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THE UNITED STATES' GLOBAL CAMPAIGN AGAINST FOREIGN BRIBERY: BOUND TO FAIL

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LA CAMPAGNE MONDIALE MENÉE PAR LES ÉTATS-UNIS CONTRE LA CORRUPTION TRANSNATIONALE : UNE AMBITION VOUÉE À L'ÉCHEC

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DECLARATION

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Abstract

This dissertation examines the United States' global campaign against foreign bribery in international business and argues that this campaign is bound to fail. This thesis is grounded in the claim that the dominant, liberal rationales underpinning this campaign are no match against states' countervailing national interests in matters of 'grand corruption'. This claim is advanced through a critical analysis of the history, development, and rationales of laws prohibiting foreign bribery in the United States, France and the United Kingdom.

Drawing on realist and liberal theories of international relations, this dissertation considers the genesis of the US prohibition of foreign bribery, and subsequent US measures to export this prohibition through a campaign of liberal, values-laden rhetoric and realist tactics to compel OECD member states to ban foreign bribery. The limits of this campaign are revealed through select case studies of foreign bribery in which claimed liberal values against this conduct yield to states' realist national interests.

Résumé

Cette thèse examine la campagne mondiale des États-Unis contre la corruption étrangère dans les affaires internationales. Il fait valoir que cette campagne est vouée à l'échec. Cet argument est fondé sur l'affirmation selon laquelle les justifications libérales qui sous-tendent cette campagne ne correspondent pas aux intérêts nationaux compensateurs des États en matière de « grande corruption ». Cette affirmation est avancée à travers une analyse de l'histoire, le développement et les justifications des lois interdisant la corruption transnationale aux États-Unis, en France et au Royaume-Uni.

S'appuyant sur des théories réalistes et libérales sur les relations internationales, elle examine les mesures prises par les États-Unis pour exporter leur interdiction de la corruption transnationale, où l'on soutient qu'ils se sont engagés dans une campagne de rhétorique libérale et chargée de valeurs, combinée à des tactiques réalistes, pour contraindre les États membres de l'OCDE à accepter une interdiction de la corruption étrangère. Les limites de cette campagne sont révélées par des études de cas de grands scandales de corruption transnationale.

GLOSSARY OF ABBREVIATIONS

AEDC	Aerospace Engineering Design Corporation
AFA	Agence française anticorruption
CEP	Corporate Enforcement Policy
CIA	Central Intelligence Agency
CJIP	Convention judiciaire d'intérêt public
CJR	Cour de justice de la République
CNPF	Conseil national du patronat français
CREEP	Committee to Re-elect the President
DCN	Direction des constructions navales
DGSI	Direction générale de la sécurité intérieure
DNI	Director of National Intelligence
DOJ	Department of Justice
DPA	Deferred Prosecution Agreement
ECJ	European Court of Justice
FBI	Federal Bureau of Investigation
FCPA	Foreign Corrupt Practices Act
FSU	Former Soviet Union
G7	Group of Seven
GAO	General Accounting Office
GBI	Grain Board of Iraq
GDP	Gross Domestic Product
GE	General Electric Company
IACAC	Inter-American Convention Against Corruption
ICC	International Chamber of Commerce

IFBT	International Foreign Bribery Task Force
IMF	International Monetary Fund
JCPOA	Joint Comprehensive Plan of Action
MEDEF	Mouvement des entreprises de France
MNC	Multinational Corporation
NAO	National Audit Office
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
NPA	Non-Prosecution Agreement
NSA	National Security Agency
OAS	Organization of American States
OCLCIFF	Office central de lutte contre la corruption et les infractions financières et fiscales
OECD	Organisation for Economic Cooperation and Development
OFFP	Oil for Food Program (UN)
PNF	Parquet national financier
SCPC	Service centrale de prévention de la corruption
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office
UN	United Nations (Organisation)
UNCAC	United Nations Convention Against Corruption
USD	United States Dollars
WGB	Working Group on Bribery (OECD)
WTO	World Trade Organization

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Money, not morality, is the principle commerce of civilized nations

—Thomas Jefferson[1]

Introduction

If corruption was a legitimate industry, it would be one of the largest sectors of the global economy. With some estimates putting its value as high as $2.6 trillion annually,[2] corruption is a significant part of many modern economies and it touches the lives of many.[3] Corruption exists in all societies, in different shapes and sizes, which change over time.[4] Corrupt conduct may be politically or financially centred, it may be small-time and local, or vast and transnational. Corruption may be a purely internal, domestic matter, or it may involve external actors, such as multinational corporations, international organisations, or foreign states and their agents. Conduct that is illegal and widely eschewed as corrupt in one culture may be commonly practiced and legal in another.[5] What was permitted yesterday may well be illegal tomorrow.[6] Today, widely accepted

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[1] John Looney (ed.), *The Papers of Thomas Jefferson*, Retirement Series, vol. 2, 16 November 1809 to 11 August 1810 (Princeton University Press, 2005) 274.

[2] Dollar amounts cited refer to nominal United States dollars unless specified otherwise.

[3] UN Secretary-General António Guterres, 8346th meeting, SC/13493, 10 September 2018: 'The World Economic Forum estimates the global cost of corruption is at least $2.6 trillion, or 5 per cent of the global GDP. According to the World Bank, meanwhile, businesses and individuals pay more than $1 trillion in bribes every year.'

[4] John T. Noonan, *Bribes* (Macmillan, 1984).

[5] For example, gift giving practices, and their links with corruption, vary across cultures: see Adam Graycar and David Jancsics, 'Gift Giving and Corruption' (2017) 40(12) *International Journal of Public Administration* 1013; Susan Rose-Ackerman, *Corruption and government: causes, consequences, and reform* (Cambridge University Press, 1999) 91-110.

[6] The influence of corporations and the ultra-rich on the US political system, for example, is increasingly seen as corrupt: see Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press, 2014); and in France, where favouritism and elite networks exert corrupting influences, see Pierre Lascoumes, *Une démocratie corruptible* (Seuil-La République, 2011).

forms of corruption include bribery, embezzlement, money-laundering, nepotism and cronyism.[7]

In this dissertation, the focus is bribery. In 2017, the International Monetary Fund (IMF) estimated that bribery makes up to two per cent of annual global gross domestic product (GDP), or $1.5-$2 trillion.[8] More specifically, the focus is a relatively new type of bribery called foreign bribery in international business, which usually involves the bribery of public officials in one state by foreign corporates or investors from another state. This type of illicit commercial corruption is vast and occurs across the globe. The Organisation for Economic Co-operation and Development (OECD), for example, has estimated that five to twenty-five per cent of the total contract value of international business transactions consists of bribes,[9] likely representing several hundred billion dollars annually.

The bribe money in these commercial deals comes primarily from multinational corporations in developed states that engage in the illicit bribery of foreign public officials in developing states. We know this because international commercial bribery is primarily paid by large multinationals seeking to do business abroad, and these firms are overwhelmingly based in wealthy, industrialised states in the developed economies of the West.[10] We also know that firms from developing countries, where domestic corruption is often rife, have little history of successfully bribing foreign officials in developed states. In other words, commercial bribery has traditionally flowed from developed states

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[7] To be sure, conceptions of corruption are contested. Corruption, a concept with strong normative valence, may indeed be essentially contestable: see W. B. Gallie, 'Essentially contested concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167; Laura Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (Yale University Press, 2013).

[8] Christine Lagarde, 'Addressing Corruption with Clarity', 18 September 2017. Due to the illicit, usually hidden nature of bribery, this estimate is not robust and its range is wide. Nonetheless, few would argue the annual value of corrupt conduct globally, including foreign bribery, totals less than hundreds of billions of dollars.

[9] Anna D'Souza and Daniel Kaufmann, 'Who Bribes in Public Contracting and Why: Worldwide Evidence from Firms' (2013) *Economics of Governance* 2.

[10] In 2017, nine OECD member states were home to 316 firms in the Fortune Global 500.

to developing states, from the Global North to the Global South.[11] Despite the illegality of this type of bribery in every developed state, and nearly all developing states, these bribe-paying firms and their agents rarely suffer prosecution for such conduct. Through a critical examination of the origins and development of the US campaign against foreign bribery in international business, this dissertation explains why this may be so, and why this campaign is arguably failing.

This is accomplished by drawing on international relations theory and situating the US campaign against foreign bribery in the political realist tradition.[12] Through this political realist analytical lens, the central argument advanced in this dissertation is that the US campaign against foreign bribery is bound to fail[13] due to the fundamentally weak rationales and incentives that underpin many states' foreign bribery laws. These weak rationales and incentives to prohibit and to enforce laws against foreign bribery, it is argued, find their source in the history of widespread foreign bribery by US firms in the 1970s, and the subsequent campaign by the US to 'export' its law against foreign bribery in the 1990s. The story told here contrasts sharply with the dominant liberal explanations to justify the prohibition of foreign bribery and the US campaign against this conduct, which rely principally on normative claims, such as morals, values and institutional arguments.

Beginning with an historical analysis of the origins and the events leading to the passage of the US *Foreign Corrupt Practices Act 1977* ('FCPA' or 'the Act'), the liberal narratives for the FCPA are scrutinised and arguably displaced by a realist rationale for the Act that is grounded in US foreign policy objectives. The dissertation then examines the negotiation and implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('Anti-Bribery

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[11] For an explanation of the North-South concept, see: Rafael Reuveny and William Thompson, 'The North-South Divide and International Studies: A Symposium' (2007) 9(4) *International Studies Review* 556.

[12] Below we consider more closely this approach to international relations.

[13] The term 'bound to fail' is borrowed from John Mearsheimer, 'Bound to Fail: The Rise and Fall of the Liberal International Order' (2019) 43(4) *International Security* 7.

Convention' or 'Convention').[14] This is done principally through the experiences of the US, France and the United Kingdom, through which we observe both France and the UK's resistance to US pressure to enact, and later to enforce, laws against foreign bribery.

It is argued that the US has demonstrably strong rationales to prohibit foreign bribery, whereas France and the UK have arguably weak rationales, and consequently weak incentives, to prohibit foreign bribery. These asymmetrical justificatory bases, it is argued, have affected how these states implement and enforce their laws against this conduct. Whereas there is relatively strong evidence of FCPA enforcement in the US, there is limited evidence of enforcement of foreign bribery laws in France and the UK.[15]

Examining critically how and why these states have limited their enforcement of laws against foreign bribery, we then consider the development of the legal regimes against foreign bribery in France and the UK, along with several case studies of major foreign bribery involving firms from these states and the US. In several cases examined, we see political realism and economic self-interest arguably play decisive roles to influence the outcomes of investigations and prosecutions of alleged major foreign bribery. These interest-based outcomes are juxtaposed against the orthodox liberal rhetoric deployed to justify laws against foreign bribery, which are steeped in values claims and underpinned by free trade and economic interdependence arguments.

Finally, the conclusion introduces several directions for future research that may help us to move past the arguable failings of the US campaign against foreign bribery, such as an increasing role for non-state actors, an international anti-corruption court, and strengthening corporate criminal liability laws. It is hoped this research will provoke new thinking about the political economy of foreign bribery in international business and the interest-based rationales for the US campaign against this conduct.

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[14] The OECD Anti-Bribery Convention was signed on 17 December 1997, and entered into force on 15 February 1999.

[15] Stephen Choi and Kevin Davis, 'Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act' (2014) 11(3) *Journal of Empirical Legal Studies* 409.

Unit of analysis: the US campaign against foreign bribery

This dissertation focuses its analysis and arguments on what is termed the 'US campaign against foreign bribery', including its origins and rationales. The US campaign against foreign bribery, it is argued, began after failed efforts to repeal the FCPA in the 1980s. This compelled the US to go abroad and push its economic competitor states in the OECD to ban foreign bribery in international business. Through a campaign of determined public advocacy and private coercive diplomacy at the OECD, the US successfully exported its ban on foreign bribery to OECD states with the adoption of the Anti-Bribery Convention in 1997. After OECD member states agreed to adopt the Anti-Bribery Convention, the US then acted to expand the jurisdiction of the FCPA extraterritorially to capture foreign firms allegedly engaged in foreign bribery. Since then, the US has wielded its campaign against foreign bribery as a powerful, global tool to sanction firms allegedly engaged in this conduct, reaping billions of dollars and advancing its status as the 'global gendarme'. In other words, the US is the architect and the leader—the *sine qua non*—of the campaign against foreign bribery.[16]

This dissertation considers the FCPA, the OECD Anti-Bribery Convention, and selected states' laws and policies against foreign bribery. It does not consider other prominent international anti-corruption agreements, such as the Inter-American Convention Against Corruption[17] or the United Nations Convention Against Corruption.[18] While these agreements are important international instruments to combat corruption, they are beyond the direct scope of analysis of this dissertation.

Several other matters may also be usefully considered upfront, such as the definition of foreign bribery and why the focus of this dissertation on the supply-side of this conduct. It is also convenient to set out the reasons why the US, France and the UK are selected

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[16] Some assert a 'global campaign against corruption' or an 'international campaign against foreign bribery', citing OECD efforts against this conduct. This is examined further in Part 2.

[17] Inter-American Convention against Corruption, 35 ILM 724, (adopted 27 March 1996, EIF 6 March 1997). Under Article VIII of this Convention, the Parties agree, 'subject to [their] Constitution and the fundamental principles of [their] legal system[s]', to prohibit and to punish bribery of foreign officials.

[18] United Nations Convention against Corruption, 2349 UNTS 41 (adopted 31 October 2003, EIF 14 December 2005).

for close analysis instead of other states, as well as discussion concerning the rationales to exclude from the scope of study the impacts of foreign bribery on people, societies, and economies. Finally, a description of the arguable 'failure' of the US campaign against foreign bribery is also offered.

Foreign bribery: a definition

Foreign bribery in international business usually takes the form of a representative or agent of a corporation giving something of value to a foreign public official, often through an agent or middleman, in furtherance of their company's business interests, such as a contract to supply goods or services to the state client. There are two key components of foreign bribery: one, the international character and business connexion of the corrupt conduct; two, the involvement of foreign government officials (or their agents) who demand or accept bribes.

This dissertation does not examine other types of bribery and related corrupt conduct that lack these essential elements, such as bribery between company representatives (so-called 'private bribery'). Private bribery is often prohibited under distinct statutes and justified according to their unique rationales. Nor do we examine bribery not involving a corporate actor and foreign government officials, such as purely domestic bribery. Unlike the fairly recent regimes prohibiting foreign bribery in international business, statutes prohibiting domestic bribery of government officials have long been enacted and are enforced strictly in most developed states. Domestic firms or individuals caught bribing local officials in the US, UK or France, for example, can expect to be investigated and prosecuted vigorously, with convicted offenders often serving punishing custodial sentences and incurring punitive financial penalties.

Finally, this dissertation does not examine certain agreements between states, state-sanctioned firms or other instrumentalities of state that some may characterise as bribery. These so-called 'government-to-government agreements' often involve payments between governments as sovereign acts of state, regardless of their perceived impropriety. Though controversial, actions by agencies of the US government, for example, to gain

influence and to support preferred senior government officials in a foreign state through significant payments is a relatively common, legal practice.[19]

Some governments routinely provide overt and covert aid to foreign governments in sometimes dubious circumstances. However, these payments usually lack the clear business character of foreign bribery as defined. While some may characterise these payments as bribery, this dissertation is not concerned with these types of payments because they relate principally to the conduct of states, and states are subject to a different set of legal rules from that which apply to corporations and individuals (namely, public international law).

Focus of analysis: supply-side foreign bribery

It 'takes two to tango', and it also takes at least two parties to engage in foreign bribery; at minimum, one party supplies the bribe and the other party demands and/or accepts the bribe. The focus in these pages is the supply-side of this 'dance'—that is, the bribe-makers. For reasons not obvious, analyses of foreign bribery and related corrupt conduct often fail to distinguish between the demand-side and supply-side of this phenomenon.[20] Where this distinction is made in the analysis of foreign bribery, scholars' focus is traditionally aimed at how best to compel, to empower, and to encourage states on the receiving end of foreign bribery to change their ways, to stop demanding bribes, and to eschew these ill-gotten gains. In short, most study on this topic has focused on the demand-side of the foreign bribery equation.

Authorities in developed states, and in the legal profession[21] and anti-corruption civil society organisations,[22] also tend to focus their analysis of foreign bribery on its perceived

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[19] See Matthew Rosenberg, 'With Bags of Cash, C.I.A. Seeks Influence in Afghanistan', *New York Times*, 28 April 2013 (detailing tens of millions of dollars paid by US intelligence services to the president of Afghanistan, Hamid Karzai, and his cadre).

