

EXTRATERRITORIAL APPLICATION OF THE FCPA UNDER INTERNATIONAL LAW

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I. INTRODUCTION

The U.S. government's broad interpretation and application of the Foreign Corrupt Practices Act's (FCPA) jurisdictional reach has yielded large sums in fines and penalties collected at the discretion of the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) with little oversight or consideration of the law's foreign policy consequences. Specifically, extension of FCPA jurisdiction to foreign non-issuers may constitute an exercise of extraterritorial jurisdiction contrary to principles of customary international law. In practice, the extraterritorial enforcement of the FCPA has bred international tension and led some companies to reconsider listing their securities on a U.S. exchange.¹

The FCPA prohibits covered individuals and entities from bribing foreign officials in order to obtain or retain business.² The 1998 amendments to the FCPA extended jurisdiction in an effort to make American businesses more competitive globally.³ Liability under the FCPA now covers domestic entities (U.S. companies and nationals), foreign issuers (foreign companies listed on a U.S. stock exchange), and non-issuing foreign agents or firms who take steps in furtherance of a corrupt payment while in U.S. territory.⁴

With respect to the FCPA's application of jurisdiction to non-issuing foreign agents or corporations, the law only requires that an employee of the issuer take some step in furtherance of a corrupt payment while in U.S. territory. The DOJ and SEC (the two organizations assigned to enforce the FCPA) have applied the FCPA to foreign issuers even when the corrupt conduct in question neither originated nor was completed within U.S. territory. This means that in practice FCPA jurisdiction can be based on a mere tangential connection (i.e. a bank wire transfer or an email) between the corruption and the United States, even though such an extraterritorial action may not be permitted under international law.

This article examines several recent case examples to show that the U.S. government's broad application of FCPA jurisdiction is, in practice, in conflict with certain customary principles of international law. Additionally, because the data reveals a large discrepancy in the FCPA fines collected for domestic versus foreign firms, I find that at

1. See Daimler case discussed *infra* at 241–42.

2. 15 U.S.C. §§ 78dd-1–3 (2014).

3. Pub.L. 100-418 (1988).

4. 15 U.S.C. §§ 78dd-1–3.

least one of three conclusions must be true: (1) foreign firms are more corrupt, (2) foreign firms are less likely to cooperate with U.S. authorities, or (3) the SEC and the DOJ are unfairly targeting foreign firms with higher fines. Finally, given the relative ease with which the DOJ and the SEC can bring charges against a foreign company (as a result of their broad interpretation of the statute) coupled with the fact that most charges are settled as opposed to litigated, the FCPA better resembles an international anti-corruption business tax than a domestic criminal law with limited extraterritorial applications.

II. THE FCPA

A. *Jurisdiction Under the FCPA*

The original FCPA, enacted in 1977, was intended to address the widespread practice of foreign bribery by American companies doing business overseas.⁵ The FCPA is composed of two main provisions, the antibribery provisions and the accounting provision (or “books and record provision”). This paper deals primarily with the antibribery provisions. The FCPA’s antibribery provisions prohibit covered persons and entities from paying or offering a gift or bribe to a foreign official in order to obtain or retain business.⁶ The SEC has civil enforcement power over issuers or other corporations that are required to file periodic reports with the SEC.⁷ The DOJ retains all criminal enforcement power and the remaining civil enforcement power.⁸

Jurisdiction under the FCPA is divided along three categories. Bribery by foreign issuers is prohibited under § 78dd-1 of the FCPA and includes companies that have stocks listed on an American exchange or are otherwise required to file periodic reports with the SEC.⁹ Section 78dd-2 of the FCPA prohibits bribery by domestic concerns, which includes any U.S. citizen as well as any company

5. H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?*, 26 N.C. J. INT’L L. & COM. REG. 239, 241 (2001).

6. 15 U.S.C. § 78dd-1–3.

7. CRIM. DIV. OF THE U.S. DEP’T OF JUSTICE & ENFORCEMENT DIV. OF THE U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4–5 (2012) [hereinafter RESOURCE GUIDE], available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

8. *Id.* at 4.

9. 15 U.S.C. § 78dd-1.

with its principle place of business in the United States or its business organized under the laws of any state in the United States.¹⁰ Finally, the prohibition on bribery is extended beyond those two categories in § 78dd-3 to any person who while in the United States corruptly makes use of a means or instrumentality of interstate commerce in order to further any act of bribing a foreign official.¹¹

Issuers and domestic persons are subject to the antibribery provisions for acts that occur within and outside the United States.¹² Unlike these first two provisions § 78dd-3 specifically has only territorial application.¹³ All three provisions additionally require the actor to “make use of the mails or any means or instrumentality of interstate commerce corruptly.”¹⁴ However, this need not be met where the alternative jurisdiction provision is fulfilled which establishes “nationality” jurisdiction.¹⁵ Both §§ 78dd-1 and 78dd-2 contain this alternative jurisdiction provision which obviates the need to make use of the mailing as a part of the violation.¹⁶

Under § 78dd-3, a foreign person or national is subject to the anti-bribery provisions: “It shall be unlawful . . . *while in the territory of the United States*, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of” bribing a foreign official.”¹⁷ Section 78dd-3, unlike in §§ 78dd-1 and 78dd-2, requires a connection between the bribery and interstate commerce.¹⁸ However, this connection need not be strong.¹⁹ The use of the U.S. mail can be sufficient to invoke jurisdiction so long as the mailing formed an incidental component of the underlying violation.²⁰ Even the use of the mails with respect to

10. *Id.* § 78dd-2.

11. *Id.* § 78dd-3.

12. See Resource Guide, *supra* note 7, at 2; see also Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 453–54 (2012) (citing 15 U.S.C. §§ 78l, 78m(b)(2), 78o(d), 78dd-1 (2006)).

13. Compare 15 U.S.C. §§ 78 dd-1(a), -2(a) with 15 U.S.C. § 78dd-3(a).

14. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

15. Ross, *supra* note 12, at 454 (citing JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 346 (3d ed. 2010)); see also 15 U.S.C. §§ 78dd-1(g), -2(i).

16. Ross, *supra* note 12; 15 U.S.C. §§ 78 dd-1(g), 78dd-2(i).

17. 15 U.S.C. § 78dd-3 (emphasis added).

18. Ross, *supra* note 12; 15 U.S.C. § 78dd-3(a).

19. Brown, *supra* note 5, at 305.

20. *Id.* at 306–11 (comparing § 78dd-3’s jurisdictional requirement to the Federal Mail Fraud Statute, 18 U.S.C. § 1341 (1994)).

the inter-bank clearance of a check would be sufficient to establish jurisdiction under § 78dd-3.²¹

The antibribery provisions apply not only to the person or entity itself but also to any officer, director, employee, or agent of the person or entity or any stockholder thereof acting on behalf of the person or entity.²² These sections also contain a provision calling for vicarious corporate liability where a company's employees or agents violate the law.²³ Under the corporate doctrine of respondeat superior, a corporation is held vicariously liable for crimes committed by its directors, officers, employees, or even agents where the act was committed within the scope of employment and was intended, at least partially, to benefit the corporation.²⁴ Vicarious liability not only

21. *Id.* at 313. In general, there must be some connection between the telephone call or mailing and the underlying criminal conduct at issue in order to satisfy the jurisdictional requirement. *See, e.g.,* United States v. Kunzman, 54 F.3d 1522, 1527 (10th Cir. 1995) (involving fraud and money laundering: "The indictment also specifically alleges an effect on interstate commerce through the use of interstate highways, the use of telephone and mails, and transactions involving banks and financial institutions engaged in interstate commerce. This is sufficient to allege an effect on interstate commerce."); United States v. DeVeaue, 734 F.2d 1023, 1029 n.4 (5th Cir. 1984) (charging securities fraud, mail fraud, and submitting false statements: "the check, which had traveled through interstate commerce, was an integral part of the scheme that defrauded Jet."); Stevens v. Vowell, 343 F.2d 374, 379 (10th Cir. 1965), U8bp8PldXC8 (observing that nothing requires the deceptive instrument be sent through the mail; only that the deception occur "in connection with the use of the instruments of interstate commerce or the mails."); Marks v. CDW Computer Ctrs., Inc., 901 F.Supp. 1302, 1312 (N.D. Ill. 1995) (concerning securities law violations, "[t]o establish federal jurisdiction for a Rule 10b-5 claim, some aspect of the securities transaction must have been executed through the use of an instrumentality of interstate commerce.").

Some courts have suggested that the use of the check system or mailing itself is sufficient to constitute engagement with interstate commerce. *See, e.g.,* McLaury v. Duff & Phelps, Inc., 691 F.Supp 1090, 1095, (N.D. Ill. 1988) (establishing jurisdiction through the use of a check even when the checks were issued and cashed within one state because the check-clearing system is integrated into the national banking system); Starck v. Dewane, 364 F.Supp. 466, 467 (N.D. Ill. 1973) (establishing jurisdiction even where "a telephone is used 'indirectly' to cause a meeting to be held for purpose of effectuating a fraud.").

22. Charles F. Smith & Brittany D. Parling, "American Imperialism: A Practitioner's Experience with Extraterritorial Enforcement of the FCPA," 2012 UNIV. OF CHICAGO LEGAL FORUM 237, at 239 (2012); *see also* 15 U.S.C. §§78dd-1, 78dd-3.

23. 15 U.S.C. §§78dd-1(a), -2(a), -3(a).

24. *See, e.g.,* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) (holding that Congress has the authority to impute criminal liability on a corporate actor and that in a tort case, liability may be imputed to the corporation on the basis of the criminal acts of its employees if done within the scope of employment even where such actions were done recklessly in violation of the orders of the employee's superiors); *see also* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and Observation*, 60 WASH. U. L.Q. 393 (1982), available at <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=2261&context=lawreview> (tracing the history of criminal corporate liability); Brown, *supra* note 5 at

establishes subject matter jurisdiction for a corporate defendant accused of FCPA violations but also serves as a basis of personal jurisdiction for an absent or foreign corporate defendant.²⁵

B. FCPA Legislative History

The original purpose of the FCPA was to restore public confidence in the integrity of the American corporation, after a report published by the SEC indicated that there was widespread bribery abroad by American businesses.²⁶ Around the time that the FCPA was enacted, Congress was particularly concerned that the pervasive bribery of foreign officials by American businesses threatened certain foreign policy goals as well as the image of U.S. democracy abroad.²⁷ The FCPA was amended in 1998 in order to help make U.S. companies more competitive globally.²⁸ The amendments attempted to address the public perception that the FCPA placed American businesses at a disadvantage in the world marketplace.²⁹ In order to

340; Cynthia E. Carrasco & Michael K. Dupee, *Corporate Criminal Liability*, 36 AM. CRIM. L. REV. 445 (1999) (discussing the elements of corporate criminal liability, including modern trends and organizational sentencing). *But see* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1357 (1999). Laufer notes that recently firms have regained near immunity for the acts of their employees and agents by instituting compliance programs. *Id.* However, with respect to the FCPA, this is less true than in other areas of corporate law.

