \textit{THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS} 18 (1989).

\textsuperscript{239} Salbu, \textit{supra} note 89, at 231.

\textsuperscript{240} Even the inartfully drafted Foreign Corrupt Practices Act of the United States embraces a plurality of laws by exempting from its reach those payments that are legal under host country law. \textit{See supra} text accompanying notes 166-167 (discussing the exemption and suggesting improvements to its language).

France, therefore, would be remiss in applying its own law and would instead determine whether the parties had satisfied the French requirements.\footnote{See, e.g., Lenn v. Riché, 331 Mass. 104, 109 (1954) (noting that because the plaintiff’s substantive contract rights arose in France, French contract law can be considered).}

In the third place, an accusation as sanctimonious as “moral imperialism” must be grounded in a clear definition of what in fact constitutes moral imperialism. Absent such a definition, virtually any transnational act becomes moral imperialism, and one is left asking more questions than are answered. Would forbidding companies to participate in genocide abroad constitute moral imperialism? Would forbidding companies to engage in slavery constitute moral imperialism? Do prohibitions on the shipments of toxic waste, or dangerous pesticides, or watered down infant formula constitute moral imperialism? Does a requirement that companies use the home country’s accounting system to measure earnings abroad constitute moral imperialism?\footnote{Salbu himself offers an all-encompassing perspective of moral imperialism: “[M]oral imperialism is an ineluctable reality whenever one sovereign entity seeks to allow or control behavior inside the borders of another.” Salbu, supra note 89, at 252. The intellectual poverty of such an absolutist realist position was noted some time ago by David Kennedy, who posited a “fundamental contradiction” in realism: states “cannot be both internally absolute and externally social.” David Kennedy, Theses About International Law Discourse, 23 GERMAN Y.B. INT’L L. 353, 361 (1980).}

Professor Salbu suggests a definition of moral imperialism based on Thomas Dunfee’s and Thomas Donaldson’s integrative social contract model.\footnote{See Thomas Donaldson & Thomas W. Dunfee, Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory, 19 ACAD. MGMT. REV. 252, 254 (1994) (explaining the integrative social contract model).} Integrative social contract theory integrates two distinct types of social contracts.\footnote{See Donaldson & Dunfee, supra note 245, at 260–62 (discussing moral free space); Donaldson & Dunfee, supra note 246, at 94–95 (discussing microsocial contracts).} The first type is a hypothetical macrosocial contract among all of the members of a given society, the contents of which are all of the economic rules to which all of the members would agree, with the condition that they not know the position they would occupy under the rules.\footnote{See Thomas Donaldson & Thomas W. Dunfee, Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics, 11 ECON. & PHIL. 85, 93 (1995) (explaining the hypothetical macrosocial contract).} Clearly, broad agreement will not generate a great number of rules; within that hypothetical macrosocial contract, therefore, exists a moral free space. Inside that moral free space, communities are free to enter into the second type of social contract—explicit contracts that provide more detailed rules concerning ethical behavior in economic life.\footnote{See Donaldson & Dunfee, supra note 245, at 260–62 (discussing moral free space); Donaldson & Dunfee, supra note 246, at 94–95 (discussing microsocial contracts).} These microsocial contracts are bounded in two ways: first, by hypernorms, which are “principles so fundamental to human existence that they serve as a guide in
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evaluating lower level moral norms; and second, by a requirement that individual members have consented to the contract. An entity may have membership in multiple economic communities.

Salbu intimates that moral imperialism occurs in the area of moral free space, when one community interferes with the ability of another community to determine what moral rules will apply to commercial transactions within the territory occupied by that community. Under this construct, he too labels prohibitions on transnational bribery as moral imperialism. Even this more explicit charge, however, is questionable.

In the first place, Donaldson and Dunfee consider the proscription of bribery to be a hypernorm. The prohibition of transnational bribery, therefore, would not fall within the zone of moral free space, in which Salbu finds the potential for moral imperialism.

In the second place, Donaldson and Dunfee emphasize the importance of discussing the correct community when discussing moral free space. Dunfee defines communities as "all coherent groupings of people capable of generating ethical norms . . . includ[ing] a corporation, a department or other subgroup within a corporation, a social club, an industry association, a faculty senate, a church or synagogue, a city government, an association of trial lawyers, and so on." Salbu, on the other hand, adheres to the realist position—he defines community solely in terms of states. Globalization,

248. Donaldson & Dunfee, supra note 245, at 265; see also Thomas W. Dunfee, The Role of Ethics in International Business, in BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY 63, 69 (Thomas W. Dunfee & Yukimasa Nagayasu eds., 1993) ("Hypernorms are defined as norms so fundamental to human existence that they will be reflected in a convergence of religious, political, and philosophical thought. Hypernorms thus represent core or fundamental values common to many cultures.").

249. See Donaldson & Dunfee, supra note 246, at 98. Consent can be indicated by, among other means, not taking advantage of an opportunity to exit. See id. at 99–100.

250. See, e.g., Donaldson & Dunfee, supra note 245, at 268 (suggesting this possibility with regard to the Indian subsidiary of a hypothetical Western company).

251. See Salbu, supra note 9, at 278; Salbu, supra note 89, at 227 n.24.

252. See Salbu, supra note 9, at 278.

253. See THOMAS DUNFEE & THOMAS DONALDSON, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (forthcoming 1998) (manuscript at 20–26, on file with author) (explicating in detail that bribery violates the hypernorms of the right to participation and of economic efficiency).


255. Dunfee, supra note 248, at 68. "Thus defined, communities are groups that determine their own membership and apply their own preferred forms of rationality." Id.