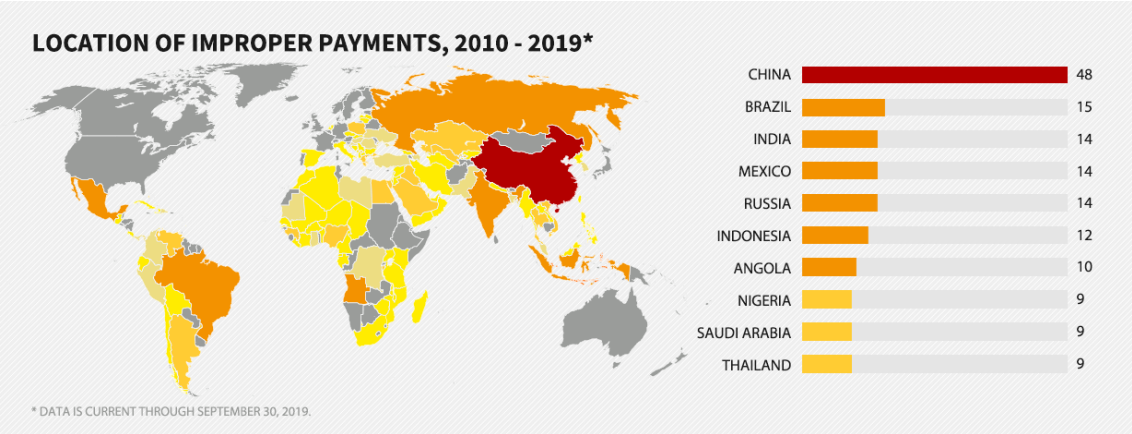
[20] Kathleen Getz and Roger Volkema, 'Culture, Perceived Corruption, and Economics' (2001) (40)(1) *Business and Society* 7.

[21] Mark Wolf, 'The World Needs an International Anti-Corruption Court' (2018) 47(3) *Dædalus* 144 (Wolf is Senior Judge, US District Court, Massachusetts).

[22] Such as Transparency International (Germany), Global Witness (UK), and Sherpa Association (France).

victims abroad, arguably betraying a recognition that critical examination of corrupt conduct by the bribe-makers remains taboo. The below 'heat map' from Stanford University's *Foreign Corrupt Practices Act Clearinghouse* illustrates this common, limited focus on the demand-side of the foreign bribery equation.

Figure 1 *FCPA Payment Location Heat Map*[23]



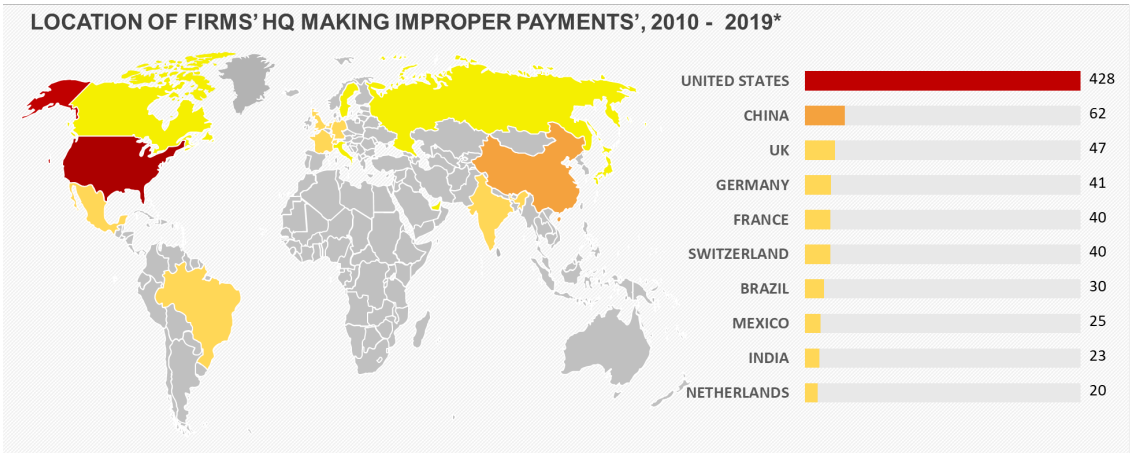
If we assume the accuracy of the data comprising the 'location of improper payments', this map depicts widespread foreign bribery in the developing world and a relative absence of this conduct in the developed world—i.e., the honest West and the corrupt rest. Despite making up almost half of global GDP, not a single member of the economically advanced Group of 7 (G7) states is represented.[24] The map says nothing about where these bribes come from.

If this map was altered to show the locations of the firms' home jurisdictions from which bribery payments were paid, it would depict a starkly contrasting picture of widespread bribery coming largely from firms in developed Western economies, and a relative lack of bribe payments by firms from developing economies. Figure 2 illustrates just that.

[23] Stanford University, Foreign Corrupt Practices Act Clearinghouse: <http://fcpa.stanford.edu/>.

[24] The G7 consists of Canada, France, Germany, Italy, Japan, the UK and the US.

Figure 2 *FCPA Payment Source Heat Map*[25]



This map, focused on the supply-side of the foreign bribery equation, shows that the unrivalled source of bribe payments is firms from the US, which is also the architect and undisputed leader of the campaign against foreign bribery. Just as petroleum products have historically flowed from East to West, foreign bribery payments have traditionally streamed from North to South.[26] Moreover, there is good evidence that firms from relatively prosperous economies bribe foreign officials from both developing *and* developed states.[27] Although analysts commonly point the finger of blame at developing states when discussing the proliferation of foreign bribery, this map shows us that these bribes are paid predominantly by firms and individuals from developed economies where such conduct has been illegal for at least two decades.

Why examine the US, France and the UK?

Like any qualitative or quantitative study, this dissertation is limited by its scope of analysis. By examining the US, France and the UK, it is hoped a useful focus of analysis

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[25] This map was developed using data from Stanford University's Foreign Corrupt Practices Act Clearinghouse. Data on file with the author.

[26] But see the exceptional case of the 'Fat Leonard' corruption scandal involving a Singaporean military contractor bribing US military officials: Eric Lichtblau, 'Admiral and 8 Other Navy Officers Indicted on Bribery Charges', *New York Times*, 14 March 2017.

[27] OECD, 'Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials' (2014); *La Tribune*, 'La corruption internationale en dix chiffres clés', 2 December 2014: 'Dans près de 50% des cas, l'affaire concernait la corruption d'agents de pays au niveau de développement élevé. Un pot-de-vin sur cinq a été versé dans un pays dont l'indice de développement était "très élevé"'.

will surpass these necessary limitations of scope. The fundamental bases for examining closely these three jurisdictions are threefold:

- their firms' history of engaging in major foreign bribery;
- their economic power as global exporters; and
- their economic rivalry in bribery-prone sectors of international trade.

More specifically, the US is examined out of necessity because it was the first jurisdiction expressly to prohibit foreign bribery in international business. This state also has a wealth of experience investigating and prosecuting foreign bribery cases involving both US and non-US firms. Moreover, the US government sees itself as the champion of this campaign against foreign bribery and is the most vocal actor against this conduct. Finally, the US is currently the world's second largest exporter of goods, with a long history of US firms engaging in major foreign bribery in pursuit of their corporate interests.

The experiences and conduct of France and the UK as they have navigated the US campaign against foreign bribery are also examined. As both France and the UK resisted US efforts to conclude an international agreement to prohibit foreign bribery, the stories of these two states are illuminating counterpoints to the dominant narrative that places the US at the centre of this campaign.

France is a major exporter with both a long history of transnational firms engaging in foreign bribery and a poor record of enforcing its laws against this conduct. It is also a major trade rival to the US, particularly with respect to strategically important sectors of trade—such as defence materiel and aerospace products, upstream petroleum development, and heavy industry—that are commonly associated with foreign bribery. The US and France also compete vigorously against each other in many of the same industrial sectors and geographic areas, which often provokes mutual allegations of corrupt conduct, industrial espionage, and undue influence.[28] The competitive relationship between France and the US in international commerce was tersely expressed

[28] R. James Woolsey, 'Why We Spy On Our Allies', *Wall Street Journal*, 17 March 2000; Emmanuel Fansten, 'NSA: espionnage économique, le sale jeu américain', *Libération*, 29 June 2015.

in a 2015 report that considered the US prosecution of a French firm for alleged foreign bribery as: 'France is no longer a friend of the US; at most, it is an ally.'[29]

The UK also resisted the US push for an international agreement to ban foreign bribery. So too does the UK have an arguably poor record of enforcing its laws against foreign bribery. Many of its transnational firms also have equally chequered histories of large-scale foreign bribery conduct. Unlike France, UK foreign policy is often more aligned with US foreign policy.[30] The so-called 'special relationship' between the UK and the US, and their mutual membership in the 'Five Eyes' global intelligence sharing alliance, speaks to this point.[31]

France, the UK, and the US were also selected due to their relative similarities as democratic, market economies. Public pledges by each of these states to prohibit, to deter and to punish foreign bribery also signal ostensibly shared commitments against this conduct. As OECD member states, this jurisdictional scope of analysis is further justified because the majority of global nominal gross domestic product, the great majority of foreign direct investment, and vast exports coming out of the OECD bloc.[32] Part and

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[29] Leslie Varenne and Eric Denécé, Centre Français de Recherche sur le Renseignement, Rapport N° 13, 'Racket Américain et démission d'État: Le dessous des cartes du rachat d'Alstom par General Electric', 19 December 2014, 34: 'nous ne sommes plus amis avec les États-Unis, tout au plus alliés.'

[30] William Wallace and Christopher Phillips, 'Reassessing the Special Relationship' (2009) 85(2) *International Affairs* 263 ('shared global leadership, shared history, shared values, [and] shared commitment to a liberal world order' are at the core of the Anglo-American special relationship).

[31] The Five Eyes includes Australia, Canada, New Zealand, the UK, and the US. Members undertake not to spy on each other. In 2016, France and the US concluded the 'Spins agreements', an intelligence sharing arrangement that, for the first time, permits France to access, and share, select intelligence from the Five Eyes alliance: *Intelligence Online*, 'SPINS: l'accord de renseignement franco-américain dévoilé cite', 29 June 2016; *Intelligence Online*, 'Paris se prépare à devenir le sixième œil des Five Eyes', 13 December 2017.

[32] See Gemma Aiolfi and Mark Pieth, 'How to Make a Convention Work: The OECD Recommendation and Convention on Bribery as an Example of a New Horizon in International Law' in Cyrille Fijnaut and Leo Huberts (eds), *Corruption, Integrity and Law Enforcement* (Kluwer Law International, 2002) 349.

parcel of their economic and trade dominance post-WWII has been widespread foreign bribery.

What about the impacts of foreign bribery?

Foreign bribery can provoke severe governance problems for states whose officials are corrupted by rent-seeking firms and their network of middlemen. It can also present challenges for businesses at risk of extortion by unscrupulous foreign officials. However, the effects of foreign bribery—e.g., on states' economic and political development, international trade, and human development—is beyond the scope of this research because it would add little to the scholarly contribution this dissertation seeks to make. There is abundant analysis of the effects of foreign bribery and related corruption on society, on business, on competitive markets, on the proper functioning of governments, and on international peace and security.[33]

What does 'failure' of the US campaign against foreign bribery look like?

Because the central argument of this dissertation is that the US campaign against foreign bribery is bound to fail, it is worth setting out upfront what this arguable failure looks like. In sum, the failure of the US campaign against foreign bribery is characterised by persistent and widespread foreign bribery, with relatively few prosecutions globally, and marked by repeated political interference in the investigation and prosecution of major foreign bribery cases. Through analysing enforcement records and trends in these large OECD economies (France, the UK, and the US), and by examining several case studies of alleged major foreign bribery by firms from these states, the failure of the US campaign against foreign bribery is arguably revealed.

[33] See, e.g., Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (Academic Press, 1978); Rose-Ackerman (n. 5); Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (W.W. Norton, 2015); Michael Johnston, *Syndromes of Corruption: Wealth, Power, Democracy* (Cambridge University Press, 2005)

Research design and methodology

The research design and methodological approach of this dissertation combines a critical examination of the origins and development of the US campaign against foreign bribery with a set of case studies of prominent foreign bribery scandals in France, the UK and the US. Drawing on realist and liberal theories of international relations, it aims to uncover the central motivations and rationales for the US campaign against foreign bribery from its roots in the 1970s to its fruits today as the US wages its campaign globally. This analysis is done principally through a realist analytic lens of states' motivations and behaviour on the international stage. In doing so, it considers and rejects dominant liberal explanations for how and why states behave the way they do in international politics.

The foreign bribery case studies examined are intended to provide a view beyond what states say they will do, to scrutinise what they in fact do when cases of 'grand corruption' arise. With these cases, the rhetoric of states and statesmen is tested against the reality of the conduct of their officials in enforcing laws against foreign bribery. These cases are not intended to prove the thesis that the US campaign against foreign bribery is bound to fail; instead, they are presented as indicators increasing the likelihood of its failure.

International political theory and foreign bribery

Using theories of international politics to tell a story about foreign bribery in international business may seem unorthodox. International political theory is usually concerned with the behaviour of states, not private actors. However, the unit of analysis in this dissertation—the US campaign against foreign bribery—is state-driven and state-centred and is therefore well-suited to analysis through theories of international politics.

Nonetheless, applying international relations theory to the analysis of foreign bribery is not without risk. Traditional theorists of international relations may argue, for example, that the US campaign against foreign bribery is largely a domestic political and legal issue, not a matter of relations between sovereigns. Others may reasonably ask: what can theories of international relations between states contribute to our understanding about the conduct of private corporations and individuals bribing foreign officials?

This dissertation is centrally concerned with understanding the motivations and strategies of the US in its campaign against foreign bribery, which involves the interaction of states,

officials, and transnational corporations. Theories of international relations, it is argued, can help to explain the motivations and conduct of these actors as they interact in the international system. Moreover, to understand cogently why states have made the decisions they have in foreign bribery policy, it is useful to investigate the institutional processes and international politics that influence states' motivations, behaviours and decision-making.

For these reasons it is argued that theories of international relations can help us to disentangle complex questions of state behaviour in matters of foreign bribery. For example, why did the US doggedly pursue an international ban on foreign bribery? Why did OECD member states ratify the Anti-Bribery Convention? Why do states interfere in or fail to prosecute major cases of alleged foreign bribery? Meaningful replies to each of these questions, it is argued, can be gleaned, at least in part, through the analytical lens of international relations theories.

Several theories of international relations are relevant to the study of the US campaign against foreign bribery. From the sociological tradition, for example, constructivists have examined the normative force of international rules and institutions and how they may affect interests and identity, arguing that international norms influence the policies of states' leaders.[34] Marxist approaches to international relations can also provide valuable explanations for the behaviour and motivations of states in the international system.[35] Marxist international relations theory aims its analytical focus on the economy in considering the roots of instability in the international system. Naturally, the Marxist approach also brings to the fore the capitalist mode of production, social inequality, and class issues in its critique of the international system.

For our purposes, however, the international relations theories examined in this dissertation are limited to realism and liberalism. These theories, it is argued, provide

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[34] Ellen Gutterman, 'Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act' (2015) 11 *Foreign Policy Analysis* 109; Elizabeth Spahn, 'Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the UN Convention Against Corruption' (2012) 23(1) *Indiana International & Comparative Law Review* 1.

[35] See Vendulka Kubalkova and Albert Cruickshank, *Marxism and International Relations* (Clarendon Press, 1985).

powerful explanations to help us to understand the motivations underpinning the US campaign against foreign bribery, and arguably demonstrate why this campaign is flawed and bound to fail. These competing theories of international politics—liberalism and realism—also help us to distinguish between core and peripheral motivations of states to adopt an international agreement to ban foreign bribery, and to implement domestic laws against this conduct.

Because it is a central claim of this dissertation that the US campaign against foreign bribery is justified via the tenets of liberalism, and that the US decision to ban foreign bribery is best explained by realist principles, it is worth considering upfront the contours of these two theories that dominate the discourse in contemporary international political analysis and which often provide contrasting accounts of states' behaviour on the international stage.