25. Brown, *supra* note 5, at 349.

26. See John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 137 (2005); see also Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment at 11–12, *United States v. Carson*, No. SACR 09-00077 JVS (C.D. Cal. May 18, 2011), available at <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21783&libID=21753>; Irina Sivachenko, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Business and Discourages Compliance*, 54 B.C. L. REV. 393, 396 (2013), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3278&context=bclr>.

27. S. REP. NO. 95-114, at 3–4 (1977), <http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf> ("The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered.").

28. Ross, *supra* note 12, at 456; see also Brown, *supra* note 5 at 285.

29. Press Statement, James B. Foley, Deputy Spokesman, OECD Convention on Combating Bribery of Foreign Public Officials (May 5, 1998), available at <http://1997-2001.state.gov/www/briefings/statements/1998/ps980505.html> ("U.S. firms have lost billions of dollars in overseas business deals in which bribes played the decisive role in the awarding of contracts."); Testimony of Paul V. Gerlach, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, Concerning H.R. 4353, The International Anti-Bribery and Fair Competition Act of 1998 before the Subcommittee on Finance and Hazardous Materials, Committee on Commerce, United States House of Representatives (Sept. 10, 1998)

produce a more level playing field, Congress also sought to achieve comparable prohibitions in other developed countries, which culminated in the passage of the Organisation for Economic Co-operation and Development (OECD) Convention.³⁰ Here, a distinction ought to be recognized between a multilateral system of anti-corruption, as was discussed during the passage of the amendments, and the present reality, a U.S. based system heavily skewed in favor of recovery of fines from foreign as opposed to domestic firms.

The legislative history of the FCPA suggests that the phrase “while in the territory of the United States” was supposed to mean that the act in furtherance of the corrupt payment must be done while the actor is physically present in the United States. The legislative history of § 78dd-3 suggests that Congress intended for the phrase “while in the territory of the United States” to be interpreted literally. The House Report on the subject uses the phrase “taken within the territory of the United States,” which suggests that the act in furtherance of the bribery must be taken while the individual is

(F.D.C.H.), *available at* <http://www.sec.gov/news/testimony/testarchive/1998/tsty1198.txt> (“Critics have contended that the FCPA places American businesses at a competitive disadvantage in the foreign marketplace because other countries do not have similar prohibitions against foreign bribery. This disadvantage may mean lost opportunities for American companies in the global marketplace, possibly affecting overseas procurements valued in the billions of dollars each year. Indeed, some of our trading partners have explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses.”); Testimony of Andrew J. Pincus, General Counsel of the Department of Commerce, before the Subcommittee on Finance and Hazardous Materials of the House Commerce Committee (Sept. 10, 1998) (F.D.C.H.), *available at* http://www.commerce.gov/sites/default/files/documents/2011/february/pincus_091098.pdf (“I can attest to the high priority that this Administration has placed on getting the world’s largest industrialized economies to adopt strict anti-bribery laws. Our goal has been to bring other countries up to our high standard, and to ensure that our firms would no longer labor under a competitive disadvantage in international trade.”); S. REP. NO. 105-277, at 2 (July 30, 1998), *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/senaterpt.pdf> (“Since the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty. Such bribery is estimated to affect overseas procurements valued in the billions of dollars each year. Indeed, some of our trading partners have explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses.”).

30. Ross, *supra* note 12, at 456–57; H.R. REP. NO. 105-802, at 10 (1998), *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/houserpt.pdf> (“Beginning in 1989, the U.S. government began an effort to convince our trading partners at the OECD to criminalize the bribery of foreign public officials. Achieving comparable prohibitions in other developed countries and combating corruption generally has been a major priority of the U.S. business community, the U.S. Congress, and successive Administrations since the late 1970s.”).

physically present within the United States.³¹ Elsewhere the report specifically states that the person acting for purposes of § 78dd-3 must be “physically present.”³² However, § 78dd-3 has, in practice, been applied where the act in furtherance of bribery was merely a bank wire transfer and where the person was not, in fact, physically present in U.S. territory. This is evidence that the enforcement of the FCPA has strayed from its original congressional intent: to restore public confidence in the *American* corporation. And although the 1998 amendments to the FCPA sought to level the playing field for American firms, the amendments were not intended to radically change enforcement efforts such that foreign companies are targeted with higher fines.

C. OECD Convention

The United States had been attempting to build an international consensus for anti-corruption for some time, in part because it was believed that the FCPA placed U.S. firms at a competitive disadvantage. These efforts helped spawn the 1997 OECD Convention which criminalizes transnational bribery.³³ Under the Convention, the bribery of a foreign official is to be recognized as a criminal offense for signatories. There are currently thirty-four OECD member signatories to the convention and seven non-member signatories.³⁴ The Convention also mandates certain internal accounting controls and provides the groundwork for mutual assistance among its signatories in investigating and prosecuting foreign bribery.³⁵

The OECD Convention suggested that states assert both the territorial and nationality basis for applying extraterritorial jurisdiction.³⁶ Article 4 of the OECD Convention holds that signatories ought to take such measures to establish jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in the signatory’s territory. It also instructs

31. Ross, *supra* note 12, at 467; *see also* H.R. REP. NO. 105-802, at 21, 22.

32. H.R. REP. NO. 105-802, at 22 (1998).

33. Brown, *supra* note 5, at 239; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, 4 (1997) [hereinafter Convention], *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

34. Convention, *supra* note 33.

35. Brown, *supra* note 5, at 239–40.

36. Convention, *supra* note 33, at 5; Brown, *supra* note 5, at 278.

countries to prosecute their own nationals for bribery occurring abroad where a country's laws allow for such extraterritorial jurisdiction.³⁷

The OECD sheds no light on the outer limits of a state's power to exercise extraterritorial jurisdiction with respect to the criminalization of foreign bribery.³⁸ It notes only that the territorial basis for jurisdiction should be interpreted broadly such that an extensive physical connection to the bribery act is not required.³⁹ Where two signatories to the OECD Convention have jurisdiction over the same unlawful conduct, the Convention advises consultation with the aim to determining the most appropriate jurisdiction for prosecution.⁴⁰

In many ways the passage of the OECD Convention signals an international desire for a multilateral solution to problems of international corruption. It bears noting, however, that this is not the equivalent of an international desire for the United States to unilaterally police global corruption.

D. FCPA Enforcement in Practice

During the first few decades after the passage of the FCPA, there were only a few enforcement actions brought against mostly U.S. companies. Today, the number of enforcement actions, particularly with respect to foreign companies, has greatly increased.⁴¹ Between 1978 and 2000, there were on average 3 FCPA matters per year compared to yearly investigation totals of around 100 today.⁴² The SEC and the DOJ have been much more successful in recent years at gathering evidence from abroad, as other countries have shown an increasing willingness to cooperate with U.S. investigators.⁴³ This is largely the result of the OECD Convention as well as implementing

37. Convention, *supra* note 33, at 5.

38. Ross, *supra* note 12, at 479–80.

39. Convention, *supra* note 33, at 10.

40. Brown, *supra* note 5, at 280.

41. Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 692 (2012), available at <http://wisconsinlawreview.org/wp-content/files/15-Yockey.pdf>; see also Sivachenko, *supra* note 26, at 415.

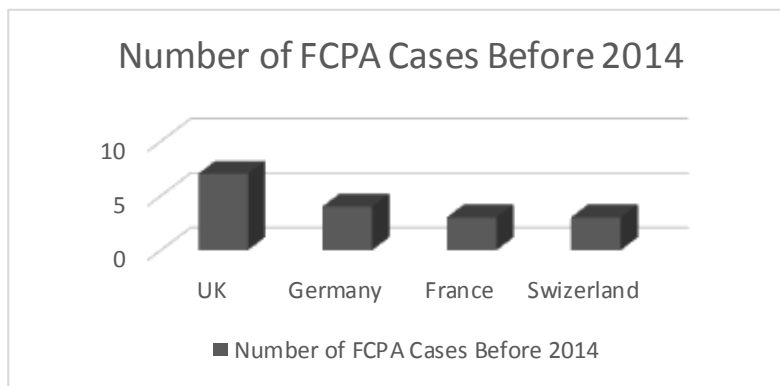
42. Allen R. Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 138 (2010).

43. Yockey, *supra* note 41, at 694.

legislation such as the U.K. bribery act.⁴⁴

Figure 1 below shows the nationality of the foreign corporations most heavily targeted in FCPA enforcement actions.⁴⁵ The United Kingdom, Germany, Switzerland, and France have had the most number of corporations targeted in an FCPA enforcement action.

The SEC and DOJ have also been more aggressive in their investigatory tactics with respect to the FCPA and have recently employed new tools such as undercover sting operations and



wiretaps.⁴⁶ This has resulted in the FCPA being singled out as one of the most, if not the most, significant challenge for corporations falling under its jurisdiction.⁴⁷ Figure 2 below shows the twenty highest FCPA penalties to date. Of the top ten, eight were foreign.

44. *Id.*

45. The statistics in Figure 1 and all subsequent figures were personally calculated using data from the Department of Justice and the Securities and Exchange Commission. See Addendum 1 for the full chart used to calculate statistics.

46. *Id.*

47. *FCPA/Anti-bribery Alert*, HUGHES, HUBBARD, & REED LLP, Winter 2013, at 2, available at <http://www.hugheshubbard.com/PublicationDocuments/FCPA%20Anti-Bribery%20Alert%20Winter%202013.pdf>.

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EXTRATERRITORIAL APPLICATION

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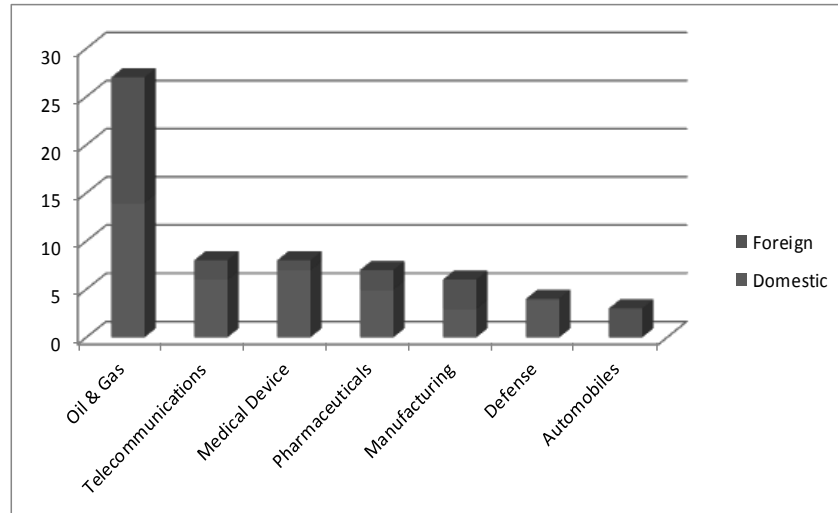
Firm	Total Monetary Penalties Paid (in millions)	Domestic or Foreign
1.Siemens	800	Foreign
2.Kellogg, Brown, & Root	579	Domestic
3.Total	398.2	Foreign
4.Alcoa	384	Domestic
5.Snamprogetti	365	Foreign
6.Technip	338	Foreign
7.JGC Corporation	218.8	Foreign
8.Daimler	185	Foreign
9.Weatherford International	152.6	Foreign
10.Alcatel-Lucent SA	137.4	Foreign
11.HP	108	Domestic
12.Magyar Telekom	95	Foreign
13.Marubeni Corporation	88	Foreign
14.Panalpina	82	Domestic
15.Johnson & Johnson	70	Domestic
16.Pfizer	60	Domestic
17.ABB	58.3	Foreign
18.Pride International	56.1	Domestic
19.Marubeni Corporation	54.6	Foreign
20.Diebold	48.1	Domestic

Regulators have recently begun the process of doing industry wide sweeps of FCPA investigations, in which they target a particular industry and use information gained from one cooperating company to go after other companies in the same industry.⁴⁸ This includes the cooperating company's competitors, suppliers, distributors, and agents.⁴⁹ As is shown in Figure 3, below, the oil and gas industry has been mostly heavily hit, followed closely by telecommunications, medical devices, and pharmaceuticals.