256. Professor Salbu's facile use of Marshall McLuhan's thirty-year-old concept allows Salbu to describe current global conditions not in terms of what they are but rather in terms of what they are not—the world is not yet McLuhan's global village. See Salbu, supra note 89, at 228 n.28 (citing MARSHALL McLuhan & QUENTIN FIORE, THE MEDIUM IS THE MASSAGE 63 (1967)). The fact that the world does not yet match the global village that McLuhan described three decades ago, however, hardly detracts from the mass of empirical evidence supporting the fact that the global economy is becoming more integrated. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1997, at 4 (1997) (providing data on increases in foreign investment); 2
however, has made possible the creation of relationships with little regard for national boundaries. In other words, it is likely that the relevant community with respect to transnational commercial transactions is not coincident with national boundaries. Prohibition of transnational bribery, therefore, does not constitute moral imperialism. Rather, it is an attempt by a national lawmaking assembly to give voice to or contribute to the creation of the values of a larger community.

Finally, even if the proscription of bribery were not a hypernorm, and even if globalization had not facilitated the creation of communities that extend beyond national borders, Salbu’s construct still does not define what constitutes objectionable moral imperialism. The nationality principle is but one means of extending jurisdiction beyond national borders; several other means exist. Indeed, if simply taking action within the moral free space of another community is the sole criterion of moral imperialism, then moral imperialism is a commonplace of everyday life. The question remains, why is this particular form of moral imperialism so much more heinous and objectionable than all of the others? Without a rigorous means of differentiating the myriad ways in which different communities interact, charges of “moral imperialism” sound ominous but have little meaning.

257. See Matthews, supra note 71, at 50 (noting that globalization has led to the creation of relationships with little regard for national boundaries).

258. Again, Professor Salbu’s reference to the Navajo Nation illustrates this point nicely. Salbu seems to describe a “them-and-us” world in which the Diné exist in identifiable distinction from the rest of the world. In reality, the Navajo economy, “since early Spanish contact, has been progressively integrated into a larger world system.” Michael Joseph Franciscioni, Kinship, Capitalism, Change: The Informal Economy of the Navajo, 1868-1995, at 141 (1998).

259. Other means of extending jurisdiction include the passive personality principle, the protective principle, and the universality principle. See Browlie, supra note 180, at 298-305; Schachter, supra note 180, at 245, 254, 267.

260. Similarly, in the current debate the link between prohibition of transnational bribery and the allegedly attendant harms is not clearly drawn. Professor Salbu states that the “moral peril” of imperialism is accompanied by a “political peril” of potential conflict leading to possible war. Salbu, supra note 89, at 227. Salbu presents no empirical support for this assertion. Salbu relies instead on three student notes, none of which deals with the prohibition of transnational bribery and none of which present empirical support for the claim that extraterritorial application of law leads to war. See id. at 226-27 nn. 23-26 (citing Derek G. Barella, Note, Checking the “Trigger-Happy” Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence, 69 Ind. L.J. 889, 913 (1994) (discussing labor law); Terrence Meyerhoff, Note, Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity, 9 Am. U. Int’l L. & Pol’y 913, 1011 (1994) (discussing language rights in Canada); and Comment, NEPA’s Role in Protecting the World Environment, 131 U. Pa. L. Rev. 353, 370 (1982) (discussing environmental law)). The observations of the eminent comparative scholar Alan Watson, on the other hand, while not precisely concerning extraterritorial application of law, certainly argue against Salbu’s assertion. Watson notes that far from being rejected, transplanted law—which goes beyond the giving of voice to alien bribery laws and even beyond extraterritorial application of domestic law—constitutes a rich source of growth for the laws of various nations. See Alan Watson, Aspects of Reception of Law, 44 Am. J. Comp. L. 335, 335 (1996) (“In most places at most times borrowing is the most fruitful source of legal change.”).
Criminalization of transnational bribery simply involves a country prohibiting its citizens and their employees from engaging in conduct in another country that is illegal in that country, destructive, and socially condemned. This criminalization does not constitute moral imperialism. Indeed, it is the converse—to allow such conduct—that is morally questionable.

VI. CONCLUSION

From an economic point of view, the world is becoming smaller. It is now possible to enter into economic relations with little regard to national borders. Laws, however, still hew to political demarcations. When considering the desirability and viability of a policy choice, this disjunction must be recognized.

The benefits of transnational economic relationships must also be noted, highlighting the very serious harm engendered by transnational bribery. One is to be encouraged, and the other limited, to the extent possible. There are many tools available to do both, but one of the most effective is criminalization of transnational bribery by the home country.

The home country need not rewrite the laws of bribery for every country in which its citizens conduct business. A statute that simply sets out the limits of bribery and then criminalizes any conduct within those limits that is also prohibited by the host country will be both clear and effective. Such a law is far more effective than simply leaving prohibition in the hands of the host country or in the hands of transnational corporations.

Globalization and fragmentation in conjunction produce an uneven terrain in which to make and implement policy choices. Nevertheless, until viable institutions come into place that replace national laws with respect to commercial transactions, national laws that give effect to both ends of transnational transactions, such as laws that prohibit transnational bribery, will be the most desirable policy choices.

Based on his historical analysis of often forceful insertions of law from one system into another, including the spread of Roman law in Western Europe, Watson concludes that even laws that rely heavily on context “may be successfully transplanted to a country with very different traditions.” Alan Watson, Legal Transplants and Law Reform, 92 L.Q. Rev. 79, 82 (1976).