Political realism

Political realism is a theoretical approach to understanding how and why states behave the way they do in international politics. As a theory of international relations, political realism is concerned primarily with matters of power, security and self-interest in its assumptions about state behaviour. This theory is often criticised for the bleak picture it paints of international politics, and its purported amoral perspective of the foreign policies of states.[36] This gloomy tradition is typified in the writings of John Mearsheimer, a leading proponent of offensive realism (or structural realism), who argues:

> [T]he sad fact is that international politics has always been a ruthless and dangerous business, and it is likely to remain that way.[37]

An offshoot of 20th Century classical political realism, which focused its explanatory power on states as representing core human behaviour (so-called 'human nature realism'),[38] offensive realism is concerned primarily with the structural environment of

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[36] John Mearsheimer, 'The False Promise of International Institutions' (1994/5) 19 *International Security* 3.

[37] John Mearsheimer, *Tragedy of Great Power Politics* (Norton, 2001) 2.

[38] See Hans Morgenthau, *Politics Among Nations* (Knopf, 1948); Frederick Meinecke, *Machiavellianism: The Doctrine of Raison d'État and Its Place in Modern History* (tr. Douglas Scott) (Hale University Press, 1957).

the international system that affects states' behaviour and their motivations as they relate to matters of survival, security, and power. Structural realism draws deeply from the well of the realist tradition, including Hobbesian conceptions of anarchy in the state of nature, Machiavellian perspectives of amorality in matters of state, and Thucydidean explanations of the role of power in relations between states. For political realists, the international system is conflict-ridden and, like Tennyson's *nature*, 'red in tooth and claw'.[39]

At their core, the varied conceptions of realism focus their analytical force on matters of competition and conflict between states—in other words, *power politics*. Realists commonly make five key assumptions about the international system that should be front of mind when analysing the motivations and behaviours of states, and therefore international relations and foreign policy:[40]

- States are the key actors in the international system, which is anarchic;[41]
- States inherently possess some offensive military capability, which means states are potentially dangerous to each other;
- States can never be certain about the intentions of other states, which means states can never know with complete confidence whether another state might be ill-intentioned against it;
- Each state's most basic motive is survival and the maintenance of their sovereignty; and
- States are instrumentally rational; that is, leaders of states think strategically about how best to survive in the anarchic international system.

These assumptions, realist practitioners argue, produce the following patterns of behaviour of states in the international system:

- States fear each other;
- Each state aims to guarantee its survival; and

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[39] Alfred Tennyson, *In Memoriam A.H.H.* (Norton, 1973).

[40] Kenneth Waltz, *Theory of International Politics* (Addison-Wesley, 1979).

[41] Anarchy, in this sense, means no central authority or 'government of governments' above sovereign states. See Joseph Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism' (1998) 42 *International Organisation* 485.

- States seek to maximise their relative power position over other states.[42]

Realists therefore argue that states are, and should be, primarily concerned with their security, relative power, and their self-interest in international politics. Unlike political liberals, for example, realists consider state compliance with international law or international rules to be motivated principally by self-interest.[43]

A common refrain against realism, usually proffered by liberals, is that realists reject or diminish the role and importance of morals and values in international politics. Liberals commonly argue that realism is a theory of amoral cynics who fail to see the value of the civilising forces of the rules-based international system and the liberal, Western 'values' it represents. Contrary to this popular assertion, realism does not reject outright a role for morals, ideals, co-operation or institutions in international politics.[44] Instead, realists argue that as states pursue their self-interests they use moral rhetoric such as 'values' to 'perpetuate [powerful nations'] supremacy … in the idiom peculiar to them'[45] in order to persuade domestic interests to support their foreign policies, and also to deceive foreign interests as to their true motivations.[46]

Political realists focus their analytical force on a careful 'weighing of the balance of material forces, together with an understanding of the history, culture and economics of the societies comprising the international system'.[47] In other words, realists prioritise matters of essential security over moral or values-based preferences that are often diverse, contestable and changing.

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[42] Mearsheimer (n. 37).

[43] Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1945-46.

[44] John Mearsheimer, 'Realists as Idealists' (2011) 20(3) *Security Studies* 424, 430.

[45] Jack Goldsmith and Eric Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective' XXXI *Journal of Legal Studies* (2002) S115, S119.

[46] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) (arguing national leaders are driven by instrumental concerns, but give rhetorical support for international norms to appease domestic and international audiences).

[47] Henry Kissinger, 'Realists vs. Idealists', *New York Times*, 12 May 2005.

While political liberals may argue that realists view history with a jaundiced eye, realists recall the failed Wilsonian promise of international institutions like the League of Nations and see clearly the shadow of history where once co-operating or allied states morphed into mortal enemies. In other words, for realists the lessons of history and conflict between states looms large.[48]

Along with detailing the fundamentals of the realist approach to international relations, it is useful to consider its usual counterpoint: liberalism, which is the dominant theory of international politics in the West.[49]

Liberalism

In its explanations for understanding the international system, liberalism focuses less on security matters and more on modes of international co-operation, norms, economic inter-dependence, and the role of institutions. Relevant to the analysis of foreign bribery, liberalism is closely concerned with the prospects for co-operation among states in circumstances where they have mixed incentives to co-operate and not to co-operate.[50]

Liberalism stands in opposition to many of the tenets of political realism. Political liberals argue that increased political and economic co-operation, and the influence of modern legal and political institutions and norms, has created an international political system in which conflict between states may be solved peacefully, and costly security competitions can be avoided.[51] Although liberals accept that states are the primary actors in the international system, they often give prominence to the role and importance of domestic politics in international affairs, which realists would argue usually matter little in international politics. With respect to the role of power in the international system, liberals argue there are factors beyond a state's (offensive) capabilities that constrain its

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[48] Mearsheimer (n. 37) xii. Including Iraq (1991), Serbia/Bosnia, Serbia/Kosovo, Afghanistan, Iraq (2003), Libya, Syria.

[49] Broadly conceived, institutions are the basic rules, traditions, and organisation in a society: see Robert Keohane, *International Institutions and State Power* (Westview Press, 1989) 164.

[50] Mearsheimer (n. 36).

[51] Andrew Moravcsik, 'A Liberal Theory of International Politics' (1997) 51 *International Organisation* 513.

behaviour,[52] such as international law (and international institutions more broadly).[53] In contrast, realists often argue that international law and international institutions are only a minor impediment to states' conduct internationally.

Political liberals also argue that states' interests are numerous and change over time—thereby rejecting the prominence that realists give to state survival and the maintenance of sovereignty. Liberalism also stresses absolute gains, in which it is argued that more than one party can gain in a relationship with the other.[54] Realists, on the other hand, insist on the primacy of relative gains in international politics. For liberal international relations theorists, international institutions,[55] free trade, and democratic forms of government are each vitally important elements of the 'liberal world order'. Liberal theory is also Western-orientated in its focus. Its applicability and attempts to explain the advantages, limitations, and exportability of Western forms of government (primarily liberal democracy) is therefore limited. Realists, by contrast, see states as 'black boxes' and essentially the same, regardless of their form of government, be they democratic, communist, or authoritarian.

Case studies

While liberalism has arguably played the dominant role in the global development of the US campaign against foreign bribery, it is worth testing critically the motivations of states to enlist in this campaign against their actions when major foreign bribery cases emerge. In these cases, we examine whether states act in accord with their liberal rhetoric against foreign bribery, or whether they revert to interest-based, realist politics. The principal cases examined are prominent foreign bribery scandals in France, the UK, and the US. Each case is one in which an abundance of documentary material is publicly available,

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[52] Ibid.

[53] Anne-Marie Slaughter, et al., 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 *American Journal of International Law* 367, 384.

[54] Robert Keohane (ed.), *Neorealism and Its Critics* (Columbia University Press, 1986); David Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993).

[55] For example, the World Bank, IMF, OECD, NATO, or simply international norms.

including judicial decisions, settlement agreements, government inquiries, reports, and extensive media coverage and scholarly analysis. They are, in this sense, ideal cases.

In several of these cases, the rhetoric of shared values and liberalism arguably yields to states' realist considerations as their national, security and economic interests collide with the claimed values-driven justifications to ban this conduct. What several of these cases demonstrate is not liberal values in action, but political realism in practice as authorities act to preference their claimed national interests. These repeated collisions, it is argued, have hastened the failure of the US campaign against foreign bribery.

However, this campaign is not dead yet. Some states, including France and the UK, are slowly conforming to the American approach to settling foreign bribery cases, if not prosecuting them. Yet, what some see as concrete instances of liberal institutionalism at work may, on a closer look, may be better understood as *faits accomplis* as these states and firms respond rationally to threats of economic and legal peril. As one French author has described it, these firms must 'comply or die'.[56] And so, in these cases of seeming international co-operation we find realist principles like the logic of consequences and self-interest continue to rule the day.

[56] Marion Leblanc-Wohrer, 'Comply or die? Les entreprises face à l'exigence de conformité venue des États-Unis', Unis', French Institute of International Relations, (2018) 34 *Potomac Paper*.

Like motherhood and apple pie…, corporate bribery abroad is not the simple, safe issue it seems at first blush.
—Theodore Sorensen[57]

Part 1: The birth of a crime

A central aim of this dissertation is to redraw the bounds of debate on foreign bribery laws and policies. Central to achieving this aim is to examine highly relevant but often overlooked facts and events that seek to foster a critical understanding of the US campaign against foreign bribery. In doing so, it highlights arguably misapprehended rationales and inapt assumptions about the origins and the development of foreign bribery laws in the US, France and UK. Similarly, it seeks to draw out the core motivations for these states to ratify the OECD Anti-Bribery Convention.

Part 1 critically examines the origins of the US ban on foreign bribery and thereby seeks to dislodge the conventional wisdom that the US enacted the *Foreign Corrupt Practices Act* (FCPA) primarily for moral or values-driven reasons. To do this, it analyses the history of the US ban on foreign bribery through the statements of the principal actors responsible for developing the FCPA. At its core, it is argued that the FCPA was enacted primarily to reduce the risks to US foreign policy and foreign relations from the bribery conduct of US firms abroad. This Part also considers the enforcement history of the FCPA, which seeks to distinguish the rhetoric from the reality of how the FCPA has been implemented as well as considering claims of arguably selective enforcement.

Critically examining the history and political economy of the US ban on foreign bribery is an essential first step because the claimed values rationales for prohibiting this conduct were arguably instrumentalised by the US in its push for an international agreement at the OECD to ban foreign bribery. Part 1 prepares the analytical field for Part 2, which critically considers the development of the US campaign against foreign bribery, the responses and experiences of France and the UK to this campaign, and several case studies of major foreign bribery scandals in France, the UK, and the US.

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[57] Theodore Sorensen, 'Improper Payments Abroad: Perspectives and Proposals' (1976) *Foreign Affairs* 1 July. Sorensen was, from 1961-64, Special Counsel to President John F. Kennedy.

I. Origins of the US prohibition of foreign bribery

This chapter critically examines the historical bases and motivations for the US ban on foreign bribery. The central argument presented here is that the fundamental rationale for the enactment of the FCPA in 1977 was to protect US foreign policy interests and foreign relations that were been harmed or were at risk of harm by the foreign bribery conduct of US firms abroad. This argument contrasts with the near consensus rationale of US officials and American legal scholars who assert a fundamentally moral or values-driven justification for the FCPA.

First, the events leading to the passage of the FCPA are examined, including the Nixon-Watergate scandal and its purported influence on the 'moralisation' of American political life and business practices. We then consider the circumstances surrounding the disclosures in the mid-1970s that US firms had engaged in widespread bribery of foreign officials. In doing so, this chapter brings to light primary source evidence of lawmakers' deliberations of foreign bribery by US firms. It also discusses the impacts that this conduct had on US foreign policy and international relations. This analysis includes consideration of evidence given to, and statements made by, US lawmakers in several congressional committees. This scrutiny is then extended to an examination of contemporaneous US diplomatic cables that document the efforts of US government agencies to contain the fallout from these scandals. Finally, several judicial decisions that discuss the legislative history of the FCPA are also considered.

Despite abundant and arguably clear evidence of the foreign policy rationale for the FCPA, the orthodox narrative to justify the Act is focused on claimed morals and values. In Section B of this chapter we consider the 'moralisation' of the FCPA to ask: what had changed? Had there been a moral awakening in the US that could plausibly explain why the FCPA may be based on moral concerns? In the end, this dissertation rejects the normative, values-driven explanation for the FCPA. Instead, it is argued that this narrative ignores the historical record of the FCPA and gives *post-factum* preference to a story of moral exceptionalism and liberal American leadership against foreign bribery and corruption more generally.

Section C concludes the chapter with an overview of the FCPA and its mechanics, as well as discussion of the FCPA enforcement record and how well this evidence fits with the

values-based assertions widely purported to justify the Act. Do we find strong evidence of FCPA enforcement and values-rich condemnation of foreign bribery? Or do we find a dead-letter law that failed to achieve its potential?

A. HISTORY AND RATIONALES OF THE US BAN ON FOREIGN BRIBERY

The task of this chapter is to illuminate the precipitating events and core policy rationales that motivated the US to ban foreign bribery. What follows is a close examination of these events and consideration of how they influenced the development of the FCPA. It is hoped this analysis provides a clear picture of why US measures against foreign bribery developed the way they have, as well as painting a cogent historical picture of the fundamental rationales that underpin the subsequent US campaign against foreign bribery.

We first consider how the domestic political scandal known as "Watergate" exposed widespread foreign bribery by US firms, leading to congressional hearings and investigations of this conduct and, ultimately, the enactment of the FCPA. We then examine relevant congressional hearings that document the revelations and the perceived impacts of widespread foreign bribery by US firms, including testimony and evidence from bribe-making firms. It is argued that a critical analysis of these hearings—in which lawmakers who would later enact the FCPA openly debated the effects of foreign bribery on US foreign policy and foreign relations—brings into sharp relief the core rationale for the US ban on foreign bribery.

This examination of the history of and rationales for the FCPA is essential to understand why the US has the foreign bribery law it has. It also provides context for understanding why enforcement efforts against foreign bribery globally have been uneven, and why there is seemingly little support for reforms to remedy this. To advance the central claim of this dissertation—that the US campaign against foreign bribery is bound to fail—it is first necessary to have a cogent and clear-eyed view of how we got to where we are.

1. Watergate

The historical seeds of the FCPA were arguably sown during the Nixon Administration and the Watergate scandal that shook the nation and brought down a US president. The impetus for the US ban on foreign bribery is traced to the investigatory and legislative fallout of Watergate. The disclosures arising out of the congressional hearings and related investigations into this scandal, it is argued, provide the facts, the rationales, and the

motivations for Congress to pass a world-first law prohibiting bribery of foreign public officials in international business.[58]

The story of Watergate begins with the arrests of five men—the so-called 'Plumbers'[59]—caught burgling the headquarters of the Democratic National Committee at the Watergate Hotel and office complex in Washington, DC on 17 June 1972.[60] Today, this event is regarded as one of the greatest domestic scandals in US political history, leading ultimately to the resignation of the president, Richard M. Nixon, and the trial and conviction of many of his senior advisors.[61] As Schroth recalls, 'after the *Washington Post* reported that a $25,000 cashier's cheque intended for the Nixon campaign had been deposited to the bank account of one of the [Watergate] hotel burglars',[62] the General Accounting Office (GAO) audited the Nixon re-election committee. Two months later, investigations uncovered 'slush funds' with hundreds of thousands of dollars in unaccounted for cash. The GAO (which reports to Congress) referred the matter to the Department of Justice (DOJ) for potential violations of federal election funding laws.[63] By September 1972, a grand jury had indicted the burglars, a consultant to the White House, and a lawyer from the Nixon re-election campaign.[64]

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[58] Sweden enacted a law in 1978 to prohibit bribery of foreign officials, but this law included a strict double criminality requirement that made it effectively unenforceable. See Michael Bogdan, 'International Trade and the New Swedish Provisions on Corruption' (1979) 27(4) *American Journal of Comparative Law* 665.

[59] The 'White House Plumbers' was formed by Nixon after sensitive military information was leaked during his first term; their mission was to harass Nixon's opponents.

[60] Peter Schroth, 'The United States and the International Bribery Conventions' (2002) 50 *American Journal of Comparative Law* 593.

[61] The 'Watergate Seven' was a group of senior advisors to Nixon involved in this scandal; each was indicted on 1 March 1974. See Karen De Witt, 'Watergate, Then and Now: Who Was Who in the Cover-Up and Uncovering of Watergate', *New York Times*, 15 June 1992.

[62] Schroth (n. 60), 593.

[63] Schroth (n. 60) 594. The GAO is charged with monitoring the observance of the provisions of the *Federal Election Campaign Act 1971*. See *America Magazine*, 'The Watergate, the Republicans and the GAO', 9 September 1972.