48. Yockey, *supra* note 41, at 693–94.

49. *Id.*

Number of FCPA Related Enforcement Actions



The DOJ and the SEC have publicly stated their intention to target individuals in FCPA related matters.⁵⁰ Individuals charged with FCPA violations nearly always plead guilty rather than risk an uncertain outcome at trial.⁵¹ For one, individuals in addition to some companies, often lack the necessary resources to mount a successful defense. This is the case even where the charges are predicated on questionable theories of liability.⁵²

As the chart below shows, 30% of FCPA cases have been brought against non-U.S. companies. Yet these 30% of companies have paid for 67% of the total FCPA fines (See Figure 5).⁵³ Thus, foreign firms are paying more than five times the FCPA fines paid by domestic firms.

50. *Id.* at 701.

51. *Id.* at 702; see also Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J. L. ECON. & POL'Y 617, 628 (2011) ("Second, prosecutors can avoid having to test their theories at trial by using significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty. Corporate employees usually have far less resources, including legal talent, computer resources, access to experts, and funds for general litigation support, than prosecutors. Accordingly, the defendant faces a strong temptation to plead guilty to avoid a higher penalty than the mismatch of resources could yield at trial.").

52. Yockey, *supra* note 41, at 703–04.

53. Statistics valid through 2013.

FCPA Cases Against Domestic Versus Foreign Firms

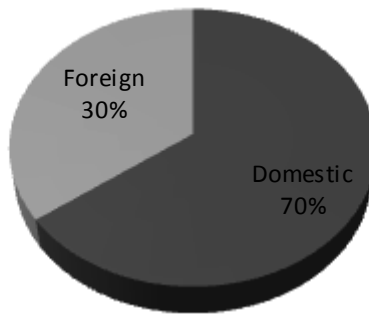


Figure 5: FCPA Fines Paid by Domestic Versus Foreign Firms



Some of the largest FCPA related settlements and fines have been taken with respect to non-U.S. companies, where jurisdiction is typically invoked on the basis of the company qualifying as an “issuer” of foreign securities. For example, some of the largest FCPA settlements include foreign companies: Siemens AG (Germany) (\$800 million), Snamprogetti Netherlands BV/ENI (Holland/Italy) (\$365 million), Technip SA (France) (\$338 million), JGC Corporation (Japan) (\$218.8 million), Daimler AG (Germany) (\$185 million), Alcatel-Lucent SA (France) (\$92 million), ABB (Switzerland) (\$58.3 million), Maygar Telekom (Hungary) (\$59.6 million), and Statoil (\$21 million).⁵⁴

On a number of occasions, the DOJ and SEC have asserted territorial jurisdiction over foreign entities and persons based on U.S. dollar wire transfers through foreign banks.⁵⁵ “These transfers typically involved the use of ‘correspondent’ accounts held by foreign banks at U.S. banks that were maintained to clear foreign U.S. dollar transactions.”⁵⁶ However, in most cases where the regulators cited correspondent accounts, they also cited other jurisdictional facts, including allegations that acts promoting the conspiracy occurred on U.S. soil.⁵⁷

The data shows a clear discrepancy in the amount of fines paid by foreign versus domestic firms. It may be the case that foreign firms are generally more corrupt than domestic U.S. firms and thus the DOJ and SEC are simply appropriating higher fines from the more serious violator. It also may be the case that foreign firms do not readily cooperate with U.S. authorities. If this is not the case and foreign firms are not more corrupt and do cooperate readily, then it must be true that the SEC and the DOJ are unfairly targeting foreign firms with higher FCPA fines.

The cost of FCPA compliance for a typical corporation is estimated as ranging from two to twenty million dollars.⁵⁸ Compliance with the FCPA increases a corporation’s pre-transactional and transactional costs.⁵⁹ Additionally, companies

54. Smith & Parling, *supra* note 22, at 240–41.

55. Yockey, *supra* note 41, at 712.

56. *Id.*

57. *Id.*

58. Sivachenko, *supra* note 26, at 414; see also Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 278 (2010).

59. Sivachenko, *supra* note 26, at 419 (“In addition to the multi-million dollar monetary

facing the uncertain terms of the FCPA may lose contracts or face disbarment when charged with an FCPA violation.⁶⁰ The vagueness of the FCPA also leads companies to turn down certain business ventures.⁶¹ Finally, the FCPA makes it costly for companies to list their stocks on a U.S. exchange.⁶² This is not to say that the FCPA does not also serve certain important goals, such as the eradication of global corruption; it is simply to say that pursuing such goals through the legislation, as it is currently written, is not without costs.

Most FCPA matters are resolved through Deferred Prosecution Agreements (DPAs) or Non-Prosecution Agreements (NPAs).⁶³ Between 2004 and 2011, DPAs and NPAs were used to resolve approximately seventy-seven percent of all FCPA related actions.⁶⁴ DPAs and NPAs typically involve paying substantial fines, the disgorgement of profits, corporate governance reforms and new anti-corruption corporate policies, a monitor to oversee the company's internal compliance program, and the agreement to cooperate with the DOJ and SEC in ongoing investigations.⁶⁵ DPAs and NPAs though useful as they may be are not without their costs. For one their increased use results in greater ambiguity surrounding the FCPA as there is a lack of judicial guidance on matters settled out of court.⁶⁶

penalties and escalating compliance costs, criminal aspects of FCPA enforcement add a host of indirect costs, including reputational damages and the potential loss of future contracts or international opportunities. Collateral consequences of criminal conviction or indictment may be more devastating than imposed fines"); *see also* N.Y.C. Bar Ass'n, Comm. on Int'l Bus. Transactions, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS—SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION? 1–2 (2011).

60. Sivachenko, *supra* note 26, at 419.

61. *Id.* at 411, 419.

62. *Id.* at 422 ("The unpredictability of FCPA enforcement further causes many foreign corporations to avoid registration in the United States in an effort to avoid the FCPA's jurisdiction. Between 2007 and 2011, at least sixty companies removed their stock from U.S. stock exchanges citing 'high administrative, regulatory and other costs' associated with a U.S. listing." (quoting N.Y.C. Bar Ass'n, *supra* note 59, at 21 n.77 (2011)).

63. Yockey, *supra* note 41, at 697.

64. ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES: PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 33 (Oct. 2010), *available at* <http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf> ("In FCPA cases, DPAs and NPAs were not used until 2004. Since then, they have been used in 30 out of 39 concluded criminal enforcement actions against companies.").

65. Yockey, *supra* note 41, at 697; *see also* Sivachenko, *supra* note 26, at 418 ("Many settlements also require installation of third-party compliance monitors, paid for by the company itself, who will police the company's FCPA compliance provisions.").

66. Brooks, *supra* note 42, at 139.

As a result of the high cost of litigation and the broad interpretation and uncertainty of the FCPA, cooperation is generally the only viable option for firms who are charged with FCPA violations.⁶⁷ As Yockey notes, “[t]he consequences of indictment, prosecution, and, ultimately, conviction are seen by many firms as being too great to consider doing anything other than settling.”⁶⁸ Firms that are charged with FCPA violations generally take a severe reputational hit.⁶⁹ Even the announcement that a corporation is the subject of an FCPA investigation can lead to significant reputational harm.⁷⁰ This is why counsel generally advises firms facing FCPA related charges to settle on good terms as opposed to pursuing a trial on the merits.⁷¹

For these reasons, federal prosecutors have a significant impact on interpreting the law and have substantial leverage when it comes to FCPA investigations.⁷² The DOJ essentially controls the disposition of the FCPA cases they initiate and impose their own extremely broad interpretation of the FCPA’s provisions.⁷³ Settlements receive little judicial oversight.⁷⁴ In light of this, federal prosecutors in FCPA cases yield immense power.

67. See generally Yockey, *supra* note 41 (discussing the FCPA settlement framework, including the large scale negative consequences associated with pursuing litigation concerning potential FCPA violations).

68. *Id.* at 691; see also Sivachenko, *supra* note 26, at 416 (“Because of the broad terms of the statute, the limited judicial review of FCPA sanctions, and business’s hesitancy to litigate corporations are left with little real bargaining power and often feel forced to accept prosecutors’ settlement terms, no matter how harsh.”). This sentiment was also echoed by the French leading evening newspaper, *Le Monde*, after Alstom underwent, in December 2014, in the context of the acquisition by General Electric, the heaviest FCPA fine ever imposed by the DOJ. Valérie Segond, *Corruption, La France Piégée*, LE MONDE ECONOMIE (Jan. 18, 2015, 5:34 PM), http://www.lemonde.fr/entreprises/article/2015/01/18/corruption-la-france-piegee_4558515_1656994.html#meter_toaster.

69. Sivachenko, *supra* note 26, at 394.

70. Yockey, *supra* note 41, at 696; see also Ribstein, *supra* note 51, at 628.

71. Yockey, *supra* note 41, at 696; see also SHEARMAN & STERLING LLP, A NEW TOOL AND A TWIST? THE SEC’S FIRST DEFERRED PROSECUTION AGREEMENT AND A NOVEL PUNITIVE MEASURE 1 (2011), available at <http://www.shearman.com/files/Publication/20b76673-2736-4a55-840f-1f75d518ca93/Presentation/PublicationAttachment/71ecb942-9eab-4482-b786-41522a71af75/LT-052411-A-New-Tool-and-a-Twist.pdf>.

72. Sivachenko, *supra* note 26, at 416.

73. *Id.*

74. *Id.* at 417.

E. Case Examples

The following case examples illustrate the general trend which has been to target non-U.S. companies listed as issuers under § 78dd-1 or as non-issuing foreign agents under § 78dd-3.