[64] Schroth (n. 60) 593.

However, even under the gathering storm of investigations and indictments, Nixon was re-elected president in November 1972. Nonetheless, the investigations continued, including prosecutions of the so-called Plumbers. After each burglar was convicted, one defendant, in a letter to the presiding judge, implicated several White House officials, alleging he had acted on the instructions of Attorney-General John Mitchell and John Dean III, Counsel to the President.[65] Nixon denied any responsibility in the matter and quickly fired several top officials.

Soon after, Senator Sam Ervin commenced televised hearings of a Senate committee he chaired (the 'Ervin Committee'), in which it was discovered all conversations in the Oval Office of the White House had been recorded by orders of President Nixon. The Ervin Committee subpoenaed these recordings, which the president refused to release on grounds of executive privilege and asserted risks to national security.[66] After the Court of Appeals ordered their release, Nixon offered to provide written summaries of the recordings on condition that no further records be disclosed. The Special Prosecutor refused this proposal.

Nixon, in what was later termed 'the Saturday Night Massacre', ordered his Attorney General to fire the Special Prosecutor.[67] Instead, the Attorney General resigned. The president then ordered his Deputy Attorney General to fire the Special Prosecutor. The Deputy Attorney General also resigned. Eventually, Nixon found a sympathetic servant in Robert Bork, the Solicitor General, who fired the Special Prosecutor.

By this time, however, the House of Representatives had prepared 22 bills of impeachment of Nixon. Soon after, a new Special Prosecutor obtained an order from the US Supreme Court that the president release the Oval Office recordings.[68] As these investigations progressed, more evidence of alleged criminal conduct surfaced, including widespread illegal campaign contributions, international money laundering, and misuse

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[65] Ibid.

[66] Ibid, 594.

[67] Carroll Kilpatrick, 'Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit President Abolishes Prosecutor's Office; FBI Seals Records', *Washington Post*, 21 October 1973.

[68] *United States v Nixon*, 418 US 683 (1974).

of campaign funds to bribe foreign officials. The US Securities and Exchange Commission (SEC or 'Commission') also began investigating foreign payments made by US firms.[69] This steady stream of incriminating investigations proved too much for Nixon, who resigned in disgrace on 8 August 1974.

A new scandal emerges: widespread foreign bribery

After Nixon's resignation, the Watergate hearings and investigations continued—now, however, there was a new focus: bribery of foreign officials. Here we examine the evidence and findings from these investigations and hearings to advance the thesis that the primary motivation for the FCPA was to protect US foreign policy from the risks of US firms bribing foreign officials. In other words, the principal rationale for the FCPA is arguably discerned from the statements of many of the lawmakers who drafted the Act. A more accurate and comprehensive source of such information is simply not available.

First we examine the SEC's 1976 'Report on Questionable and Illegal Corporate Payments and Practices' (SEC Report), which details the initial scale of the bribery. We then examine testimony, evidence, and reports from the following hearings before committees of the US Congress:

- US Senate Subcommittee Hearings on Multinational Corporations and United States Foreign Policy, Committee on Foreign Relations (1975) ('the Church Committee');
- US Senate Committee on Banking, Housing and Urban Affairs, United States Senate (1976) ('the Proxmire Committee');
- US House of Representatives Hearing Before the Subcommittee on International Economic Policy and Trade of the Committee on International Relations (1977) ('the Nix Committee'); and
- US House of Representatives Hearings Before the Subcommittee on Consumer Protection and Finances, Committee on Interstate and Foreign Commerce (1976) ('the Murphy Committee')

[69] See SEC, 'Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices', 12 May 1976.

2. The SEC Report

The 1976 SEC 'Report on Questionable and Illegal Corporate Payments and Practices' was the outgrowth of an investigation that initially focused on US companies alleged to have made illegal political campaign contributions, primarily to Nixon's Committee to Re-Elect the President (CREEP).[70] As the SEC continued its investigations, and more evidence of questionable conduct emerged, the SEC set up a voluntary disclosure program in which each company that had made illegal contributions 'agreed to investigate itself and deliver its detailed findings to the SEC and the courts.'[71]

The SEC's disclosure program applied to questionable or illegal payments made both domestically or internationally. Although company participation in this voluntary program did not explicitly insulate them from enforcement action, the SEC held the view that doing so would diminish the possibility it would institute an action.[72] Recalcitrance, however, would be met with harshness.[73] During the SEC investigation from 1974-1976, hundreds of US firms (435 to be precise), including at least 117 of the Fortune 500 at the time, admitted to the SEC that they had, *inter alia*, bribed foreign officials and foreign political parties, totalling more than $300 million.[74] As one might expect, these firms also failed to account for these payments on their corporate books, many of which maintained covert slush funds specifically to pay these bribes.

The SEC investigation centred on whether these foreign payments should have been disclosed to investors. Given the SEC's regulatory remit at the time, existing US corporate laws, and the fact that foreign bribery was not illegal in the US, its investigation was limited. The mission of the SEC is not to prevent corruption, and it has no general policing powers. However, the SEC is interested in preventing fraud on investors in firms

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[70] The *Federal Election Campaign Act 1971* restricted contributions to individual candidates, directing funds to political parties.

[71] David Boulton, *The Lockheed Papers* (J. Cape, 1978) 257; Gutterman (n. 34) 120.

[72] SEC Report (n. 69) 8.

[73] Noonan (n. 4) 656.

[74] Wesley Cragg and William Woof, 'The US Foreign Corrupt Practices Act: A Study of Its Effectiveness' (2002) 107:1 *Business and Society Review* 98; Schroth (n. 60) 593.

under its supervision. These disclosures to the SEC demonstrated that foreign bribery was systemic and widespread across industries, not simply the actions of a few rogue companies or unscrupulous executives. Nor was this conduct confined to bribing foreign officials in developing nations.

Disclosures showed that foreign bribery was a long-held practice, sometimes spanning decades, of many of the largest and most powerful US multinational corporations. Companies admitted to making payments to foreign officials in more than a dozen states.[75] One of the most prominent firms implicated in these payments was the Lockheed Aircraft Corporation ('Lockheed'), then the largest US defence contractor.[76] It was later established that Lockheed was far and away the single greatest contributor to foreign bribery among US firms in the SEC investigation.[77]

The SEC Report was only the beginning of investigations into foreign bribery by US companies. We now turn to consider the reports, investigations, evidence and testimony from three expansive congressional hearings that document the perceived impacts of foreign bribery by US firms. It is these impacts, it is argued, that expose the core rationale for Congress to act to prohibit this conduct with the passage of the FCPA.

3. Congressional hearings

This section provides the evidence to discern lawmakers' rationales to enact the FCPA. It is argued that the evidence before these congressional hearings presents a comprehensive and cogent account of the justificatory bases for US lawmakers to enact the FCPA. In each committee, we see that the primary concern of lawmakers was the threat that foreign bribery posed to US foreign policy and its foreign relations. By

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[75] Including Algeria, Germany, Ghana, Honduras, Italy, Iran, Japan, Mexico, the Netherlands, the Philippines, Saudi Arabia, South Korea, Sweden, Venezuela. See SEC Report (n. 69).

[76] See Frank Badua, 'Laying Down the Law on Lockheed: How an Aviation and Defense Giant Inspired the Promulgation of the Foreign Corrupt Practices Act of 1977' (2015) 42(1) *Accounting Historians Journal* 106.

[77] Lockheed's practices and techniques were so widespread, systemic and highly-developed that later accounts of similar conduct were referred to as 'the Lockheed model' (in which third parties were used as conduits to bribe foreign officials). See Noonan (n. 4) 654-655.

examining these hearings closely, we can also test the plausibility of other claimed rationales for the FCPA, such as the moral or economic justifications for this law.

Initially, there were several views in government about how best to respond to these bribery revelations, and the varied consequences of their disclosure. Some in the Ford administration and the business community, for example, argued it was not the place of the US government to police the behaviour of corporations operating abroad, where 'business norms' may be different. Attempting to do so, they submitted, risked the ire of friendly states objecting to US attempts to apply its laws abroad.[78] This approach, however, was dismissed by many in Congress given the extent of the bribery and its ongoing repercussions.

a) The Church Committee

Headed by Senator Church, the US Senate Subcommittee on Multinational Corporations heard testimony, most of which was public, from executives of many large US multinational firms. Many of these executives appeared under subpoena and were compelled to detail the bribery of foreign officials and foreign political parties in connection with their firms' corporate interests. The evidence from these firms demonstrated these payments were substantial, longstanding, and global.

By way of context, it is noted that the Church Committee hearings were not initially focused on foreign bribery. Rather, they were established for a broader purpose relating to the rise and rise of the multinational corporation, particularly American firms.[79] By the 1970s, it was becoming apparent that the number, reach, resources, and power of US multinational corporations had become so significant that their actions could severely

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[78] The Ford Administration later proposed payments to foreign officials be disclosed to select branches of the US government. Restricting the reforms in this manner, it was thought, would avoid claims of 'moral imperialism' and keep friendly states onside.

[79] Robert Gilpin, *US Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment* (Basic Books, 1975). See also, Elizabeth Spahn, 'Multijurisdictional Bribery Law Enforcement: the OECD Anti-Bribery Convention' (2012) 53(1) *Virginia Journal of International Law* 1, noting: '[T]he wealth and power of multinational corporations (MNCs) can overwhelm all but the most powerful nation states, leaving smaller nations vulnerable to unscrupulous foreign predators.'

undermine foreign governments. Multinational corporations were thus emerging as potential challengers and interlopers to US national and security interests.[80]

In the context of the ideological battles that characterised the Cold War, particularly the claimed moral and economic superiority of market economies over centrally-planned economies, the self-serving conduct of some US firms operating abroad presented challenges to core US interests. For example, in March 1972 the Senate Foreign Relations Committee voted to undertake an investigation into the influence of multinational corporations on US foreign policy after American multinational firm ITT Company had allegedly tried to prevent the election of Salvador Allende to the presidency of Chile, including by offering one million dollars to the Central Intelligence Agency (CIA).[81]

This offer was reportedly made to presidential adviser Henry Kissinger and Richard Helms, then head of the CIA, by John McCone, a member of ITT's board of directors and former director of the CIA, who was serving as a CIA consultant at the time. As ITT executives and CIA personnel gave evidence to this effect at the congressional hearing into this matter, Senator Church suggested that a law prohibiting private contributions to the CIA might be an appropriate piece of legislation coming out of these hearings. The subcommittee's concerns over ITT's conduct were laid bare by Senator Church:

> If ITT's actions in seeking to enlist the CIA for its purposes with respect to Chile were to be sanctioned as normal and acceptable, no country would welcome the presence of multinational corporations.[82]

In other words, if ITT was seen to be a political actor capable of enlisting the support of the American clandestine services to further its private interests, other US multinationals, which were becoming increasingly dependent on the global market, would be seen in the

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[80] Lewis Solomon, 'Multinational Corporations and the Emerging World Order' (1976) 8 *Case Western Reserve Journal of International Law* 329; Richard Barnet and Ronald Muller, *Global Reach: The Power of the Multinational Corporations* (J. Cape, 1974).

[81] Schroth (n. 60) 593.

[82] US Senate, 'Multinational Corporations and United States Foreign Policy: Hearings Before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations', United States Senate, 94th Cong. 1 (hearings held March 1973-September 1976) (the 'Church Committee'), 18.

same jaundiced light abroad. Lawmakers insisted this outcome could not be good for the US or for US multinational firms. This distrust over ITT's attempts to enlist the CIA for its private purposes provoked Senator Clifford P. Case to ask Charles Meyer, US Assistant Secretary of State for Inter-American Affairs during the Chilean election:

> Is the CIA working for the United States or for ITT and McCone?[83]

The Senate report largely cleared the CIA over its conduct in this matter, but it did note that ITT had overstepped the line of acceptable corporate behaviour. It also considered that the pressures ITT placed on the US government for CIA intervention were 'incompatible with the formulation of US foreign policy in accordance with US national, rather than private interests.'[84] What may be good for a US corporation's bottom line, in other words, may not be good for US foreign policy. The theme of lawmakers' admonitions, seeking to draw a bright line between national interests and private interests, carried through these hearings as the focus of lawmakers expanded into the matter of foreign bribery by US firms. As the Church Committee's investigation of ITT and other multinationals concluded, the Watergate and SEC investigations provided new opportunities to expand the investigation to include firms engaging in foreign bribery abroad.

Evidence presented to the Church Committee[85] included large payments, innocuously termed 'corporate payments abroad', made to the President of Korea, several Saudi Arabian generals, Italian political parties, a Japanese Prime Minister, and a reputed war criminal. The Presidents of Honduras, Italy, and Gabon, a Dutch Prince, the Minister of Defence in West Germany, a General in France, and many other senior officials and statesmen were implicated in this widespread bribery by US firms.

For decades, it became apparent to the Committee, many of the most powerful US firms had run amok in pursuit of their narrow corporate interests, at the expense of vital US interests. These revelations provoked extreme concern from the US government and Congress. But why were they so concerned? And how did the conduct of these firms

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[83] *CQ Almanac*, 'Multinational Probe Hits ITT Involvement in Chile' 29th ed. (1973), 848.

[84] Ibid, 845.

[85] Church Committee (n. 82).

affect US national interests? Recall that these alleged bribes were not illegal in the US at the time. Responses to these questions are provided through an examination of these hearings and the related foreign bribery scandals.

As the evidence unfolded before the Church Committee and in the press, and the effects of the disclosure of the payoffs began to ricochet globally, the scale of unbridled foreign bribery by US firms became a major diplomatic issue for the US government. Soon, these scandals had morphed into a serious matter for Congress, which was determined to assert its role in guiding and protecting the foreign policy and other interests of the US, particularly against the background of Watergate and amidst the Cold War. The grave concern of Congress about the impacts of these bribery scandals was forecast by the opening statement from Senator Church:

> [W]hat we are concerned with is not a question of private or public morality. What concerns us here is a major issue of foreign policy for the United States.[86]

This statement set the tenor for much of the testimony and lines of enquiry from lawmakers. As the repercussions of the foreign bribery revelations were still unfolding, both in the US and internationally, the senators' focus on the foreign policy impacts seems natural. Indeed, it would have been odd if the senators had directed their attention to other, more abstract issues, such as whether it is immoral to offer or to demand a bribe, whether the conduct was in fact bribery, or what the economic effects of foreign bribery may be.

These subsidiary issues did feature in the background, but they were not discussed at length or critically by lawmakers or witnesses to these committees. Instead, they were treated as ancillary matters to the investigation at hand. The Church Committee engaged in a forensic analysis of the facts, robustly engaged with its witnesses, and followed several lines of enquiry to discern the impacts of the conduct in question on US national interests; namely, the foreign policy and foreign relations of the US.

Lawmakers' questioning was particularly pointed when it related to the perceived effects that the disclosures of foreign bribery had, or would have, on friendly and allied governments. This was especially prominent where the conduct occurred in areas of the world that the US was engaged in geopolitical and ideological contests with the USSR,

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[86] Ibid (emphasis added).

such as Latin America, the Middle East, and Western Europe. Deputy Legal Advisor Mark Feldman, US Department of State, for example, testified to the Church Committee about the ongoing impacts of the revelations of widespread foreign bribery by US firms:

> Let me give a few examples of events related to the disclosure of the last weeks which have impacted our foreign relations: The head of a friendly government has been removed from office and other friendly leaders have come under political attack. Both multinational enterprises and US Government agencies have been accused of attempting to subvert foreign governments. A firm linked with payments in one country has had property in another country expropriated, not because of any alleged improprieties in that country, but simply on the grounds that it was an undesirable firm. Several governments have presented firms suspected of making payments with ultimatums of economic retaliation or criminal prosecution.[87]

This statement demonstrates the serious threats perceived by the US government from the disclosure of bribery of foreign officials by US firms. These threats were perceived as severely affecting US foreign policy and foreign relations with these nations, and putting US economic interests at risk of collateral damage by association with the US or with US firms operating in states in which major foreign bribery scandals had erupted.