1. Statoil

In 2006, Statoil, a Norwegian based oil and gas company, was the first non-U.S. company to which the FCPA was applied,⁷⁵ about thirty years after the FCPA was introduced in 1977. Statoil, which qualified as a foreign issuer under § 78dd-1, agreed to pay \$21 million in penalties to resolve FCPA related charges with both the SEC and DOJ regarding alleged improper payments made in Iran.⁷⁶ Statoil had been charged with violating both the anti-bribery provisions and the accounting provisions of the FCPA and allegedly used a U.S. bank in New York to make payments to an Iranian official in order to ensure Statoil would obtain a contract to develop part of Iran's South Pars oil field.⁷⁷ Additionally, Statoil was one of the first cases to use a deferred prosecution agreement in the FCPA context.⁷⁸

After the charges were made against Statoil, Assistant Attorney General Alice Fisher stated that:

Although Statoil is a foreign issuer, the Foreign Corrupt Practices Act applies to foreign and domestic public companies alike, where the company's stock trades on American exchanges This prosecution demonstrates the Justice Department's commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope.⁷⁹

75. Smith & Parling, *supra* note 22, at 237.

76. *Id.* at 237–38; Press Release, U.S. Dep't of Justice, Statoil ASA Satisfies Obligations under Deferred Prosecution Agreement and Foreign Bribery Charges Are Dismissed (Nov. 19, 2009), <http://www.justice.gov/opa/pr/statoil-asa-satisfies-obligations-under-deferred-prosecution-agreement-and-foreign-bribery> [hereinafter Statoil ASA Satisfies Obligations].

77. Smith & Parling, *supra* note 22, at 242.

78. Statoil ASA Satisfies Obligations, *supra* note 76 (“‘This case shows that deferred prosecution agreements against corporations can work as an important middle ground between declining prosecution and obtaining the conviction of a corporation,’ said U.S. Attorney Prett Bharara. ‘The deferred prosecution in this case helped restore the integrity of Statoil’s operations and preserve its financial viability while at the same time ensuring that it improved what was obviously a failed compliance and anti-corruption program.’”).

79. Press Release, U.S. Dep't of Justice, U.S. Resolves Probe Against Oil Company that

Since that time, the trend has been to not only include foreign companies but to target them in FCPA actions. It is also interesting to note that the SEC and DOJ did not begin to apply the FCPA to foreign companies immediately but waited nearly a decade before they began to prosecute foreign companies.

2. Siemens

At the end of 2008, the DOJ filed criminal charges against Siemens Aktiengesellschaft (AG), a German manufacturing company, for violations of the FCPA accounting provision, and the SEC filed civil charges against Siemens for violating the accounting as well as the antibribery provisions.⁸⁰ According to both the SEC and DOJ, Siemens qualified as an issuer for purposes of the FCPA because its shares were listed on the New York Stock Exchange and registered pursuant to Section 12(b) of the Exchange Act.⁸¹ In order to settle these charges, Siemens agreed to pay \$800 million in penalties to the SEC and the DOJ, representing the largest monetary sanction to date imposed for an FCPA matter, for either a U.S. or a foreign firm.⁸² Siemens also agreed to implement a compliance monitor for a four year term and to hire independent U.S. legal counsel to advise the monitor.⁸³ Siemens, one of the most highly publicized international bribery cases to date, demonstrates the great jurisdictional reach of the FCPA; connections between the bribery and the United States were not particularly close in this case.⁸⁴

Bribed Iranian Official (Oct. 13, 2006), http://www.justice.gov/opa/pr/2006/October/06_crm_700.html.

80. Smith & Parling, *supra* note 22, at 243 (citing Information at 36–39, SEC v. Siemens Aktiengesellschaft, No. 08-CR-367-RJL (D.D.C. Dec. 12, 2008), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensakt-info.pdf> and Complaint at 36–38, SEC v. Siemens Aktiengesellschaft, No. 1:08-CV-02167 (D.D.C. Dec. 12, 2008), *available at* <http://www.sec.gov/litigation/complaints/2008/comp20829.pdf>).

81. Smith & Parling, *supra* note 22, at 243.

82. *Id.* at 245.

83. *FCPA/Antibribery Alert*, *supra* note 47, at 191.

84. *Id.*; *see, e.g.*, Information at 13, U.S. v. Siemens S.A. (Argentina), No. 08-CR-368-RJL (D.D.C. Dec. 12, 2008) *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensargen-info.pdf>; Statement of Offense at 5, U.S. v. Siemens S.A. (Venezuela), No. 08-CR-370-RJL (D.D.C. Dec. 12, 2008), *available at* <http://www.justice.gov/sites/default/files/opa/legacy/2008/12/16/siemens-venezuela-stmt.pdf>. *See generally* Information, U.S. v. Siemens Aktiengesellschaft, No. 08-CR-367-RJL (D.D.C. Dec. 12, 2008), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensaktinfo.pdf> (explaining the foundation for charges under the FCPA).

In the case of Siemens, the United States was not the only country to bring corruption related charges; Siemens also paid €395 million to settle an investigation by the Munich Public Prosecutor's Office which was based on the company's alleged failure to supervise its officers and employees with respect to corruption.⁸⁵ As is typical with respect to FCPA charges, the penalty paid in the United States was greater than the penalties paid in the corporation's home country (in this case Germany). This has significant foreign policy implications. The home country may wish to prosecute a firm for bribery but may balance that against an interest in maintaining the health and solvency of one of its national corporations. The unilateral approach by the United States with respect to these matters may have the effect of putting a foreign company either out of business or else in a position where it is forced to reevaluate doing business in the United States or listing on a U.S. stock exchange (as was the case with Daimler).

3. Daimler

In 2010, German automaker Daimler resolved FCPA related investigations with the DOJ and the SEC, agreeing to a monetary penalty of \$93.6 million, \$91.4 million in profit disgorgement, and the implementation of both a corporate compliance monitor and independent consultant.⁸⁶ For purposes of these investigations Daimler was considered an issuer within the meaning of § 78dd-1 of the FCPA.⁸⁷ Additionally, the jurisdictional hook with respect to FCPA antibribery charges concerned Daimler's use of U.S. bank accounts and U.S. companies in executing certain business with foreign government officials.⁸⁸ Importantly, just about a month after Daimler resolved FCPA related charges, the company announced it was delisting its shares from the New York Stock Exchange.⁸⁹ The Daimler case elicited a strong negative reaction from the German

85. Smith & Parling, *supra* note 22, at 245.

86. *Id.* at 247.

87. Information at 1, U.S. v. Daimler AG, No. 1:10-CR-00063 (D.D.C. Mar. 22, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerag-info.pdf>.

88. *Id.* at 1, 3.

89. Smith & Parling, *supra* note 22, at 250; Vanessa Fuhrmans & Laura Stevens, *Symbolic Shift: Why Daimler is Delisting: Why Daimler, European Firms Want to Delist from U.S. Exchanges*, WALL ST. J. EUR., May 18, 2010, <http://www.wsj.com/articles/SB10001424052748704314904575250583589623828>.

media, who in particular cited the intrusiveness of the settlement terms, specifically, the corporate compliance monitors.⁹⁰ The media noted that the SEC not only had a hand in deciding which Daimler manager could lead the department, but now the SEC can also send their own people to Germany in order to keep a closer eye on the corporate managers.⁹¹ This opinion was shared by some in the French media who pointed out recently that French firms cannot even utilize the protections of the French judicial system, as they are forced to address corruption related charges in the United States instead of France.⁹² Additionally, there are significant differences in disclosure and data privacy rules between the United States and foreign jurisdictions, in particular, the European Union, which has caused friction with respect to the enforcement of the FCPA.

4. BAE Systems

In 2010 U.K. defense contractor BAE Systems plc pleaded guilty to defrauding the U.S. by making false statements concerning its FCPA compliance program.⁹³ It was sentenced to pay a \$400 million criminal fine, which represents one of the largest criminal fines for FCPA related charges. As part of its settlement, BAE was required to retain an independent compliance monitor for three years to oversee its new anticorruption compliance program.⁹⁴ With respect to the BAE case, it is worth noting that the DOJ never charged BAE with violating the actual provisions of the FCPA, but instead succeeded on charges of making false statements.⁹⁵ Part of the reason why BAE was not charged with actual FCPA charges may be because the jurisdictional links between the bribery in this case and the United States were quite weak.⁹⁶ This illustrates the large degree of leverage that prosecutors have in defining the criminal activity involved in an FCPA matter.

90. Smith & Parling, *supra* note 22, at 248.

91. *Und Uncle Sam Befiehlt*, 38 FOCUS MAGAZIN 212, 213–14 (Sept. 18, 2006), http://www.focus.de/finanzen/news/unternehmen-und-uncle-sam-befiehlt_aid_213618.html.

92. Segond, *supra* note 69.

93. *Id.*

94. Smith & Parling, *supra* note 22, at 246.

95. Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/op a/pr/bae-system s-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>.

96. Smith & Parling, *supra* note 22, at 245.

5. JGC Corporation

In April 2011 JGC Corporation, a Japanese construction and engineering firm, settled FCPA related charges by agreeing to pay more than \$200 million as part of a DPA.⁹⁷ The violation concerned the agent Jeffrey Tesler for contracts on Bonny Island, Nigeria, for which a number of other companies were also charged.⁹⁸ The violation allegedly began in Europe and occurred primarily within Nigeria, with only tangential connections to the United States. JGC is not a domestic concern or an issuer.⁹⁹ The DOJ asserted that JGC conspired with issuers and domestic concerns.¹⁰⁰ The DOJ also asserted jurisdiction based on JGC's use of correspondent bank accounts.¹⁰¹ The DOJ relied on these two U.S. connections to establish U.S. jurisdiction: (1) that JGC possessed vicarious liability through agency relationships with its American joint-venture partner,¹⁰² and (2) that wire transfers through New York banks formed a territorial act in furtherance of the crime.¹⁰³ Instead of charging JGC directly with a violation of § 78dd-3 as might be expected, the DOJ charged it with causing violations of §§ 78dd-1 and 78dd-2 through its commercial relationships with other firms that were domestic concerns and issuers.¹⁰⁴ Under the terms of the DPA, JGC agreed to retain an independent compliance consultant to review its compliance program for two years.¹⁰⁵

97. Ross, *supra* note 12, at 444. For cases involving a jurisdictional theory based on the transfer of emails routed or stored through U.S. network servers, see *SEC v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013); Information, *United States v. Magyar Telekom Plc.*, No. 1:11CR00597 (E.D. Va. Dec. 29, 2011).

98. Press Release, U.S. Dep't of Justice, *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty* (Apr. 6, 2011), <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html> [hereinafter *JGC Corp. Resolves FCPA Investigation*].

99. Information at 2, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf>.

100. *Id.* at 7.

101. *Id.* at 13.

102. Deferred Prosecution Agreement at 3, *United States v. JGC Corp.*, No. 4:11-cr-00260, at 3 (S.D. Tex. Apr. 6, 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf>.

103. Ross, *supra* note 12, at 447.

104. Information at 8, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf>.

105. *JGC Corp. Resolves FCPA Investigation*, *supra* note 98.