There is a distinction to be noted here that arguably signals important policy differences between the Executive and Legislative branches of the US government in this matter. A careful reading of Mr Feldman's statement indicates the US State Department's focus of concern was not the conduct of these multinationals—the bribe payers—but rather the *disclosure* of this conduct. These disclosures, from the Executive's perspective, were causative of the harm to US foreign policy interests. In other words, the Executive argued that the Senate's decision to conduct public hearings, and not to censor the names of the firms and the identities of the nations alleged to be involved in this bribery, was the proximal cause of the harm to US foreign policy and foreign relations. This was reinforced by Robert S. Ingersoll, Undersecretary of State, who gave the following testimony:

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[87] Mike Koehler, 'The Story of the Foreign Corrupt Practices Act' 73(5) *Ohio State Law Journal* (2012) 929, 939 (emphasis added).

> I wish to state for the record that grievous damage has been done to the foreign relations of the United States by recent disclosures of unsubstantiated allegations against foreign officials… [I]t is a fact that public discussion in this country of the alleged misdeeds of officials of foreign governments cannot fail to damage our relations with these governments.[88]

Ingersoll's statement, rather than being an indictment of the conduct by US firms, is arguably a reproach of Congress, and particularly the Church Committee, for disclosing these matters publicly. Nonetheless, what is important for our purposes is to understand that the harm to US foreign policy would not have occurred but for the facts of widespread foreign bribery by these American firms. Moreover, although the Church Committee decided the hearings must be public to be effective in laying the groundwork to secure support for anti-bribery legislation, the Committee did not name the foreign officials alleged to have received or demanded bribes. However, the identity of the states the subject of the bribery was disclosed by the Committee.[89]

Senator Church and other lawmakers dismissed suggestions, by Ingersoll and others, that its decision was the cause of the damage done to US foreign relations. Instead, members of the Committee argued it was inevitable that the conduct in question would come to light in one form or another. Responsibility for the damage caused to US foreign policy, lawmakers considered, was squarely with the multinationals implicated in the bribery.

The Church Committee performed its lawful duty, this much is clear. Furthermore, few would credibly suggest that the US Congress, confronted with widespread evidence of secret overseas payments, should have simply left the matter for the Executive to decide how to proceed.[90] As lawmakers, it was their responsibility to investigate the matter before crafting any legislative response.

Below, we consider further the impacts of these events on US interests and the interests of states friendly and allied to the US. We begin with a bribery scandal by a US firm in

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[88] US Senate, Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, 5 March 1976. Ingersoll was US Ambassador to Japan.

[89] Frank Church, 'Lockheed: Corporation or Political Actor?', *The Harvard Crimson*, 26 October 1976, 5.

[90] Particularly given Congress was aware of evidence that elements of the US government had acquiesced in the bribery of foreign officials.

Honduras, and then consider several bribery scandals by US defence firm Lockheed in Japan, Italy, and the Netherlands.

United Brands: a banana coup

In Mr Feldman's statement noted above, he refers to the 'head of a friendly government' being removed from office. In this case, he is referring to the Republic of Honduras and then President Oswaldo López Arellano. President Arellano, a general who seized power after two coups d'état, was himself removed by military coup d'état on 22 April 1975 after revelations that United Brands Company, a US banana conglomerate, had bribed Arellano to reduce a newly imposed banana export tax. These payments, amounting to $2.5 million, were intended to save United Brands $7.5 million.[91] The first payment of $1.25 million to the finance minister, made through United Brands' subsidiaries, was falsified in the company books to conceal its source and purpose.

As evidence of the bribery came to light, the chairman of United Brands, Eli Black, took his own life in February 1975 by smashing the window of his forty-fourth-floor Manhattan office and jumping.[92] Given the nature of Mr Black's demise, an SEC investigation was initiated. Because of the bribery revelations, and President Arellano's failure to produce his financial records to the Honduran National Congress, he was soon ousted in a coup d'état. The new Honduran government moved swiftly to nationalise United Brands' railroads and divest significant landholdings of the company.[93] However, this case was merely a prelude of explosive events to emerge as Lockheed's conduct came to light.

The Lockheed scandals: a global bribery model emerges

As noted above when discussing the SEC Report, evidence of Lockheed foreign bribery spread far and wide across many nations, including important US allies in Western

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[91] Peter Nehemkis, 'Business Payoffs Abroad: Rhetoric and Reality' (1975) 18 *California Management Review* 2, 10.

[92] Peter Kilborn, 'Suicide of Big Executive: Stress of Corporate Life', *New York Times*, 14 February 1975.

[93] R. Graham, 'A modern banana republic', *Financial Times*: XV, 17 February 1990; D. Pauly and R. Thomas, 'The Great Banana Bribe', *Newsweek* [76], 21 April 1975.

Europe, Asia, and the Middle East. The political firestorm that lawmakers and diplomats had predicted had by now spread globally, and the repercussions of widespread bribery of foreign government officials by US firms had begun to bear poisonous fruit, damaging US foreign policy interests and hurting its foreign relations with many nations, but particularly with respect to two important allies to the US during this period: Japan and Italy. Below, we examine several Lockheed-related foreign bribery cases that provoked severe foreign policy problems for the US.

Lockheed in Japan: 'a fatal blow' to democracy

In Japan, former Prime Minister Kakuei Tanaka and other high-level officials in his government were forced to resign because of disclosures made to the Church Committee that they had taken bribes from Lockheed. Many Japanese blamed Lockheed and the US government, with right-wing nationalists suggesting it was part of a US conspiracy to undermine and to embarrass Japan. In 1976, Tanaka was arrested and convicted of accepting $2 million from Lockheed to influence All Nippon Airways to purchase their Tristar jetliners instead of the DC-10 from McDonnell Douglas. Tanaka was convicted of corruption and sentenced to four years in prison but managed to avoid this sentence after multiple appeals and his death before their disposition.

A letter to US President Ford from newly-installed Prime Minster Takeo Miki, since declassified, demonstrated the gravity of the Lockheed scandal in Japan. The Prime Minister sought urgent co-operation from the US to divulge the identities of the beneficiaries of the alleged bribery, noting:

> The Japanese political circle has been profoundly shaken by the reported allegation made at the public hearings of the Senate Sub-Committee on Multinational Corporations that Japanese government officials received payments from Lockheed. A grave concern is spread throughout Japan at present that, if the whole issue is kept unsolved with the names of the officials involved remaining in doubt, democracy in Japan may suffer a fatal blow. I share this concern. The disclosure of all the relevant materials including the names of the officials involved, if any, would serve better the interest of Japanese politics and of the everlasting friendship between the United States and Japan.[94]

[94] Gerald R. Ford Presidential Library, 24 February 1976, Box 2 of NSA Presidential Correspondence with Foreign Leaders Collection (emphasis added).

With Japan's prime minister pleading to the US president that its democracy was in peril over this scandal, as well as noting Japan's position as an economically powerful and strategic American ally, US lawmakers and the executive branch were undoubtedly aware of the dangerous political and economic impacts flowing from Lockheed's conduct in Japan. In his opening statement Senator Church began:

> [W]e will show that Lockheed has for many years employed as its agent a prominent leader of the ultra right-wing militarist political faction in Japan and has paid him millions of dollars in fees and commissions over the last few years. In effect, we have had a foreign policy of the United States government which has vigorously opposed this political line in Japan and a Lockheed foreign policy which has helped to keep it alive through large financial subsidies in support of the company's sales efforts in this country.[95]

The foreign policy implications of this scandal for the US were clearly perceived to be severe. Discussing the effects of the Lockheed scandal in Japan, former US Ambassador to Japan, Dr. Edwin O. Reischauer, stated:

> The political process in Japan is in turmoil, untimely elections—that is, untimely from the point of view of the party in power—may prove necessary, and, as a result, leadership might slip at least partly into the hands of opposition parties that are less friendly to the United States. In the meantime, the Japanese are furious with the United States, and Japanese-American relations, which only a few months ago had never been better, have passed under a chilling shadow.[96]

Lockheed's bribery, however, was not confined to Japan, and nor were the negative effects of this firm's conduct on US foreign policy and foreign relations.

Lockheed in Italy: corrupt capitalism helping the Communist Party

In Italy, the Christian Democratic government was rocked when President Giovanni Leone was forced to resign in June 1978 after allegations he took bribes from Lockheed and others.[97] Several convictions for corruption, with custodial sentences, soon followed

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[95] Church Committee (n. 82).

[96] Edwin Reischauer, 'The lessons of the Lockheed Scandal; Japanese reactions', *Newsweek* [87:20], 10 May 1976.

[97] Henry Tanner, 'President of Italy resigns in scandal', *New York Times*, 16 June 1978, A1.

when immunity was lifted for members of Parliament. This included two former defence ministers and senior members of the armed forces who were involved in the purchase of Lockheed aircraft.[98] During this period, the Italian Communist Party made major gains in local elections at the expense of the US-preferred, Christian Democratic Party.[99] This electoral outcome was not ignored by Senator Church, who, when addressing Lockheed Chairman Daniel Haughton, observed:

> When you pass fat wads of money to these foreign officials, you greatly influence whether they are going to buy an airplane or whether they are going to import some wheat. […] Look at the result of the latest Italian election where the Communists made startling gains because of the common perception that the Communist Party was the only one that wasn't involved in gigantic ripoffs.[100]

In Japan and Italy, we see plainly the negative impacts of Lockheed's bribery on US foreign policy. On the other hand, the ethics or morality of Lockheed's conduct is arguably better suited for personal reflection in the pews than they are helpful to discerning the legislative rationales to prohibit this conduct. The case for the foreign policy rationale for the US ban on foreign bribery is reinforced with the Church Committee's consideration of Lockheed's bribery conduct in the Netherlands.

Lockheed in The Netherlands: crisis in the House of Orange

Following disclosures to the Church Committee of Lockheed bribery in the Netherlands, Prince Consort Bernhard, then the Inspector General of the Dutch Armed Forces, was investigated for 'unacceptable' behaviour over his receipt of a $1.1 million bribe.[101] The prince ultimately resigned his public positions, and lost his military uniform (for a period), but avoided prosecution after the Dutch parliament voted against his this following a special commission of enquiry established to investigate his dealings with Lockheed. For the House of Orange, it was a crisis. For the Dutch government, it was a

[98] Noonan (n. 4), 668.

[99] NB: Lockheed also contributed $58,000 to the Italian Communist Party.

[100] Church Committee (n. 82).

[101] Noonan (n. 4), 663-668.

severe embarrassment. And for the US government, it was one more diplomatic fire abroad, lit by a US firm's bribery, that it would have to extinguish.

The below statement of Senator Church articulates clearly the effects that foreign bribery by US firms was having on US foreign policy interests in Italy, Japan, and elsewhere:

> These very practices have extremely serious consequences both for the conduct of US foreign policy and the reception US business receives abroad. US-based corporations should not be allowed to weaken a friendly government through bribery and corruption while the United States is relying on that government as a stable sure friend in supporting our policies.[102]
>
> [W]hen these payments become known, and they will and do, whether it be through revelations by Senate subcommittees or through the common knowledge that leads to revolution and the downfall of such governments as the Idris regime in Libya, the repercussions are often international and the foreign policy implications for the United States severe. Payments by Lockheed alone may very well advance the communists in Italy. In Japan, a mainstay of our foreign policy in the Far East, the government is reeling as a consequence of payments by Lockheed. Inquiries have begun in many other countries. The Communist bloc chortles with glee at the sight of corrupt capitalism.[103]

Elsewhere, Senator Church stated:

> US-based corporations should not be allowed to weaken a friendly government through bribery and corruption while the United States is relying on that government as a stable sure friend in supporting our policies. US-based corporations should not be supporting political factions antithetical to those supported by the US Government. Nor do we want [...] the defense priorities of our allies distorted by corporate bribery.[104]

Later, Senator Church continued:

> It is no longer sufficient to simply sigh and say that is the way business is done. It is time to treat the issue for what it is: a serious foreign policy problem.

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[102] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014) 6-7.

[103] Ibid.

[104] Church Committee (n. 82).

> Several oil companies testified before the subcommittee that they had made huge political contributions in Italy and Korea, for example. They claimed to be supporting the democratic forces who are friendly to foreign capital in those countries, but in fact, they were subverting the basic democratic processes of those two countries by making illegal contributions and were, at the same time, providing the radical left with its strongest election issue.
>
> The large and steady gains made by the Italian Communist Party in recent elections are due in no small part to the fact that it is believed to be the only non-corrupt political force in the country, while the other parties are seen as the handmaidens of foreign and domestic financial interests. So that while bribes and kickbacks may bolster sales in the short run, the open participation of American firms in such practices can, in the long run, only serve to discredit them and the United States. Ultimately, they create the conditions which bring to power political forces that are no friends of ours, whether a Quaddafi in Libya, or the Communists in Italy.[105]

This focus on the negative impacts of foreign bribery on US foreign policy was not limited to this Senate Committee or to Senator Church. Although the Church Committee was the most prominent of the congressional committees examining these matters, and it had a significant influence on the final form of the law that was to become the FCPA, at least three other congressional committees examined these matters: the Proxmire Committee, the Nix Committee, and the Murphy Committee. Below, we examine lawmakers' statements concerning foreign bribery by US firms, and its perceived effects on the US.

b) The Proxmire Committee

Senator Proxmire, in a hearing in the US Senate Committee on Banking, Housing, and Urban Affairs, stressed the urgency of the foreign bribery matter, arguing that efforts to conclude bilateral or multilateral agreements to prohibit this conduct must not hold up anti-bribery policy development in the US. Senator Proxmire made clear his views on the effects of foreign bribery on US interests:

> Bribery of foreign officials by some US companies casts a shadow on all US companies [and] creates severe foreign policy problems. The revelations of improper payments inevitably tend to embarrass friendly regimes and lower the esteem for the United States

[105] Church Committee (n. 82).

> among the foreign public. It lends credence to the worst suspicions sown by extreme nationalists or Marxists that American businesses operating in their country have a corrupting influence on their political systems.[106]

In other words, the perceived effects of these bribery revelations were so severe that lawmakers considered a legislative remedy could not wait for international partners to be persuaded of the merit in adopting laws against foreign bribery. The focus in Congress as these events unfolded was squarely on stanching the bleeding, not on persuading others to follow the US down a similar path of prohibition of foreign bribery. That would come much later. For Senator Proxmire, and other lawmakers on record supporting moves to criminalise foreign bribery, the need to enact a law against this conduct was justified by the serious harm to US foreign policy interests caused by US multinationals bribing foreign officals abroad.[107] The bipartisan investigations into these matters extended beyond the Senate to the House of Representatives, which we examine next.

c) The Nix and Murphy Committees

In related hearings in the House, the 'Nix Committee' and the 'Murphy Committee' investigations also privileged the negative US foreign policy impacts of foreign bribery over discussion of ethical, moral or economic rationales to prohibit this conduct. To the extent that there was collective outrage in the Congress over widespread foreign bribery by US firms, it did not manifest as ethical or moral revulsion; rather, the persistent threat to US foreign policy from foreign bribery was the source of lawmakers' concerns. Confirming this, Representative Nix stated:

> There has been a negative impact on our foreign policy already because of these revelations. Peru has expropriated property of the Gulf Corp. in that country. Costa Rica is considering expropriation legislation and other countries in Latin America may be considering such steps. The interference in democratic elections with corporate gifts undermines everything we are trying to do as a leader of the free world. … [I]n Italy the

[106] Foreign and corporate bribes: hearings before the Committee on Banking, Housing and Urban Affairs, United States Senate, Ninety-fourth Congress, 2nd session, S. 3133 (5, 7, 8 April 1976).

[107] Robert Smith, 'Proxmire Says Lockheed Bribed Foreign Officials', *New York Times*, 11 August 1975.

> Communist party is using the fact of multinational bribery in Italy against the political friends of the United States.[108]

Representative Solarz:

> Failure to take prompt and effective action can only encourage the continuation of these practices and, thereby, continue to create serious problems in our international economic and political relations throughout the world. One government has already been toppled and political parties in several other countries have been seriously compromised.[109]

Similarly, Representative Harrington:

> [I]t is obvious that the foreign policy repercussions of such payments can be severe. […] US business contributions to foreign political parties can severely impair official policy. The US Government, not private business, should conduct US foreign policy.[110]

The argument made here is that US firms were conducting a rogue US foreign policy when they bribed foreign officials to advance their business interests. Considering the routine involvement of US diplomatic and other officials in facilitating US business interests abroad, both then and now, a bribe-taking foreign official or a rival international firm or government may reasonably perceive such conduct to be sanctioned by the US government. Such an inference is perhaps unavoidable when the firm is underwritten by US government loans and otherwise politically championed by the US government. Indeed, Lockheed was widely perceived as an instrument of US foreign policy.[111]

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[108] Koehler (n. 102) (emphasis added).

[109] US House of Representatives Hearings Before the Subcommittee on International Economic Policy of the Committee on International Relations (1975) ('the Nix Committee').

[110] US House of Representatives Hearings Before the Subcommittee on Consumer Protection and Finances, Committee on Interstate and Foreign Commerce (1976) ('the Murphy Committee') (emphasis added).

[111] Amy Myers Jaffe and Ronald Soligo, *The international oil companies* (James A. Baker III Institute for Public Policy, 2007); William D. Hartung, *Prophets of War: Lockheed Martin and the Making of the Military-Industrial Complex* (Nation Books, 2011).

Today, large US defence firms and the American oil majors are perceived as 'ambassadors' of US foreign policy when operating abroad.[112] Judge John T. Noonan's magisterial tome *Bribes* documents the close connection between the US and Lockheed, and their mutual reliance. Comparing Lockheed's relationship with the US government to the East India Company and England, Noonan notes that in the 1960s Lockheed was the largest US defence contractor, 'dependent for its existence on procurement orders from the Defense Department', and 'by the same token, the Defense Department was dependent on it for planes and missile systems'.[113]

Like England had done for the East India Company when it came into financial trouble,[114] so too did the US government provide for Lockheed during a downturn by guaranteeing its borrowings up to $250 million.[115] The US had also established an agency, the Emergency Loan Guarantee Board, to give it supervisory authority over Lockheed. A *Washington Post* editorial during this period notes:

> It would have been unfortunate enough to have any American corporation involved in this kind of transaction. But Lockheed is not considered, in other countries, to be just another American company. It is the largest US defense contractor, and it owes its existence to federally guaranteed loans. It is seen abroad as almost an arm of the US government. Its misdeeds, thus, have done proportionately great damage to this country and its reputation.[116]

This close arrangement, Noonan argues, exposed the relationship between Lockheed and the US government to 'political currents' in the 1970s.[117] As evidence of widespread foreign bribery by Lockheed was exposed, Congress was clearly indignant.

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[112] See Ben Wattenberg and Richard Whalen, *The Wealth Weapon: U.S. Foreign Policy and Multinational Corporations* (Transaction Books, 1980).

[113] Noonan (n. 4) 654-655.

[114] William Dalrymple, *The Anarchy: How a Corporation Replaced the Mughal Empire, 1756-1803* (Bloomsbury, 2019); Karl Marx, 'The East India Company—Its History and Results', *New York Daily Tribune*, 11 July 1853.

[115] Noonan (n. 4) 654-655.

[116] Cited in Koehler (n. 87) 935 (emphasis added).

[117] Noonan (n. 4) 655.

Representative Solarz:

> [W]hat is at stake is much more than the individual interests of corporations which are competing for a share of foreign markets. What is in fact at stake is the foreign policy and national interest of the Untied [sic] States. It is clearly in our interest to put a stop to these pernicious practices. Leaving aside the question of whether bribery is necessary to win contracts—and there is much evidence that it is not—there is much more involved than a few dollars. We simply cannot permit activity which so damages US foreign policy.[118]

Representative Moss:

> Disclosures have shown that United Brands dealings with the Honduran Government and Lockheed's relationship with the Dutch Crown, Italian political parties, and former key leaders of the ruling Japanese party had an impact as great as the Department of State might have had. Surely the public expects more than to have foreign policy made in the board rooms of United Brands or Lockheed.[119]

Collectively, these lawmakers' statements establish the bedrock rationale for the US regime against foreign bribery as rooted in the foreign policy blowback caused by the conduct of US multinational corporations. Through their vast bribery of foreign officials and foreign political parties across the world, Congress perceived that these firms had interfered with and subverted US foreign policy interests and damaged US foreign relations with friendly and allied governments. Put simply, these firms had seriously compromised core US national interests. When confronted with these challenges to its foreign policy, Congress responded swiftly, and arguably proportionately, to this ongoing threat. While the US government could not stop foreign officials from soliciting or accepting bribes from US firms, it could prohibit US firms from soliciting or paying bribes to these foreign officials.

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[118] Cited in Koehler (n. 102) 7 (emphasis added).

[119] Ibid.

In a later hearing in the House of Representatives, Congressman Murphy opened consideration of the Foreign Payments Disclosure Bill[120] by noting:

> The foreign policy implications for the United States are staggering and in some cases, perhaps irreversible.[121]

Based on the evidence before them, lawmakers from the Church, Proxmire, Nix, and Murphy Committees in the House and Senate each identified clearly the threats and harms to US foreign policy interests from American firms engaging in foreign bribery. Contrary to the dominant discourse today, this clarity of rationale has either been obfuscated, lost or never appreciated by many who study this area of law and international policy.

It is not only the Congressional record that we may turn to in this task of rendering the arguable core rationale for the FCPA. Next, with the help of several contemporaneous diplomatic cables as these scandals unfolded, we consider the role and the response of the US Executive branch of government.

4. Contemporaneous diplomatic cables

Because most of these congressional hearings were not conducted *in camera*, the fact of widespread, systematic foreign bribery by US firms fast became a Pulcinella's secret around the world. The US responded to the urgent concerns of its international partners by engaging its diplomatic services to forewarn its friends of the looming scandals. Below, we examine some of the measures that the US took to contain these scandals, and which were documented in contemporaneous diplomatic correspondence since made publicly available. Instead of liberal hand-wringing about the moral or ethical problems associated with engaging in foreign bribery, we see a US government that is clearly distressed about the implications for its foreign policy and its foreign relations with the affected states.

The impacts of foreign bribery by US firms on foreign governments, and therefore on US foreign policy and foreign relations with these states, were detailed in diplomatic cables

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[120] HR 15481 was a 'foreign payments disclosure' bill to prohibit foreign bribery and to maintain accurate books and records. See, US Committee on Federal Regulation of Securities, 'A Report on Certain Foreign Payments Legislation', 94th Congress (1975-1976).

[121] Ibid.

hurriedly prepared by responsible US agencies to alert foreign governments to the impending disclosures of foreign bribery by US firms in their respective states. These cables also sought to manage the ensuing blowback of these developments. Given the passage of time, and the recent publication of otherwise classified documents, we have the benefit of examining several diplomatic cables that document US government efforts to negotiate the myriad of foreign policy crises that arose as these foreign bribery disclosures emerged.

In early guidance to US diplomatic posts as these events unfolded, the Department of State was crystal clear in expressing its condemnation of foreign bribery conduct by US firms, and in its rationale for this censure:

> [State] Dep[artmen]t condemns illicit payments to foreign government officials by US firms. Such payments and their disclosure can cause (and, in some instances, have caused) serious damage to US foreign relations.[122]

As these scandals coursed through governments in Latin America, Western Europe, the Middle East, and Asia, the US government went to great lengths to assuage foreign governments embroiled by these scandals. These cables demonstrate just how serious the US government considered the impacts of these scandals to be on US foreign policy and foreign relations.

What is missing from these dispatches is any mention of the liberal normative rationales against foreign bribery that are so commonly put into rhetorical service. There is nothing mentioned about morals or 'American values', nor are there any liberal economic arguments about a 'level playing field' or 'fair competition' that would later be widely used. Any notion of human rights concerns related to such conduct is wholly absent; so too is any consideration of the effects that foreign bribery may have on governance and democratic processes in developing nations. These cables provide further evidence that the objective rationale of the US to ban foreign bribery was based on realist foreign policy grounds, not on liberal institutional or normative claims.

Latin America

[122] US Department of State diplomatic cable, 13 November 1975: 'Bribery of Foreign Officials by US Firms Operating Abroad', canonical ID: 975STATE258169_b3, declassified 6 July 2006.

A diplomatic cable from the US Department of State sent to all US diplomatic posts, describing the position of the US government after foreign bribery scandals had erupted in several Latin American countries, states:

> The United States condemns such actions by US corporations in the strongest terms. They complicate our relations with friendly foreign governments and make it more difficult for the United States to assist other US firms in the lawful pursuit of their legitimate business interests abroad.[123]

There is no mention of the moral or ethical issues of engaging in foreign bribery. In fact, the cable notes that this conduct is not illegal in the US, and only arises as a regulatory matter for the SEC where such payments are not reported where required.[124] What is evident, however, is the scale of the efforts that the US government undertook to respond to concerns from nations such as Venezuela, Bolivia, and Ecuador that their government officials may be implicated in such scandals. Expanding on this, the cable notes:

> [I]n a few cases it is probable that the illegal activity will be used at least indirectly as the basis of implied threats to the [US Government] with respect, for example, to the cutting off of [US Government] access to the commodities produced by the companies alleged to have engaged in the illegal activities.[125]

Clearly responsive to threats of expropriation and denial of market access from some Latin American countries, or their state-controlled firms, this cable articulates US government concerns about the foreign policy problems it was experiencing as these events unfolded in this region.

Europe

As noted above, Italy was stunned by the Church Committee disclosures of widespread foreign bribery by several US firms, including Lockheed. Arising out of the 1971 Italian

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[123] US Department of State diplomatic cable, 15 May 1975: 'Bribery of Foreign Officials by US Corporations', canonical ID: 1975STATE114202_b, declassified 5 July 2006.

[124] The practice of firms hiding these payments by keeping them off the books, however, was not legal. Some SEC officials were concerned that these payoffs were not accurately accounted for and, where material, represented hidden risks to shareholders. Of course, bribery of government officials was generally prohibited, *de jure* if not *de facto*, in jurisdictions where it was practised.

[125] US Department of State diplomatic cable, 15 May 1975 (n. 123).

purchase of 14 C-130 aircraft manufactured by Lockheed, costing approximately $60 million at the time, *Scandalo Lockheed* implicated former Italian defence ministers, generals, elite businessmen, and even the President of Italy. Providing an update to Washington, DC, on the unfolding events in Italy, US Minister Counsellor Robert Beaudry sent a cable documenting what he called 'precedent-setting media attention' of this scandal, estimating that 'at least 100 Italian journalists are working full time on Lockheed and related scandals.'[126] In detailing the impacts of this scandal on US national interests, Beaudry wrote:

> The significance of the Lockheed scandal is that coming so soon on the heels of the CIA revelations it has thrown mud on many of the most important non-communist Italian institutions and individuals which had managed to escape incrimination in the CIA stories. It has also further discredited the image of American democracy as a model for the Italian political system and called into question the advisability of close public association with America.[127]

Discussing the impacts of the scandal on the Italian military, Beaudry notes:

> The press is arguing that bribes were necessary to sell the C-130 because it was not the proper plane for Italy's military needs. … They also point out that Lockheed managed to pass the entire cost of the 'sales effort' back to the Italian taxpayer. The Lockheed scandal demonstrated to some that, in addition to our government, US business also feels free to interfere in internal affairs of a sovereign ally.[128]

Summing up the mood in Italy toward the US government and US firms at the time, Beaudry writes 'we are an embarrassment for our friends'.[129] As this foreign policy crisis developed in Italy, in which dozens of officials were accused of corrupt involvement with Lockheed, Northrop, and other US firms, the impacts of this scandal on Italy's democracy

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[126] US Department of State, Embassy Rome, diplomatic cable, 'Italian Lockheed Scandal: Its Meaning and Impact', 1 March 1976, declassified 4 May 2006.

[127] Ibid.

[128] Ibid, 10(b).

[129] Ibid, Para 12.

became apparent as elections approached. Another cable from the US Embassy, Rome, penned by Ambassador John A. Volpe, noted:

> This affair could prove to be the straw that backs the DC's backbone. In any event this is what many of our DC contacts tell us and others. It would appear that they are suffering shell shock and are busily preparing exculpatory excuses for the defeat they fear the public will give them in the coming elections. They may be right and the [US Government] will be given much of the responsibility. We owe it to them and ourselves to clean this up as soon as possible—if that is possible—so that the Italian democratic process can have a fair chance of working.[130]

Elsewhere in Europe, the State Department fretted over the fall out of bribery disclosures in Germany, The Netherlands, and Spain. Diplomatic coverage of the reactions of governments to the disclosure of widespread foreign bribery by US firms also extended to states in the Middle East and Asia, including Saudi Arabia, Japan and South Korea.

Along with considering the legislative and executive branches of the government to discern the core justificatory rationale for the FCPA, it is useful to examine US judicial consideration of this law. Closing the triangle of power in the US government, we next consider the writings of superior US courts as they relate to the legislative rationales of the FCPA.

5. Case law

Examining case law to discern the legislative rationale for the US ban on foreign bribery is not particularly fruitful simply because few FCPA cases are litigated in the courts. Because the standard operating procedure of the DOJ and SEC is to negotiate settlements with FCPA defendants, this area of case law is effectively a legal desert.[131] Nonetheless, the limited case law there is provides a small window into the judiciary's understanding of the rationales for the FCPA.

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[130] US Department of State, Embassy Rome, diplomatic cable, 'Lockheed Scandal: Smoke Without Fire? No One Burned, But Everyone Asphyxiated Just The Same?', 29 April 1976, declassified 4 May 2006. NB: DC was the US allied, anti-communist Democrazia Cristiana Party.

[131] Robert Anello and Kostya Lantsman, 'Law vs. Lore: the lack of judicial precedent in FCPA cases' 2015 (22) *Business Crimes Bulletin* 11.

In *Clayco Petroleum Corp. v Occidental Petroleum Corp.*, the Court wrote:

> The FCPA was intended to stop bribery of foreign officials and political parties by domestic corporations. Bribery abroad was considered a 'severe' United States foreign policy problem; it embarasses (sic) friendly governments, causes a decline of foreign esteem for the United States and casts suspicion on the activities of our enterprises, giving credence to our foreign opponents. […] The FCPA thus represents a legislative judgment that our foreign relations will be bettered by a strict anti-bribery statute.[132]

In *Lamb v Phillip Morris, Inc.*,[133] the Court noted 'the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets.'[134] In *US v Castle*,[135] the Court took a different approach and considered the potential domestic effects of foreign bribery as the primary rationale for the FCPA, whereas foreign policy considerations were secondary. The Court, *per curiam*, wrote:

> First, Congress was concerned about the domestic effects of such payments. [...] Such massive payments had many negative domestic effects, not the least of which was the distortion of, and resulting lack of confidence in, the free market system within the United States.
>
> Congress' second motivation was the effect of such payments by US companies on the United States' foreign relations. The legislative history repeatedly cited the negative effects the revelations of such bribes had wrought upon friendly foreign governments and officials.[136]

With respect, the legislative record of the FCPA does not indicate Congress was primarily concerned with the effects of foreign bribery on the 'free market system' within the US. How foreign bribery could create systemic threats to the 'free market' are, unfortunately,

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[132] 712 F.2d 404 (9th Cir.) (1983), cert. denied, 104 S. Ct. 703 (1984).

[133] 915 F.2d 1024 (6th Cir.) (1990).

[134] Ibid, 1029.

[135] 925 F.2d 831 (5th Cir.) (1991).

[136] Ibid, 836.

not elaborated further by the Court beyond repeating concerns that US firms may have used foreign bribery to compete unfairly against other US firms.[137]

In *US v Kay*,[138] the Court wrote:

> Congress enacted the FCPA in 1977, in response to recently discovered but widespread bribery of foreign officials by United States business interests. Congress resolved to interdict such bribery, not just because it is morally and economically suspect, but also because it was causing foreign policy problems for the United States.[139]

More recently, we find evidence in the courts of a shifting rationale for the FCPA, but which continues to hew to US foreign policy rationales. In *US v Frederic Pierucci, et. al.*,[140] Judge Janet Bond Arterton, when sentencing a former Alstom SA executive and French national to a further period of imprisonment following his guilty plea to FCPA offences, remarked:

> [E]fforts to install and nurture democracy in these countries is thwarted if international business people take the view that you can't compete without bribes.[141]

However odd it may be for some to hear a senior US judge in a criminal sentencing matter espouse their views on the foreign policy of Her Honour's government, it speaks clearly to the underlying political objectives of the FCPA. What is absent is any attempt to situate the Act and its objects in the moral or normative justificatory arguments that are so common.

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[137] Ibid.

[138] 359 F.3d 738 (5th Cir. 2004).

[139] Ibid, 746.

[140] DOJ, Press Release, 16 April 2013, '*U.S. v. Frederic Pierucci*, Docket number: 12-CR-238-JBA), District of Connecticut.

[141] *Law360*, 'Judge Sends "Message" In Ex-Alstom Exec's Bribery Sentence', 25 September 2017. Mr Pierucci, upon his release from US custody, tells a story of his prosecution that differs markedly from the narrative portrayed by Judge Bond Arterton: see Frédéric Pierucci and Matthieu Aron, *Le piège américain* (JC Lattès, 2019).