6. Tenaris

In May 2011 the SEC announced it had used a deferred prosecution agreement for the very first time in settling FCPA related charges with Tenaris.¹⁰⁶ Tenaris, an issuer under § 78dd-1, resolved charges with the DOJ by way of an NPA.¹⁰⁷ In this case, the DOJ alleged FCPA territorial jurisdiction over a small company from Luxembourg, Tenaris, whose sole connection to the United States was the transfer of \$32,140 through an intermediary bank in the United States to an agent.¹⁰⁸ Here all allegations of bribery took place outside of the United States, which specifically involved the bribing of an Uzbekistan government official.¹⁰⁹

7. Pankesh Patel

In 2012, a federal judge acquitted a defendant, Pankesh Patel, charged with FCPA violations where the territorial nexus to the United States under § 78dd-3 was that he mailed a package from the U.K. to Washington D.C., which contained an original copy of a purchase agreement for the corrupt deal.¹¹⁰ At trial, the DOJ argued that the mailing qualified under § 78dd-3 because Patel had taken other acts within the United States that formed the basis of the corrupt

106. Press Release, Sec. & Exch. Comm'n, Tenaris to Pay \$5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), <http://www.sec.gov/news/press/2011/2011-112.htm>.

107. *Id.*

108. Yockey, *supra* note 41, at 712.

109. Sec. & Exch. Comm'n, *supra* note 106.

110. Ross, *supra* note 12 at 476; *see FCPA Summer Review 2011*, MILLER CHEVALIER (July 13, 2011), <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=60408> ("In the indictment against the 22 SHOT Show defendants, the DOJ claimed that Patel committed a substantive anti-bribery violation by sending a package via DHL from the United Kingdom to Washington D.C. containing an original copy of a purchase agreement for the corrupt deal, among other charges. Because Patel is a U.K. national (and does not otherwise qualify as an 'issuer' or 'domestic concern' under the FCPA), the DOJ charged Patel under Section 78dd-3 . . . [the judge in the case, Judge Leon,] indicated that he did not understand the basis of the government's interpretation of the statute, and concluded: 'I would think the more cautious, conservative interpretation would be that each act has to be while in the territory of the United States.' The court then granted Patel's motion to dismiss the relevant charge, though it did not issue a formal statement of Judge Leon's reasoning for the dismissal."); *see also* Indictment at 9, *United States v. Patel*, No. 09-338 (D.D.C. Dec. 11, 2009), *available at* <http://www.justice.gov/criminal/pr/documents/11-16-09-patel-indicement.pdf> (alleging that Patel, a UK citizen and person for purposes of § 78dd-3 mailed a package to the United States with links to the bribery); Order Granting Motion to Dismiss at 1, *United States v. Goncalves*, cr-00335-RJL4 (D.D.C. Feb. 23, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/goncalvesa/2012-02-24-goncalvesa-courts-dismissal-order.pdf>.

deal; Judge Leon, the judge in the case, rejected the government's position, finding that the mailing itself must be done while in the United States.¹¹¹ The dismissal of the charges did not include Judge Leon's reasoning.¹¹² The dismissal in this case implies that the act under § 78dd-3 must occur while the individual is physically present in the United States which differs from the previous position taken by the Justice Department.¹¹³

In all of these cases, it may be true that the FCPA was indeed substantively violated. What is interesting, however, is that these cases have very little territorial or other connection to the United States. The fact that it is the United States and not other countries prosecuting these cases of bribery makes a significant difference for the United States in terms of foreign policy and for the system of international law more broadly. The OECD Convention specifically aimed to set up a multilateral system for coping with international bribery. For now it appears as though the United States, and to a certain extent the U.K., is leading the way in their far-reaching attempts to eradicate global corruption.

8. Alstom

Alstom S.A. (Alstom), a French power and transportation company, pleaded guilty in December 2014 and agreed to pay a \$772.29 million fine to charges related to a scheme involving bribe payments in countries around the world including Indonesia, Saudi Arabia, Egypt, and the Bahamas.¹¹⁴ Alstom was charged as an issuer.¹¹⁵ Alstom pleaded guilty to a two-count criminal information filed in December in the U.S. District Court for the District of Connecticut, charging the company with violating the FCPA by falsifying its books and records and failing to implement adequate internal controls.¹¹⁶ Sentencing has been scheduled for June 2015.¹¹⁷

111. MILLER CHEVALIER, *supra* note 110.

112. *Id.*

113. *Id.*

114. Press Release, Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), *available at* <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> [hereinafter Alstom Pleads Guilty].

115. See Information at 2, United States v. Alstom S.A., Case No. 3:14-cr-00246-JBA (D. Conn. Dec. 22, 2014).

116. Alstom Pleads Guilty, *supra* note 114.

117. *Id.*

Also, Alstom Network Schweiz AG, formerly Alstom Prom, Alstom's Swiss subsidiary, pleaded guilty to a criminal information, which charged the company with conspiracy to violate the anti-bribery provisions of the FCPA.¹¹⁸ Alstom Power Inc. and Alstom Grid Inc., two U.S. subsidiaries of Alstom, entered into deferred prosecution agreements, in which they admitted that they conspired to violate the anti-bribery provisions of the FCPA.¹¹⁹

The plea agreement cites certain factors that the department considered in reaching its resolution, including: Alstom's failure to voluntarily disclose the conduct, Alstom's failure to cooperate, the breadth of the companies' misconduct, Alstom's lack of an effective compliance and ethics program, as well as Alstom's prior criminal misconduct.¹²⁰

With respect to the Alstom decision, the Deputy Attorney General James M. Cole, Assistant Attorney General Leslie R. Caldwell of the Justice Department's Criminal Division, First Assistant U.S. Attorney Michael J. Gustafson of the District of Connecticut and FBI Executive Assistant Director Robert Anderson Jr. announced that "this Department of Justice will be relentless in rooting out and punishing corruption to the fullest extent of the law, no matter how sweeping its scale or how daunting its prosecution."¹²¹ "Today's historic resolution is an important reminder that our moral and legal mandate to stamp out corruption does not stop at any border, whether city, state or national," said First Assistant U.S. Attorney Gustafson.¹²²

According to *Le Monde*, a leading French newspaper, companies such as Alstom are forced to cooperate with the United States when charged because to refuse to cooperate would be to ruin a firm's reputation and cut it off from critical markets.¹²³ Failure to cooperate, they point out, is an expensive experiment, as illustrated by Alstom.¹²⁴

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Segond, *supra* note 68.

124. *Id.*

III. EXTRATERRITORIAL EXERCISES OF JURISDICTION

A. *Definitions*

The term ‘jurisdiction’ has multiple meanings attached to it. The most relevant for purposes of this analysis is the “State’s legal capacity to: (a) make, (b) enforce, and (c) adjudicate breaches of its substantive rules.”¹²⁵ One textbook on international law notes that: “the unauthorized exercise of sovereign power in the territory of another State is typically protested as an exercise of ‘extraterritorial’ jurisdiction, thus violating International Law.”¹²⁶ According to this definition, where a state exercises extraterritorial jurisdiction it necessarily infringes upon the sovereignty of another state:

Every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies that exclusion of power from all others.¹²⁷

That is, the principle of sovereignty incorporates the notion that a state is to have exclusive jurisdiction over her peoples and territory to the exclusion of all other states. An unlawful extraterritorial act of jurisdiction occurs where one state violates the sovereignty of another through the application of its laws.

Certain exercises of extraterritorial jurisdiction are far more acceptable than others. “Many countries routinely apply their laws to conduct occurring beyond their national borders, in ways that do not adversely impact international relations.”¹²⁸ A number of factors influence the degree to which an act of extraterritorial jurisdiction will be accepted by the international community. On the one hand, acts which violate well established principles of international law are less likely to be accepted particularly where they interfere with another state’s right to regulate. Alternatively, acts taken in conjunction with multilateral efforts are more likely to be accepted.

125. WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 235 (5th ed. 2007).

126. *Id.*

127. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (partially overruled on other grounds).

128. SLOMANSON, *supra* note 125, at 236.

B. Under International Law

Customary international law dictates the boundaries of what is legal in terms of states exercising extraterritorial jurisdiction. States commonly exercise extraterritorial jurisdiction over both criminal and civil matters. The authority to do so derives from firmly established principles of customary state practice.¹²⁹ At its most basic level, the international practice is such that a state may not exert extraterritorial jurisdiction unless acting under a permissive rule of international law.¹³⁰

The outer limits of extraterritorial jurisdiction are defined by customary international law. States may prescribe jurisdiction under the following permissive rules: (1) conduct that takes place wholly or partially within its territory (territorial jurisdiction); (2) conduct dealing with the state's nationals or nationally based entities (nationality jurisdiction); (3) conduct outside the home territory that has a substantial effect within its territory (passive personality jurisdiction); (4) conduct that threatens the national security of the prescribing state (protective jurisdiction); and (5) conduct that is abhorrent to humanity (universality jurisdiction).¹³¹

The nationality principle allows states to exert their jurisdiction over their own subjects abroad, and it applies equally to persons as well as entities.¹³² With respect to the FCPA, this principle allows the DOJ to have jurisdiction over actions made by any U.S. company or national such as those falling under § 78dd-2 jurisdiction for domestic concerns.¹³³ This applies even where there is no connection to interstate commerce.¹³⁴

Territoriality is the most common basis that states use for asserting extraterritorial jurisdiction.¹³⁵ This principle has been described as “the primary principle applied by U.S. courts.”¹³⁶ Under

129. *Id.* at 236.

130. The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7).

131. Restatement (Third) of Foreign Relations Law of the United States § 402 (1987), available at [http://internationalcriminallaw.org/Restatement\(Third\)_of_Foreign_Relations_Law/RSecs334_401-04_411_432_442.PDF](http://internationalcriminallaw.org/Restatement(Third)_of_Foreign_Relations_Law/RSecs334_401-04_411_432_442.PDF); SLOMANSON, *supra* note 125, at 237.

132. Brown, *supra* note 5, at 318 (citing Restatement (Third) of Foreign Relations Law of the United States § 402(2) (1987); Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 290–92 (1999)).

133. Sivachenko, *supra* note 26, at 401.

134. *Id.*

135. Brown, *supra* note 5 at 278 (citing Restatement (Third) of Foreign Relations Law of the United States § 402, cmt. c (1987)).

136. Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*,

this principle, the regulating state, in this case the United States, has jurisdiction over any acts that take place in the territory of the United States through the means of interstate commerce.¹³⁷ This provides the basis for jurisdiction under § 78dd-3.¹³⁸

The Third Restatement of Foreign Relations Law of the United States suggests an additional reasonableness balancing test to gauge the outer limits of legal uses of extraterritorial jurisdiction.¹³⁹ This test examines the proscribing state's connection to the activity being regulated, the link between the culpable individual and the proscribing state, the significance to and compatibility with the international legal system, and the likelihood that the law will conflict with another state's regulation of the activity.¹⁴⁰ Where these factors balance in favor of an interpretation of jurisdiction that is reasonable, then the jurisdiction will not be considered in violation of international law. Where, on the other hand, the balancing of these factors leads to an interpretation that the state's exercise of extraterritorial jurisdiction was unreasonable, it will be considered in violation of international law. This balancing test was born out of international hostility towards the assertion of nationality based jurisdiction for actions taken exclusively abroad, the result of "the United States and certain other countries to construe territorial and nationality-based jurisdiction broadly."¹⁴¹

C. Under U.S. Constitutional Law

The Charming Betsy Canon of judicial interpretation holds that U.S. law is interpreted with the presumption that Congress did not intend to violate international law or norms.¹⁴² Often this canon has

34 AM. CRIM. L. REV. 325, 342 (1997).

137. Sivachenko, *supra* note 26, at 401.

138. Under international law, an act of extraterritorial jurisdiction is also lawful under the (1) passive personality principle (victim of crime is nationality of prescribing state), (2) protective principle (national security), and (3) universality principle (crimes that are abhorrent to humanity). SLOMANSON, *supra* note 125, at 237.