Similarly, in *US v Hoskins*, the influential Second Circuit Court of Appeals considered the legislative history of the FCPA. Judge Gerard Lynch, in a concurring opinion, wrote:

> [B]y embroiling American companies in the corrupt activities of foreign officials, such bribery tends to perpetuate the corruption of developing nations, to the long-run disadvantage of the United States both in foreign policy (by associating the United States and its citizens and businesses with unpopular corrupt regimes) and in commerce (by perpetuating the corruption 'tax' levied on all those who do business with such regimes).[142]

The writings of these US courts support the thesis that the prohibition of bribery of foreign officials, and the related ban on foreign political contributions, was the rational, considered, and arguably well-founded response of the legislature and a government committed to protecting and advancing US foreign policy and foreign relations. Confronted with damning evidence that many of its largest national champions had undermined core national interests, Congress acted to ensure similar future conduct by US firms would not be without risk.

Taken together, these legislative, executive, and judicial sources provide a deep factual basis for discerning a clear, evidence-based justificatory rationale for the US Congress to pass, and for President Carter to enact, the FCPA. This evidence shows that the impacts of widespread foreign bribery by US firms lay squarely in the damage they did to US foreign policy and international relations. US allies and strategic partners were shaken by crises of legitimacy, coups d'état, criminal investigations and prosecutions of heads of state, ministers and senior officials, as well as the worst kind of national embarrassment. These were the concrete outcomes of pervasive foreign bribery by US firms during this period.

Although the facts surrounding the foreign bribery disclosed in the SEC Report and the congressional investigations are not in dispute, the fundamental reasons for enacting the FCPA nonetheless remains misapprehended, under-examined, and simply ignored by scholars, jurists, journalists, civil society, and politicians alike. The foreign policy rationale for the FCPA is only rarely accepted as a primary consideration, and usually without further explanation. Most commonly, this rationale for the Act, or any rationale

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[142] *U.S. v Hoskins*, 902 F.3d 69, No. 16-1010 (2d Cir. 2018), Lynch, J, [III (3)].

for that matter, is simply omitted. By and large, scholars, policymakers, and commentators simply assume foreign bribery is 'bad', with no explanation given as to how or why states may have made the relatively recent decision to prohibit this conduct.

This dearth of critical analysis of the justificatory bases for the FCPA, it is argued, presents real problems for those concerned with minimising foreign bribery. If we do not know or do not agree on the reasons why this conduct should be prohibited, we should expect that individuals, firms, and foreign governments alike will contest this area of law and international policy. Moreover, without general agreement of the 'why' of a given law, it is folly to expect consensus in 'how' a law, or related multilateral agreement, is implemented internationally. When we fail to articulate clearly, and forthrightly, the reasons for prohibiting foreign bribery in the US, we also risk undermining the salience of the FCPA, both in the US and abroad.

Finally, the omission of consideration of the rationale for the FCPA has also influenced how other states interpreted US measures to cajole them to agree to a multilateral agreement to ban foreign bribery. It is argued in Part 2 that this has had persistent and far-reaching consequences for the US campaign against foreign bribery, ranging from poor international co-operation to investigate and prosecute this conduct to deep suspicion and mistrust among Parties to the OECD Anti-Bribery Convention.

Despite the broad evidence of the foreign policy basis for the FCPA that is documented here, it is necessary to examine the orthodox justifications for this law, including the claimed normative arguments.

B. THE MORALISATION OF THE FOREIGN CORRUPT PRACTICES ACT

The motivations of Congress to enact the FCPA was surely clear to government officials during these hearings that exposed widespread foreign bribery by US firms. This clarity, however, was soon obscured by a post-enactment narrative that situated morals and 'American values' at the justificatory core of the Act. Here we consider this push to 'moralise' the FCPA.

Alongside the evidence that US foreign policy blowback was the central concern of Congress as these scandals unfolded, some commentators and business executives raised the ethical and moral aspects of foreign bribery.[143] Today, many continue to see a fundamentally moral rationale for laws against foreign bribery. Globally, justificatory arguments for laws against various forms of corruption are often couched in terms of morality, values, and, more recently, integrity. In assessing the credibility of normative claims to justify the enactment of the FCPA, it is important to query what had changed to justify these values-based arguments against foreign bribery. After all, foreign bribery was both legal and widely practised by US multinational corporations.

What had changed?

Until the disclosures of foreign bribery by US firms exploded in the mid-1970s, had successive Republican and Democratic administrations simply been ignorant of widespread foreign bribery by many of the largest US multinational corporations? Had the US diplomatic and intelligence services been unaware that hundreds of major US firms had for decades bribed foreign governments and foreign political parties to the tune of hundreds of millions of dollars?

Given the close relationship the US government had with many of the firms implicated in this conduct—for example, by providing overseas diplomatic assistance to these firms

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[143] W.M. Blumenthal, 'Business ethics: a call for a moral approach' (Jan. 1976) 44 *Financial Executive* 32; W. Safire, 'Should we export morality?' (Dec. 1975) 107 *Reader's Digest* 123-4; Steven Brenner and Earl Molander, 'Is the ethics of business changing?' (1977) 55 *Harvard Business Review* 147; Mary Bender, 'Ethics experts wax inconclusive on bribery abroad', *New York Time*s, 3 August 1975.

and shepherding the approval of export licences for sensitive technologies—it is implausible that the US government was wholly ignorant of these practices.[144] But if we assume prior ignorance of these practices, had lawmakers' morals changed overnight after learning of this conduct? This explanation is, *prima facie*, unpersuasive. A better explanation, it is submitted, is that lawmakers saw the harm being done to US foreign policy by US firms engaging in this conduct and responded to ban it. Nonetheless, it is recognised many today maintain the view that lawmakers' support for the FCPA was founded on the ethical ideals of the US, in which foreign bribery ran 'counter to the moral expectations and values of the American public'.[145] Next, we consider the normative story of the FCPA.

1. Analysing the normative narrative

It is a common assertion that foreign bribery was just the way international business was done prior to the FCPA. Left unexamined in this assertion is the obvious question: if foreign bribery was such a common and accepted business practice, why was it outlawed? And why did the US Congress react with such apparent outrage upon 'learning' of this widespread practice? After all, foreign bribery was not illegal. In critiquing the normative narrative for the FCPA, replies are offered to these oft-avoided questions.

For many legal and social science scholars, the normative context for the FCPA holds the key to understanding US policy on foreign bribery. Some argue, for example, that an 'anti-corruption norm', deep in the American psyche and this nation's politics. Amplified by Watergate and the ensuing disclosures of foreign bribery by US firms, this norm was, it is claimed, what led Congress to pass the FCPA.[146] Had latent societal norms in the US against domestic corrupt conduct crystallised to force the hand of Congress to forbid foreign bribery too? Had the Watergate scandal turned Congress into crusading do-

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[144] See Kenneth Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption' (2002) XXXI *Journal of Legal Studies* S141, S158. See also, David Binder, 'Northrop Cites Undercover Role', *New York Times*, 7 June 1975; David Ignatius, 'Ironic Payoff—Foreign Bribery Trials May Show US Knew Of Some Payments*', Wall Street Journal*, 5 October 1978; *New York Times*, 'Lockheed Backed in a Bribery Case', 24 October 1983, A15.

[145] House Report, No. 95-640, 'Unlawful Corporate Payments of 1977', 4-5 (1977). See also, Spahn (n. 34); Ellen Gutterman, 'On corruption and compliance: explaining state compliance with the 1997 OECD Anti-Bribery Convention' (2005) (Thesis, Ph.D.), University of Toronto, 121.

[146] Spahn (n. 34); Teachout (n. 6).

gooders bent on moralising the US and its multinational corporations? Answering any of these questions in the affirmative requires credible evidence, which, alas, is serially omitted by the proponents of such arguments. The dearth of evidence to support these assertions, however, has not stopped scholars and commentators from cursorily repeating that the impetus for the FCPA was a newfound, post-Watergate moralism on the part of the US government.

This dissertation rejects the 'normative rationale' for the FCPA, and argues that this narrative ignores the historical record, is ill-conceived, and distracts the analyst from the fundamental, self-interested purposes that justified the enactment of the FCPA; that is, US lawmakers' objective concerns about the foreign policy blowback provoked by US firms' widespread foreign bribery. Nonetheless, because the 'normative FCPA' argument is so common there is utility in examining it critically, if only to despatch it finally from the catalogue of plausible arguments for the primary rationale for the FCPA.

A moral awakening in America?

It is often asserted that the American nation—after Nixon, after corrupt Vice President Agnew, after its disastrous war in Vietnam—was simply fed up with corruption in all its forms, including the 'corporate payoffs', 'commissions', and 'payments abroad' the focus of this dissertation. With the election of President Carter, so it is argued, came an American 'moral awakening'. The aspirations of President Carter in respect of human rights, the environment, and other social policies are often lumped together by scholars and legal commentators in attempts to justify the FCPA. We are meant to understand that the FCPA was part and parcel of Carter's 'new politics', a fresh start that stood in contrast to the corrupt, scandal-plagued Nixon presidency. With the passage of the FCPA, Noonan writes: 'America's ambassadors—that is, its businessmen—were to show American purity throughout the globe.'[147]

[147] Noonan (n. 4), 680.

Proponents of this narrative often cite the Carter administration's 'moral equivalent of war' to apply to corruption, and therefore to justify the FCPA.[148] However, Carter's famous speech indicates it was not directed at foreign bribery or corruption; instead, it was aimed squarely at addressing the US energy crisis and the crippling energy embargo of the US by certain Arab nations.[149] Moreover, Carter's widely-cited programme to lift the spirits of a distraught America was not launched until after the Church Committee and related hearings were concluded, and after the FCPA was widely agreed in Congress. Carter's signature on the FCPA Bill was more rubber stamp than it was evidence of bold, moral leadership by a new breed of US president.

Along with the poverty of critical analysis of the justificatory rationale for the FCPA, the popular narrative of American moral leadership is oft-repeated. This is unfortunate; not because there is intentional falsehood in these assertions, but because they omit readily available evidence that challenges these assumptions. Acting like an echo chamber, these assertions both encourage uncritical acceptance of the normative narrative of the FCPA and discourage critical consideration of the fundamental rationale for the Act. This has arguably contributed to a false consensus and unfortunate groupthink on this topic.

The legislative rationale for the FCPA is treated as a sort of common-sense requiring no supporting evidence. Available evidence that challenges the conventional wisdom is consistently omitted. It is a specific aim of this dissertation to undermine any alleged consensus about the rationales for the FCPA, and to provoke critical consideration of why the US government enacted this law. Knowing foreign bribery was not illegal in the US prior to 1977 and was widely practiced by many of this state's most important firms, it is a curious task to read dozens of scholarly articles that neglect any critical consideration about why the FCPA was enacted. However, some do offer a view about why the FCPA became law, and it is worth considering those here.

Table 1 below cites a wide selection of peer-reviewed publications and monographs that indicate the author(s) view(s) (or adherence to a view) of the primary motivations or

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[148] Some argue President Carter invoked this programme against corruption in support of human rights; see, e.g., Cragg and Woof (n. 74) 118.

[149] Daniel Horowitz, *Jimmy Carter and the Energy Crisis of the 1970s: The 'Crisis of Confidence' Speech of July 15, 1979* (Bedford/St. Martin's, 2005).

rationales for the FCPA, all of which consider the Act as stemming from values-driven considerations. Not included here is the thousands of column inches from widely-circulated newspapers and newsmagazines, likely having a far greater influencing effect than professional legal journals, which broadly repeat the story that the FCPA was enacted in a brilliant stroke of American moral leadership.

Table 1: ***Scholars' assertions of the moral impetus for the FCPA***

Author, publication	**Title**	**Relevant commentary**
Gantz, David (1997-98) 18 *Northwestern Journal of International Law & Business* 457, 459	'Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus'	'The US Congress enacted the [FCPA] in 1977 in a spirit of moral outrage against disclosures that certain large US corporations had bribed foreign government officials in order to obtain business.'
Isaacson, Kristin (2014) *University of Illinois Law Review* 597	'Minimizing the menace of the FCPA'	'[T]he US government wanted to foster worldwide consumer confidence in US corporations by encouraging 'morally sound' business practices'
Posadas, Alejandro (2000) 10 *Duke Journal of Comparative and International Law* 345, 352	'Combating Corruption Under International Law'	'Because the foreign payments hearings revealed numerous international illicit practices rather than a small number of isolated cases, Congress ultimately chose to criminalize foreign bribery on moral grounds.'
Dalton, Marie (2006) 2 *New York University Journal of Law and Business* 583, 594	'Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act'	'The notion of corruption embodied in the Act is defined utilizing ethical, as opposed to economic, criteria and is based upon the belief that payments designed to influence government officials to perform services outside their prescribed duties are morally wrong.'
Duncan, Christopher (2000) 1 *Asia Pacific Law and Policy Journal* 47, 10	'The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?'	'The impetus behind the Foreign Corrupt Practices Act (FCPA), the main extraterritorial anti-corruption law of the United States, was moral indignation. This feeling resulted in created (sic) a broad, vague act based on Western principles of morality.'
Surjadinata, Kenneth (1998) 12 *Emory International Law Review* 1021, 1086	'Revisiting Corrupt Practices from a Market Perspective'	'The United States' continued insistence on taking the moral high ground is perplexing, given that an alternative mechanism, the market, can define in a superior manner those practices which tend to destroy aggregate utility for all parties and those which tend to maximize it.'

Gutterman, Ellen (2015) 11(1) *Foreign Policy Analysis* 110	'Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act'	'Congress passed the FCPA in the context of a heightened focus on ethics in government and in business that was part of the political fallout of the [Watergate] scandal. Congress intended the FCPA to ensure a high level of integrity and ethical practice among American businesses operating abroad.'
Jakobi, Anja (2013) (Suppl 7) *Zeitschrift für Politikwissenschaft* 243, 246	'The changing global norm of anti-corruption: from bad business to bad government'	'As a consequence of moral concerns related to these practices, the FCPA was approved unanimously by the congress…'
Davis, Kevin (2002) 4(2) *American Law & Economics Review* 328	'Self-Interest and Altruism in the Deterrence of Transnational Bribery'	'[T]he legislative history of the FCPA […] strongly suggests that its enactment was the product of moral outrage'.
Almond, Michael & Scott Syfert (1997) 22(2) *North Carolina Journal of International Law and Commercial Regulation* 389	'Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy'	'Enacted in the wake of Watergate, the FCPA embodied a growing sentiment in the United States that bribery, even when committed abroad, is ethically unacceptable, economically anti-competitive, and simply bad business.'
Earle, Beverley (1995-96) 14(2) *Dickinson Journal of International Law* 207	'The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument'	'The legislation represented efforts to enforce a concept of morality and to 'level the playing field' in forbidding the use of corrupt payments offered to foreign officials to obtain or retain business.'
Abbott, Kenneth and Duncan Snidal (2001) 31 *Journal of Legal Studies*, S161	'Values and Interests: International Legalization in the Fight Against Corruption'	'Values were centrally responsible for the enactment of the FCPA.' '[T]he fundamental motivation for the statute was moral.'
Ashcroft, John (2012) 26 *Notre Dame Journal of Law, Ethics & Public Policy* 25	'The Recent and Unusual Evolution of an Expanding FCPA'	'A morally incensed American public stirred Congress to address corporate governance concerns through FCPA legislation intended 'to restore public confidence in the integrity of the American business system.'
Klich, Agnieszka (1996) 32 *Stanford Journal of International Law* 121, 123	'Bribery in Economies in Transition: The Foreign Corrupt Practices Act'	'The FCPA essentially reflects the view that corruption, and in particular, its subset bribery, is so immoral that not even the loss of business by American companies could justify it.'