139. Ross, *supra* note 12, at 471.

140. *Id.*; Restatement (Third) of Foreign Relations Law of the United States § 403 (1987).

141. Brown, *supra* note 5 at 321; *see also* Restatement (Third) of Foreign Relations Law of the United States pt. IV, ch. 1. (1987).

142. Ross, *supra* note 12 at 481 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (2 Cranch) (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.") and *Talbot v. Seeman*, 5 U.S. 1, 43 (1801) ("[W]e

been applied to questions of extraterritorial effects.¹⁴³ Here, the question is: Given that the FCPA applies extraterritorially and given also that Congress did not intend for these extraterritorial application to violate international law, what can be said with regard to the legality of the FCPA's extraterritorial application? If, in fact, the FCPA's extraterritorial application is found to violate international law, then FCPA enforcement has strayed from its original purpose, because it is clear that Congress did not intend for the FCPA's extraterritorial application to violate international law.

The Supreme Court has taken up the issue of extraterritorial jurisdiction in a manner similar to that advocated by the Third Restatement.¹⁴⁴ Generally, in the context of corporate law, the Supreme Court has hesitated to apply laws to noncitizens where the conduct occurred abroad. *Morrison v. Nat'l Australia Bank* clarified that this presumption against extraterritoriality should be heeded especially where the intended effects of the illegal actions are experienced primarily outside of the United States.¹⁴⁵ Since the Supreme Court's decision in *Morrison*, courts have applied an even stronger presumption against extraterritoriality.¹⁴⁶ This presumption against extraterritoriality, which is designed to deal with statutory ambiguity, may apply even where there is no conflict between the extraterritorial law and the laws of another state and even where some conduct occurs within the prescribing state.¹⁴⁷ Additionally, the

think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”)).

143. Ross, *supra* note 12, at 481 (citing Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 489 (1998), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2099&context=faculty_scholarship).

144. Ross, *supra* note 12, at 472. See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (“But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined by the law of the country where it is done.”), *overruled by* *Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010); see also *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945) (“[I]t is settled law . . . that any state may impose liabilities . . . for conduct outside its borders that has consequences within its borders which the state reprehends.”); *Rivard v. United States*, 375 F.2d 882, 887 (5th Cir. 1967) (applying the territorial-effects doctrine); *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), *superseded by* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (2006)).

145. *Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 248–50 (2010).

146. Ross, *supra* note 12, at 473.

147. *Id.* at 474–75; see also *Morrison*, 561 U.S. at 254–55, 266; *E.E.O.C. v. Arabian*

FCPA, as opposed to the securities laws at issue in *Morrison*, was intentionally applied to extraterritorial conduct.

The Due Process Clause of the Fifth Amendment is the primary judicial mechanism that limits the application of extraterritorial jurisdiction. The due process standard varies by circuit, with some courts requiring the defendant have some nexus to the United States and other circuits incorporating international law principles on extraterritorial jurisdiction.¹⁴⁸ It is clear that the defendant must have minimum contacts with the United States.¹⁴⁹ Jurisdiction will lie where the violation was a “‘direct foreseeable result’ of the extraterritorial conduct and the defendant [knew or had reason to know] that the conduct would have that effect in the United States.”¹⁵⁰

IV. DOES THE FCPA VIOLATE INTERNATIONAL LAW?

On the one hand, the jurisdictional hooks with respect to the extraterritorial application of the FCPA have some concrete basis in international law. For example, with respect to § 78dd-1, the extraterritorial jurisdictional basis for issuers is not particularly controversial because issuers are already subject to many U.S. federal securities law.¹⁵¹ Jurisdiction for domestic concerns, § 78dd-2, like § 78dd-1, is subject to extraterritorial jurisdiction under the nationality principle. The § 78dd-3 jurisdictional hook is founded on a territorial theory, which is not necessarily controversial because it requires a territorial nexus to the crime; and when an individual commits a criminal act in a country, that country has jurisdiction over the crime.¹⁵² The issue is when jurisdiction under § 78dd-3 is applied

American Oil Co., 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

148. See, e.g., *United States v. Cardales*, 168 F.3d 548 (1st Cir. 1999); *United States v. Caicedo*, 47 F.3d 370 (9th Cir. 1995); *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990).

149. *Brown*, *supra* note 5, at 335.

150. *Id.* at 338. See *United States v. Int’l Bd. of Teamsters*, 945 F. Supp. 609, 623 (S.D.N.Y. 1996) (noting that Labbatt’s actions caused sufficient effects within the U.S. to satisfy constitutional due process).

151. *Ross*, *supra* note 12, at 461.

152. *Id.*; Annotation, *Comment Note Necessity of Proving Venue or Territorial Jurisdiction of Criminal Offense Beyond Reasonable Doubt*, 67 A.L.R.3d 988, 1004 (1975) (“The judicial power to hear and determine a criminal prosecution, as between the forum and other states, federal districts, or countries, on the basis of the offense having occurred within the territorial limits of the forum state or federal district, is what is referred to by the term ‘territorial jurisdiction.’”). See *Trindle v. State*, 602 A.2d 1232, 1238 (Md. 1992) (Eldridge, J., dissenting in part and concurring in part) (“[T]he Sixth Amendment to the Constitution of the

without much of a territorial nexus to the crime. When the interpretation of § 78dd-3 is stretched so thin so that a mere bank transfer is used as a predicate for jurisdiction, then the exercise of extraterritorial jurisdiction is less reasonable and may fail the balancing test under international law. Similarly where jurisdiction is based on an agency relationship alone, neither the nationality principle nor the territorial principle are invoked. Thus, such cases might constitute an unlawful exercise of extraterritorial jurisdiction.

Two aspects of FCPA enforcement are particularly troubling. The first involves the DOJ asserting jurisdiction based on expansive vicarious liability theories, including agency relationships (such as in the JGC case). The second includes the interpretation of the territorial provision of § 78dd-3 as allowing for jurisdiction where the territorial nexus to the United States is tenuous, where the acts in furtherance of the bribery which take place in the United States are minor (e.g.: transfer of money from a U.S. bank account e-mail through a U.S. router).¹⁵³ Essentially, when jurisdictional theories under § 78dd-3 are stretched thin, the Foreign Corrupt Practices comes into conflict with international law.

When jurisdiction under § 78dd-3 is based on a weak predicate, the act of extraterritorial jurisdiction may fail the reasonableness balancing test under international law. The balancing test, for one, looks at the link between the regulating state and the activity being regulated. When jurisdiction is based on a wire transfer or email through a U.S. router, there is often little connection between the bribery at issue and the United States. The test also examines the likelihood that the law will conflict with regulation by other states. Where there is little connection between the bribery at issue in the case and the United States, it is more likely that other countries may take issue with United States acting as the global anti-corruption enforcer.

Jurisdiction under § 78dd-3 has been heavily criticized by commentators of the FCPA and has been described as “near limitless.”¹⁵⁴ The meaning and thus the scope of jurisdiction of §

United States, made applicable to state judicial proceedings by the Fourteenth Amendment, requires that ‘in all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State . . . wherein the crime shall have been committed’ A state may not, consistent with the Sixth Amendment, try an accused for a crime committed entirely in another state.”).

153. Ross, *supra* note 12, at 464.

154. *Id.* at 463; Mauro M. Wolfe, *Does the US Government Have Limitless Jurisdiction*

78dd-3 remains unclear from a reading of the provision; it is not obvious what exactly is meant by the phrase “while in the territory of the United States.” A look at other provisions of the U.S. code does not add clarity as this phrase does not appear elsewhere in the code in its precise form.¹⁵⁵ Elsewhere in the code, Congress has defined extraterritorial jurisdiction with much more precision. In practice, prosecutors have taken jurisdiction under § 78dd-3 to its near limit. Such a broad reading of § 78dd-3 is contrary to its legislative history and the congressional intent. Congress did not intend for foreign businesses to be targeted that had little to no connection to the United States.

There is a presumption established under *Morrison* that laws such as the FCPA do not apply to conduct occurring abroad unless there is clear indication by Congress to do so.¹⁵⁶ The legislative history suggests that Congress was hesitant to apply the FCPA to foreign entities or persons without a meaningful connection to the territory of the United States.¹⁵⁷ Applying *Morrison*, under these circumstances would suggest caution in applying the FCPA extraterritorially.¹⁵⁸ However, in practice, the FCPA has been applied even where there was merely a tenuous connection to the United States.

Extraterritorial jurisdiction with respect to most securities laws requires that the foreign conduct have a direct and substantial, rather than general effect on the United States or its nationals.¹⁵⁹ Other U.S. statutes that specifically call for extraterritorial application typically also indicate that the prohibited conduct has a substantial effect within the United States.¹⁶⁰ This is not the case with the FCPA. And, where there has not been a demonstrable effect on U.S. interests, courts in other cases, such as *Morrison*, have not hesitated to reject

Enforcing the FCPA?, 3 NEWSL. CRIM. L. SEC. LEGAL PRAC. DIV. INT’L B. ASS’N, May 2010 available at <http://www.martindale.com/matter/asr-1055918.pdf>.

155. Ross, *supra* note 12, at 465–66.

156. *Id.* at 471; *see also* *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.”), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

157. Ross, *supra* note 12, at 474.

158. However, there a number of critical differences between the securities law at issue in *Morrison* and the FCPA.

159. Brown, *supra* note 5, at 331.

160. Ross, *supra* note 12, at 465. *See also* 18 U.S.C. § 2332b(a)(1) (2006).

extraterritorial jurisdiction.¹⁶¹ Where a U.S. company has suffered as a result of its competitors' foreign bribery, it is easy to see how this effects test can be met. However, where there is no observable negative consequence for U.S. companies as a result of the bribery, U.S. interests are not sufficiently implicated for purposes of international law.¹⁶² In cases where U.S. interests have not been implicated, the assertion of subject matter jurisdiction would be *prima facie* unreasonable under grounds of international, but not necessarily U.S. law.

The FCPA has strayed from its original purpose. Originally, the 1998 amendments to the FCPA were intended to make the FCPA applicable to certain foreign entities as a way of offsetting the competitive disadvantage to America corporations. Today, however, it is foreign businesses that are paying the majority of FCPA fines.

A. Separation of Powers Concerns

The FCPA is enforced by prosecutors from the DOJ and the SEC, two agencies that form part of the executive branch. Because the FCPA is rarely litigated, organizations have immense power in shaping what the law is. However, these same prosecutors simultaneously determine who will pay for violating the law. In theory prosecutors as executive branch members consider the foreign policy implications of their enforcement decision. However, in practice the FCPA has the potential to bypass international jurisdictional norms and substantially involve American foreign policy.¹⁶³

Because the bribe itself does not need to take place within the United States, and where a phone call or bank transfer is enough to warrant jurisdiction, virtually any corporation is a potential target of the FCPA.¹⁶⁴ Add to this law enforcement's aggressive tactics, pressure on companies to settle, sparse judicial precedent on the FCPA, and little judicial oversight of settlements, and it becomes clear that in the FCPA prosecutors have near limitless power to determine which firms pay while others walk free. This kind of potential for selective enforcement is evidence that there is a current imbalance of power on this issue with respect to the three branches of

161. *Id.* at 333.

162. Brown, *supra* note 5, at 334.

163. Ross, *supra* note 12, at 449.

164. Sivachenko, *supra* note 26, at 400.

government. The Separation of Powers principle implies that the executive branch ought not to be writing what the law is at the same time it enforces the law. Congress, in this case, ought to have defined with greater precision what the law was and the courts should be the ones presently interpreting its meaning. As it currently stands, the DOJ and the SEC are defining the law at all levels as well as enforcing it.

B. Foreign Policy Consequences of FCPA's Extraterritorial Reach

International criticism of the FCPA should be interpreted in light of the kinds of foreign policy implications inherent in this analysis and ultimate determination. The aggressive enforcement of the FCPA has led some critics to question whether this is American imperialism run amok.¹⁶⁵ In particular, the FCPA presents acute problems concerning extraterritoriality because it specifically regulates conduct occurring abroad in whole or in part, lacks a firm and concrete scope, and is aggressively enforced.¹⁶⁶ Any law with a transnational scope has the potential to incite foreign relations trouble, however, the FCPA is particularly troubling in this regard because it regulates conduct that may have only a tenuous effect on American interests.¹⁶⁷ Another problem stems from the fact that because most FCPA matters are settled out of court by way of DPAs or NPAs, there is little judicial guidance on the outer boundaries of FCPA jurisdiction, and the SEC and DOJ continue to aggressively push the FCPA to the limit.¹⁶⁸

Another question emerges after taking into consideration the aggressive enforcement of the FCPA against foreign-owned businesses: Is this an attempt by the SEC and the DOJ to give American businesses a competitive edge by enforcing the FCPA more

165. Smith & Parling, *supra* note 22, at 249.

166. Ross, *supra* note 12, at 458.

167. *Id.* at 458–59; *see also* Brown, *supra* note 5, at 240 (“[E]nlargement of the extraterritorial effect of the [FCPA’s] antibribery provisions may prove to be the most significant and challenging foray by the United States into the regulation of international business . . .”).

168. Brooks, *supra* note 42, at 156 (noting that despite a large amount of uncertainty surrounding the FCPA, there are not many judicial precedents due to the proliferation of DPAs and NPAs); *supra* note 12, at 459; *see also* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 4 (2d ed. Am. Bar Ass’n 2010); Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred?: Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1869–70 (2005).

stringently against non-U.S. companies?¹⁶⁹ Even if this conclusion has little basis in reality, it is the case that the targeting of foreign businesses with comparatively higher fines certainly has the power to incite critics.

Some have pointed out that aggressive enforcement of the FCPA risks inviting countervailing measures by foreign governments against U.S. companies.¹⁷⁰ The FCPA is seen in some ways to intrude on state sovereignty. If Germany, for example, has chosen not to view certain bribery related conduct as improper, it is difficult to see what business the U.S. has in second-judging that decision.¹⁷¹ Moreover until very recently, the bribery of foreign government officials was not only allowed in large parts of the world; it was tax deductible.¹⁷² Such was the case in Germany where Siemens and Daimler are headquartered. Other countries around the world, for these reasons, have expressed resentment at the United States for taking on the role of global anticorruption “police officer.”¹⁷³

Aggressive enforcement of the FCPA in the United States has led to fewer foreign companies accessing U.S. capital markets.¹⁷⁴ One critic notes that the FCPA adds to a firm’s cost even where no one in the firm has the intention of paying a bribe.¹⁷⁵ The FCPA simply adds to the already high cost of registering with a U.S. stock exchange. As the Daimler case illustrates, sometimes that added cost is simply too high for businesses and they will choose to delist as opposed to facing U.S. regulation.

As enforcement moves away from conduct that is viewed as obviously unacceptable throughout the world, it is more likely that some will view that enforcement activity as illegitimate.¹⁷⁶ This has a

169. Smith & Parling, *supra* note 22, at 254 (“[A]ggressive enforcement has, at times, led foreign companies and citizens to view the US regulators not as policemen but as biased referees who are trying to punish foreign companies in order to help their US competitors.”).

170. *Id.* at 255.

171. *Id.* at 252 (“[T]he US government is viewed as a bull in a china shop when it comes to the protection and use of personal information The different notions of what constitutes confidential person information and the reduced protection for that information is one source of criticism of US investigation methods.”).

172. *Id.* at 253.

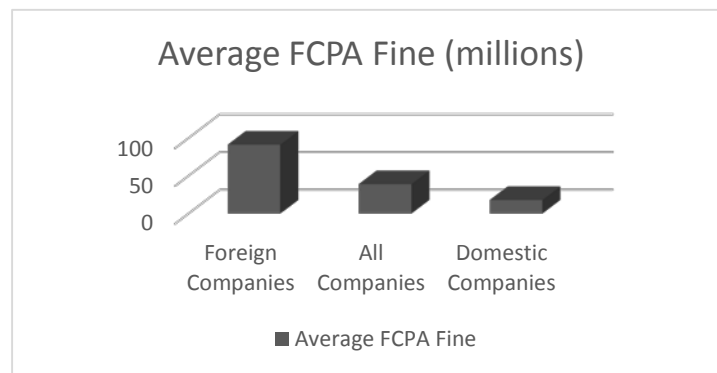
173. *Id.* See Sean Hecker & Margot Laporte, *Should FCPA ‘Territorial’ Jurisdiction Reach Extraterritorial Proportions?*, INT’L L. NEWS: AM. BAR ASS’N (2013), available at http://www.americanbar.org/publications/international_law_news/2013/winter/should_fcpa_territorial_jurisdiction_reach_extraterritorial_proportions.html.

174. Smith & Parling, *supra* note 22, at 254; Fuhrmans & Stevens, *supra* note 89.

175. Smith & Parling, *supra* note 22, at 254.

176. *Id.*

number of practical consequences. For one, the less legitimate the anti-criminal mission seems abroad, the less forgivable will be intrusions into other spheres of sovereign influence. In the example explored above, Germany might be more or less forgiving of the United States for placing immense fines on German corporations for FCPA violations if the German authorities believed that the conduct on the part of Siemens or Daimler causing the violation was substantially egregious so as to offend international norms. Also relevant is the extent to which foreign governments believe in the genuineness of the desire on the part of U.S. officials in achieving reasonable and definable transnational anti-corruption standards.



V. THE INTERNATIONAL BUSINESS ANTI-CORRUPTION TAX

Taking a step back and conceptualizing fines under the FCPA as an international business tax allows us to understand some of the trends already discussed and to address what questions remain. First, it is clear that the FCPA is broadly interpreted by the agencies enforcing it. There is also evidence that many, if not all, major international firms violate the terms of the FCPA in at least one context. Given the DOJ and SEC's aggressive law enforcement tactics it is easy to see how they could find an FCPA violation with nearly any major multi-national company. Under these circumstances the enforcement of the FCPA begins to look more like the enforcement of a tax rather than a criminal law. Although the FCPA is technically a penalty, "[t]hat label cannot control whether the payment is a tax for purposes of the Constitution."¹⁷⁷ This quote is

177. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572 (2012).

from the Supreme Court's decision on the constitutionality of the Affordable Healthcare Act where the Supreme Court determined that the Affordable Healthcare Act was a tax for purposes of the Constitution. Although there are critical differences between the penalty at issue in that case and the FCPA penalties at issue here, it is never the less useful to reconceive of the FCPA penalty as a tax as an academic exercise.

When the FCPA is re-envisioned as a tax it becomes immediately apparent that the tax is not uniformly collected according to some clear set of rules but rather collected at the near sole discretion of the DOJ and SEC. These two organizations by way of settlement terms decide who pays the tax, how much they pay, and whether there are any additional terms alongside the tax. This poses separation of powers concerns as well as potential Fourteenth Amendment claims. The potential for selective or discriminatory enforcement is great. Add to this that the average tax paid by domestic companies charged with FCPA violations is \$17.8 million, while the average tax paid by foreign companies charged with FCPA violations is \$91.1 million—over five times as high!¹⁷⁸

If, in fact, the SEC and the DOJ are collecting FCPA fines according to a neutral criteria related to the severity of bribery, this data suggests that either foreign firms are significantly more corrupt than domestic firms or foreign firms are less likely to cooperate with U.S. authorities. In the alternative, if foreign firms are not more corrupt on average than domestic firms, one wonders why foreign firms are paying more than five times the FCPA penalty on average.

VI. ADDRESSING EXTRATERRITORIALITY OF THE FCPA

It seems that, at a minimum, current extraterritorial enforcement of the FCPA has the potential to violate international law. Potential solutions to this conflict, from the broad to the narrow, are explored briefly below.

Shayne Kennedy notes that criminal corporate liability is unnecessary where the corporation may be heavily fined in the absence of criminal liability. Fines are not uncommon in FCPA matters. Criminal penalties, Kennedy notes, as opposed to fines, are higher in transaction costs.¹⁷⁹ One potential solution to the

178. Statistics are valid through 2013.

179. Shayne Kennedy, *Probation and the Failure to Optimally Deter Corporation Misconduct*, 71 S. CAL. L. REV. 1075, 1088–89 (1998).

extraterritorial application would be for the DOJ to back away from corporate criminal liability in general. This, however, is a rather blunt solution. There is some evidence which suggests that costly as the FCPA may be, it actually works in deterring bribery and international corruption. If so, it may be worth it for the United States to push the boundaries of international law in order to make headway towards these anticorruption goals.

One author proposes drawing on the presumption against extraterritoriality established in *Morrison* in order to find a “reasonable limit to the territorial provision of the FCPA.”¹⁸⁰ The FCPA is somewhat unique from *Morrison* in that it was much more clear in the case of the FCPA that the law was meant to apply extraterritorially. More importantly, FCPA cases are rarely litigated, which keeps *Morrison*, for all practical purposes, out of the equation.

One solution to the problem of aggressive FCPA enforcement would be to amend the FCPA in order to add greater clarity to the law in terms of the limits of its jurisdiction.¹⁸¹ Although greater clarity would greatly reduce FCPA transaction costs, the process of gaining the political will to accomplish an amendment may not be feasible at the present time.

Finally, some scholars argue that in order to determine the outer limits of jurisdiction under the FCPA, one should look to see whether an act is legal under principles of international law. As one author notes:

By failing to link a violation of U.S. law to a demonstrable prejudice of national interest, the jurisdictional reach of the FCPA exceeds the legitimate grasp of U.S. legislative and enforcement authorities. Indeed, taken to its apparent limits, the amended FCPA would in effect be a general warrant against international bribery. Fortunately, the proscriptive zeal of the FCPA is restrained by international law which imposes a requirement of reasonableness on the exercise of both proscriptive and enforcement jurisdiction.¹⁸²

Yet, in many senses the FCPA is not, in reality, restrained by international law. For example, the Ninth Circuit concluded that the application of a law extraterritorially need not comply with

180. Ross, *supra* note 12, at 444.

181. Sivachenko, *supra* note 26, at 425.

182. Brown, *supra* note 5, at 359.

international law, prosecutors must only prove that: (1) it was Congress's intent that the law apply abroad and (2) application of the law in that case complies with the Fifth Amendment.¹⁸³ However, other circuits have factored international law into their due process analysis.¹⁸⁴

The reasonableness test under international law is a balancing test; this test ought to be considered by those judicial or otherwise determining the outer boundaries of jurisdiction under the FCPA. Because most FCPA matters are settled out of court, I argue that the SEC and DOJ should explicitly consider the reasonableness test under international law, especially with regard to their decisions as to who to prosecute under § 78dd-3. It is crucial that prosecutors be the ones to consider international law because courts currently have little policing power over FCPA settlements.

The U.S. should focus its enforcement efforts with respect to the FCPA on bribery which has a close connection or substantial effect on the US. This way anti-corruption can be pursued while minimizing potential foreign policy concerns and international law breaches. This is also keeping in the spirit of the original FCPA legislation and its amendments.

VII. CONCLUSION

Current enforcement efforts with respect to the Foreign Corrupt Practices Act can be re-conceptualized as an international business tax, collected at the near sole discretion of the SEC and the DOJ. Many major international corporations violate the SEC and DOJ's broad interpretation of the FCPA, but only a handful are prosecuted. Nearly all FCPA matters are resolved out of court by way of a plea agreement, DPA, or NPA, the terms of which are largely dictated by the SEC and DOJ.¹⁸⁵ Statistical evidence reveals a large discrepancy between FCPA fines collected from foreign versus domestic firms. This reveals that either foreign firms are measurably more corrupt, less willing to cooperate, or else the SEC and DOJ are unfairly imposing heavier fines on foreign companies.

In fact, the U.S. government's current aggressive FCPA enforcement policy may be placing it under shaky international legal

183. *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990).

184. *See United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995).

185. *ORG. FOR ECON. CO-OPERATION & DEV.*, *supra* note 64, at 32.

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grounds. Under international law, a state may only exert extraterritorial jurisdiction based on one of several enumerated principles.¹⁸⁶ Section 78dd-3 of the FCPA exerts extraterritorial jurisdiction against foreigners even in cases where there is only a tangential connection between the underlying criminal conduct and the territory of the United States. This kind of exercise of extraterritorial jurisdiction fails the balancing test under international law. There is an easy way out of this conflict with international law. The SEC and DOJ should explicitly consider the balancing test under international law when determining whether to exert jurisdiction extraterritorially under the FCPA. Prosecutorial decisions incorporating this test will eliminate any conflict with international law and conserve prosecutorial resources for application of the FCPA in line with original congressional intent.

186. SLOMANSON, *supra* note 125, at 236.

ADDENDUM 1¹⁸⁷

Corporation	Foreign	Nation	Criminal Monetary Penalty (Mil.)	Total Penalty (Mil.)
Siemens AG	Y	Ger.	450	800
Kellogg Brown & Root LLC	N	U.S.	402	579
Total S.A.	Y	Fr.	245.2	398.2
Snamprogetti Neth.	Y	Neth.	240	365
Technip S.A.	Y	Fr.	240	338
JGC Corp.	Y	Japan	218.8	218.8
Daimler AG	Y	Ger.	93.6	185
Weatherford Int'l	Y	U.S.		152.6
Alcatel-Lucent SA	Y	Fr.	92	137.4
Magyar Telekom	Y	Hung.	63.9	95
Marubeni Corp.	Y	Japan	88	88
Panalpina	N	U.S.	71	82
Johnson & Johnson	N	U.S.	0	70
ABB Ltd	Y	Switz.	19	58.3
Pride Int'l	N	U.S.	32.6	56.1
Archer Daniels Midland Co.	N	U.S.	17.8	54.3
Royal Dutch Shell PLC	Y	Neth./U.K.	30	48.1
Diebold Inc.	N	U.S.	25.2	48.1
Baker Hughes Incorporated	N	U.S.	11	45
Titan Corp.	N	U.S.	13	41.5
Pfizer Inc.	N	U.S.	15	41.3
Willbros Group Inc.	N	U.S.	22	32.3
Bilfinger SE	Y	Ger.	32	32
Chevron Corp.	N	U.S.	25	30
Eli Lilly & Co.	N	U.S.	0	29.4
Bridgestone	N	U.S.	28	28
Innospec	N	U.S.	14.1	27.5
Tyco int'l	Y	Switz.	13.7	26.8
Vetco Gray Inc.	Y	U.K.	26	26
General Electric	N	U.S.	0	23.4
Biomet	N	U.S.	17.3	22.8
Smith & Nephew PLC	Y	U.K.	16.8	22.2

187. All values expressed in millions (USD).

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York Int'l Corp.	N	U.S.	10	22
Statoil, ASA	Y	Nor.	10.5	21
Transocean	Y	Switz.	13.4	20.6
AGCO Corp.	N	U.S.	1.6	20
AB Volvo	Y	Swed.	7	19.6
Alliance One Int'l	N	U.S.	9.5	19.5
Control Components, Inc.	N	U.S.	18.2	18.2
Novo Nordisk	Y	Den.	9	18
Fiat S.p.A.	Y	It.	7	17.8
ABB Vetco Gray, Inc.	Y	U.K.	10.5	16.4
Aon	N	U.S.	1.8	16.3
Armor Holdings, Inc.	Y	U.K.	10.3	16.1
Diageo	Y	U.K.	0	16
Parker Drilling Co.	N	U.S.	15.9	15.9
Tidewater	N	U.S.		15.7
Schnitzer Steel Indus., Inc.	N	U.S.	7.5	15.2
Maxwell Technologies	N	U.S.	8	14.4
Stryker Corporation	N	U.S.	0	13.3
Allianz SE	Y	Ger.	0	12.4
Nordam Group Inc.	N	U.S.	11.8	11.8
BizJet	N	U.S.	11.8	11.8
BellSouth Corp.	N	U.S.		10.9
Flowserve Corp.	N	U.S.	4	10.5
IBM	N	U.S.	0	10
Int'l Business Machines Corp.	N	U.S.	0	10
Tenaris	Y	It.	3.9	9.3
Universal Corp.	N	U.S.	4.4	9
Data Systems & Solutions LLC	N	U.S.	8.8	8.8
Noble Corp.	Y	U.K.		8.1
El Paso Corp.	N	U.S.	5.5	7.8
Orthofix Int'l	N	U.S.	2.2	7.4
Ingersoll-Rand Company Ltd.	Y	Ir.	2.5	6.8
GlobalSantaFe Corp.	N	U.S.		5.85
Tyson Foods, Inc.	N	U.S.	4	5.2
DPC (Tianjin) Co. Ltd.	N	U.S.	2	4.8
Textron Inc.	N	U.S.	1.2	4.7
Koninklijke Philips Electronics	Y	Neth.	0	4.5
Aibel Group Ltd.	Y	U.K.	4.2	4.2
Akzo Nobel N.V.	Y	Neth.	0.8	3.8
Watts Water	N	U.S.	0	3.8

UTStarcom Inc.	N	U.S.	1.5	3
Faro Tech., Inc.	N	U.S.	1.1	3
Diagnostic Products Corp.	N	U.S.		2.9
Rockwell Automation Inc.	N	U.S.	0	2.8
Comverse	N	U.S.	1.2	2.8
RAE Systems	N	U.S.	1.7	2.8
Lucent Technologies Inc.	N	U.S.	1	2.5
Syncor Taiwan, Inc.	Y	Taiwan	2	2.5
Latin Node Inc.	N	U.S.	2	2
AGA Med. Corp.	N	U.S.	2	2
Oracle Corp.	N	U.S.	0	2
InVision Tech.	N	U.S.	0.8	1.9
ITT Corp.	N	U.S.	0	1.7
Ralph Lauren Corp.	N	U.S.	0.9	1.6
Monsanto Co.	N	U.S.	1	1.5
Saybolt Inc.	N	U.S.	1.5	1.5
Helmerich & Payne, Inc.	N	U.S.	1	1.4
Keyuan Petrochemicals	Y	China	0	1
Westinghouse Air Brake Technologies Corp.	N	U.S.	0.3	0.7
Nature's Sunshine	N	U.S.	0	0.6
Micrus Corp.	N	U.S.	0.5	0.5
Sam P. Wallace Co. Inc.	N	U.S.	0.5	0.5
Syncor International	N	U.S.	0	0.5
Schering-Plough Corp.	N	U.S.	0	0.5
Avery Dennison Corp.	N	U.S.	0.2	0.5
Ball Corp.	N	U.S.	0	0.3
Montedison, S.p.A	Y	It.		0.3
Triton Energy Corp.	N	U.S.		0.3
Dow Chemical Co.	N	U.S.	0	0.3
Delta & Pine Land Co. & Turk Deltapine Inc.	N	U.S.	0	0.3
Con-way Inc.	N	U.S.	0	0.3
United Industrial Corp.	N	U.S.	0	0.3
Veraz	N	U.S.	0	0.3
UNC/Lear Services Inc.	N	U.S.	0.1	0.1
Am. Bank Note Holographics Inc.	N	U.S.		0.1
Chiquita Brands Int'l	N	U.S.	0	0.1
NATCO Group Inc.	N	U.S.	0	0.1

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The Mercator Corp.	N	U.S.	0	0
Nexus Tech.	N	U.S.	0	0
Int'l Materials Solutions Corp.	N	U.S.	0	0
Control Systems Specialist, Inc.	N	U.S.	0	0
Katy Industries, Inc.	N	U.S.	0	0
Page Airways, Inc.	N	U.S.	0	0
International Systems & Controls Corp.	N	U.S.	0	0
Tesoro Petroleum	N	U.S.	0	0
Ashland Oil Inc.	N	U.S.	0	0
BJ Services Co.	N	U.S.	0	0
Oil States International	N	U.S.	0	0
Bristow Group	Y	U.K.	0	0
Immucor Inc.	N	U.S.	0	0
4735.05	Total FCPA Penalties imposed through 2013			
2015	Total FCPA Penalties paid by Foreign Individuals/Entities			
1545.3	Total FCPA Penalties paid by U.S. Individuals/Entities			
35	Cases of foreign penalties paid			
87	Cases of US penalties paid			
122	Cases Total			
38.8	Average Penalty Paid			
91.1	Average penalty paid by foreign company			
17.8	Average penalty paid by domestic company			
5.1	Times more average penalty paid by foreign versus domestic			
30.30%	% of cases against foreign firm			
69.70%	% of cases against domestic firm			