Brown, H. Lowell (1998) 50 *Baylor Law Review* 1, 2	'Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act'	Arguing the FCPA was enacted '[i]n the maelstrom of moral outrage at the political and corporate abuses revealed in the course of the Watergate affair'.
Murphy, Aaron (2005) 2 *New York University Journal of Law & Business* 229, 233	'The Migratory Patterns of Business in the Global Village'	The FCPA 'was clearly an attempt to codify a moral reaction to the outrage over the corporate scandals that followed the Watergate fiasco'.
Davis, Kevin E. (2012) 67 *New York University Annual Survey of American Law* 497, 498-501	'Why does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?'	Describing the moral motivations for the FCPA and arguing that the US had a vital interest in being perceived as a moral leader during the Cold War.
Magnuson, William (2012-13) 51 *Columbia Journal of Transnational Law* 360, 379	'International Corporate Bribery and Unilateral Enforcement'	'The FCPA was an important milestone in the history of inter- national corporate bribery regulation, and the moral significance of its passage should not be overlooked.'
Smith, K.J. (2017) 45 *Hofstra Law Review* 1119, 1120	'The Foreign Corrupt Practices Act: Set aside the Moral and Ethical Debates, How Does One Operate within This Law?'	'Congress passed the Foreign Corrupt Practices Act to attempt to curb the unethical behavior of American businesses doing business overseas.'
Rossbacher, Henry & Tracy Young (1997) 15(3) *Penn State International Law Review* 519	'The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption'	'Most importantly, the Act upholds a valued moral standard underlying the history and culture of the United States.'
Spahn, Elisabeth (2012) 23 *Indiana International & Comparative Law Review* 1	'Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption'	'The thirty-fifth anniversary of the US FCPA is an opportune time to note the very successful globalization of values embodied in this remarkable statute.' 'The twin values, morality and free market competition, provided the initial bases for enacting the FCPA.'
Jakobi, Anja P. (2013)	*Common Goods and Evils? The Formation of Global Crime Governance*	'As a consequence of moral concerns related to these practices, the FCPA was approved unanimously by the congress, prohibiting American companies from bribing foreign officials.'

Windsor, D., & K.A. Getz (2000) (33) *Cornell International Law Journal* 731, 772	'Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values'	'In retrospect, the legislative process was effectively a moral crusade combined with a rough, and possibly self-serving, estimate that economic and diplomatic consequences would be, if not strictly trivial, then at least reasonably acceptable'.

Despite the common assertion that 'post-Watergate moralising' is why the US enacted the FCPA, there is little persuasive evidence to support this position—nor is much credible evidence proffered by proponents of this theory. Instead, advocates of this argument appear to rely on the common revulsion for corruption as a stand-in for cogent analysis of the justificatory rationales for the FCPA. This lack of rigour has arguably acted as historical revisionism and undoubtedly contributed to the popular narrative of American 'moral leadership' in matters of foreign bribery and corruption more generally.

When tested against the legislative and historical record, however, we see that the bipartisan condemnation of this conduct was not focused on whether foreign bribery was morally 'right' or 'wrong'. In fact, many lawmakers chose not to call the conduct 'bribery' at all, preferring instead euphemistic terms, such as 'corporate payments', 'irregular payments', or 'commissions'.

Those scholars who have undertaken more than a rudimentary analysis of the rationale for the FCPA cite an admixture of legislative motives that includes purported moral justifications and other rationales, such as economic efficiency, international market access, and democracy promotion and good governance in developing states.[150] However, several analysts have presented brief rationales for the FCPA that go beyond the thin claims of US moral leadership and American values. Professors Dan Danielsen and David Kennedy, for example, state:

[150] See, e.g., Koehler (n. 102); Rachel Brewster and Samuel Buell, 'The Market for Global Anticorruption Enforcement' (2017) 80 *Law and Contemporary Problems* 193.

> This reflects the intention of Congress when it enacted the FCPA to focus on the harm done to our economy and to our foreign policy interests by the practice of bribing foreign governments.[151]

In a study of the effectiveness of the FCPA, Professors Wesley Cragg and William Woof cite evidence from congressional hearings to argue 'the crucial importance of the FCPA lay in the domain of US policy', noting 'the link to US foreign policy objectives was therefore a central feature of the FCPA from its inception'.[152] Similarly, Dan Tarullo, a former senior US official intimately involved in designing and executing the US campaign against foreign bribery and the negotiation of the Anti-Bribery Convention, has observed:

> Congress concluded that the bribery scandals had adversely affected US foreign policy, 'tarnished' the 'image of American democracy abroad,' and impaired confidence in the 'financial integrity of our corporations'.[153]

Tarullo also references an accompanying footnote suggesting the 'attribution of "moral" motivation to Congress, while reasonable, does not tell the whole story.'[154] This perfunctory comment, relegated to a footnote, is characteristic of the poverty of analysis for US motivations to enact the FCPA.

Professor Mike Koehler has done more than most to publicise, if not analyse, the motivations to enact the FCPA. Discussing the importance of the FCPA legislative history to give meaning to the Act, Koehler observes: '[w]hy Congress enacted the FCPA and what conduct Congress sought to capture by the law are topics that are often overlooked'.[155] Koehler submits that '[f]oreign policy was the primary policy concern

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[151] David Kennedy and Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Open Society Foundations, 2011) 47.

[152] Cragg and Woof (n. 74) 9-10.

[153] Daniel Tarullo, 'The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention' (2003-04) 44 *Virginia Journal of International Law* 665, 673. From 1993-96, Tarullo was US Assistant Secretary of State for Economic and Business Affairs, and later served as Assistant to the President (Clinton) for International Economic Policy.

[154] Ibid, at note 22.

[155] Koehler (n. 102) 1.

from the discovered foreign corporate payments which motivated Congress to act'.[156] Alas, he provides little analysis of the substance of these payments.

What were the foreign policy issues that spurred Congress to act? Why was Congress 'concerned' about these payments? Koehler fails to ask these questions. While he recites relevant commentary from Senator Church, Congressman Nix, and others, who speak directly to this point (i.e., the foreign policy 'problems' caused by US firms bribing foreign officials), Koehler misses the opportunity to engage critically with the mischief that so concerned Congress. In the end, he seems unpersuaded by his own argument that foreign policy was the primary policy concern for the FCPA and hedges his bets to add that foreign policy was 'not the sole concern' of Congress in this matter.[157] Taking the oft-invoked catch-all approach to justifying the FCPA, Koehler writes:

> Congressional motivation was also sparked by post-Watergate morality, economic perceptions including a sense that prohibiting foreign corporate payments would give US companies a comparative advantage and actually help companies resist foreign payment demands, as well as global leadership.[158]

Nonetheless, Koehler's research and publication of important FCPA-related legislative materials and documentation of relevant historical events helps the analyst to nail down the justificatory rationales for the Act. Far more common is the widespread, cursory assertion that the primary motivations for the US to enact the FCPA was this state's desire to impose good morals and ethics in international business.[159] This type of piecemeal analysis of the FCPA has arguably contributed much to the circumstance we find ourselves in today, in which the legislative rationale for the FCPA is poorly understood, misapprehended, and generally misconceived in both the US and elsewhere.

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[156] Ibid 6.

[157] Ibid.

[158] Ibid 7.

[159] Laurence Cockcroft, *Global Corruption: Money, Power and Ethics in the Modern World* (I.B. Tauris, 2012), 112 (arguing: 'In contrite mood Congress accepted the case, as a way of establishing business ethics, for outlawing such [bribery] payments.')

Foreign bribery: the cost of doing business?

Some argued that foreign bribery by US firms was, and perhaps is, necessary to advance US corporate interests internationally. Corporate foreign bribery was simply how business was done for many of the largest American firms as they expanded their operations beyond this nation's borders to grow their markets and US exports. By the 1970s, Kenneth Rodman argues:

> [T]he American market was no longer as dominant for US-based MNCs [multinational corporations] as it had been in the past. As other countries increased economic opportunities relative to the US market and as MNCs expanded their overseas operations, American investors became increasingly dependent on foreign markets and sources of raw materials.[160]

Foreign bribery was also argued by some, particularly American academic economists, as necessary 'to induce change in the ossified bureaucracies of developing countries'.[161] Samuel Huntington, for example, argued in the late 1960s that this type of corruption enabled private actors to work around inefficient bureaucracies to get business done.[162] Similarly, the World Bank had long considered corruption and bribery to be a political matter, instead of an economic one, which was a 'necessary, even valuable way to cut through bureaucratic red tape' needed to deliver major development projects.[163] Others, such as Professor Joseph Nye, have argued that a certain level of corruption could promote entrepreneurship.[164]

It was also common for corporate executives and government officials, in attempts to deflect blameworthiness during congressional hearings into their conduct abroad, to argue

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[160] Kenneth Rodman, 'Sanctions at Bay? Hegemonic Decline, Multinational Corporations, and US Economic Sanctions since the Pipeline Case' (1995) 49(1) *International Organization* 105.

[161] Tarullo (n. 153) 674. See also, Nathaniel Leff, 'Economic Development Through Bureaucratic Corruption' (1964) 8(3) *American Behavioural Scientist* 8-14.

[162] Samuel Huntington, *Political Order in Changing Societies* (Yale University Press, 1968) (cited in Rachel Brewster, 'The Domestic and International Enforcement of the OECD Anti-Bribery Convention' (2014) 15(1) *Chicago Journal of International Law* 84, note 32).

[163] Abbott and Snidal (n. 144) S158-S159.

[164] Joseph Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 *American Political Science Review* 417.

that foreign bribery was the product of 'extortion', suggesting US firms were forced to make these payments under the economic duress of imperious, corrupt foreign officials. They had to pay these bribes, they argued, or cease business activities in the country, with shareholders and employees in the US left to suffer the economic consequences. These appeals, it is noted, do not speak to morals or values; instead, they are focused squarely on the economic interests of US firms. If engaging in foreign bribery was economically beneficial to US firms, then perhaps it was a 'cost of doing business'.

But for the subversion and damage done to US foreign policy by this conduct, one could imagine this practice continuing uninterrupted. The normative story for the FCPA, however, misses the import of these events. The normative narrative also omits consideration of the emphasis of the relevant Congressional investigations, which were not punctuated by arguments concerning morality, good ethics, or proper norms as the justificatory basis for outlawing this conduct. In fact, the public record demonstrates there was little substantive discussion in these hearings about whether the relevant conduct was 'right' or 'wrong'. Lawmakers simply assumed that any type of bribery raised ethical or moral issues, regardless of its technical legality in the US at the time. This should be expected. Bribery, particularly when it involves state officials, has raised vexing issues of morality and ethics in societies across millennia.[165]

To be sure, some US lawmakers did share conclusory moral and ethical appraisals of foreign bribery as they debated the fallout of these scandals.[166] Although not discussed prominently or critically, moral concerns and ethical assumptions about bribery were raised by some lawmakers, officials, and witnesses. However, these concerns were commonly reduced to simple value statements, such as 'bribery is immoral', 'bribery is unethical', and 'bribery is wrong'. Senator William Proxmire, for example, stated:

> There's just no disagreement on ... the venal effect of bribery, that it is wrong.[167]

Similarly, Congressman Solarz, in related hearings in the House, stated:

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[165] For the definitive American account of bribery, and the ethical, legal, and religious injunctions against this conduct, see Noonan (n. 4).

[166] Noonan (n. 4) xiii, xvi; Teachout (n. 6).

[167] Cited in Abbott and Snidal (n. 144) S161.

> Simple business ethics would seem to dictate the standards on which firms would conduct their affairs, and it is truly a sad commentary that the excuse put forward by most of the corporations is that other nations engage in bribery and massive political contributions as well. The conduct of commercial operations by foreign nations in a morally shabby manner is no excuse for American citizens to engage in such scandalous activities as well.[168]

President Gerald Ford, in announcing new initiatives in 1976 for a task-force on questionable corporate payments abroad, noted:

> [W]e must recognize that unethical behaviour by only a few companies can spoil the environment for everyone.[169]

Similarly, President Carter, in his FCPA signing statement, also invoked ethical condemnation of foreign bribery when he stated:

> I share Congress' belief that bribery is ethically repugnant and competitively unnecessary...[170]

But Carter's statement was immediately qualified with the following:

> Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries.[171]

Carter's moral argument for the FCPA is framed conclusively, while the explanatory work is arguably done by his cognate statement referring to the foreign policy and international relations problems suffered by the US because of widespread bribery by US firms.

In a 1979 speech by the Assistant Attorney General of the DOJ, Philip Heymann, also invoked notions of ethics, morality and 'pretentions [sic] of national honour' in defending

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[168] Koehler (n. 87) 943, note 33.

[169] Gerald R. Ford, Remarks Announcing New Initiatives for the Task Force on Questionable Corporate Payments Abroad, 14 June 1976.

[170] Foreign Corrupt Practices and Investment Disclosure Bill, Statement on Signing S. 305 into Law, 20 December 1977.

[171] Ibid.

government support for the FCPA.[172] However, Heymann's assertions lack explanatory power when weighed against the evidence in the congressional record, and are arguably displaced by his later statement:

> If an American company bribe is exposed in foreign newspapers, it may cause the downfall of that government. The rise and fall of foreign governments is a matter too serious for private determination. The foreign policy repercussions of overseas bribery are by themselves reason enough to ban the practice.[173]

Unlike vague and contestable notions of the ethics or morality of foreign bribery, the foreign policy rationale to justify US policy relates both to the facts and the experience of the US government as it responded to US firms' widespread foreign bribery. The justificatory work in this case is done by reference to observable facts and events in international politics, whereas Heymann's earlier appeal to morals to justify the FCPA arguably feature as thin stand-ins. Nonetheless, in justifying the FCPA domestically US officials continue assiduously to pair the hard-nosed, realist foreign policy motivations for the Act with liberal sweet-talk about American values.

US government connivance?

It is important to test the notion of whether it is plausible that the US government was learning for the first time of major foreign bribery by many of its largest firms.[174] Had the US government simply been ignorant to the fact that widespread foreign bribery, though not strictly illegal at the time, had been occurring for decades? There is credible evidence suggesting that foreign bribery was well-known, perhaps even condoned, inside the Washington Beltway since the end of World War II. These suspicions were raised by,

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[172] Philip Heyman (sic), 'Justice outlines priorities in prosecuting violations of Foreign Corrupt Practices Act', *American Banker*, 21 November 1979

[173] Ibid.

[174] Executive and legislative branch agencies must have been aware of the existence of such payments, particularly in relation to defence procurement that often requires authorisation by senior officials. See Ann Crittenden, 'CIA said to have known in 50's of Lockheed bribes', *New York Times*, 2 April 1976.

among others, Senator Jesse Helms during hearings before the Proxmire Committee, when he pressed Deputy Secretary of State Ingersoll on this matter:

> [...] I am somewhat mystified in the light of all the reports that have come to me, sir, that apparently at the State Department during all of the years when these things were alleged to have occurred, that there was a complete 'hear no evil and see no evil'.
>
> Now, just tell me this one more time. Nobody at the State Department ever dreamed of anything of this sort was going on at the time?[175]

Senator Helms also interrogated the chairman of Lockheed, D.J. Haughton, as to the US government's knowledge of these foreign payments:

> Senator Helms: Do you feel these bribes or whatever name may be applied to them came as any surprise to the Government of the United States, specifically the State Department?
>
> Mr Haughton: I don't believe they came as any surprise to the State Department or to other branches of the US Government.[176]

In related hearings, Senator William Proxmire stated:

> One of the most disturbing aspects of this is the role the Defense Department has played, especially with respect to defense contractors who sold abroad. We have a document which indicates that at one point a top official in the Defense Department had counselled defense contractors on paying bribes and urged them to do so under circumstances where it was necessary.[177]

Whilst the morals of the US government concerning bribery may have activated only at this nation's borders for some lawmakers, this crude distinction may not have been appreciated by the US electorate, whose deep-seated fears about the effects of bribery and other forms of official corruption are as old as this nation's history.[178] As Judge Noonan argues:

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[175] Cited in Koehler (n. 87) 968.

[176] Ibid.

[177] Ibid.

[178] See Teachout (n. 6).

> For Americans generally, bribery has nearly always had a high interest. Treason and bribery are the two crimes mentioned by name in the Constitution. Charges of corruption have often decided elections.[179]

Foreign bribery was not a 'new drug' wreaking havoc on the US and its citizens, justifying a swift prohibitory response. For decades, foreign bribery was simply how international business was done for many US firms. Perhaps these lawmakers' morals had been updated by the public disclosure of vast foreign bribery by US firms. In this vein, it is reasonable to query whether lawmakers and government officials knew about such conduct before its disclosure. If US officials were so resolutely and morally offended by bribery of any type, why were these moral standards not reflected in existing law?

It is not credible to argue that the morals of US lawmakers and the federal government changed almost overnight as evidence of widespread foreign bribery by US firms was disclosed. Yet this is the unavoidable inference to be drawn if one accepts that the primary rationale to enact the FCPA was moral righteousness. It is submitted to be far more credible to take these lawmakers at their words in the congressional record, and thereby to understand that they were incensed by these corporate payoffs not because of a rush of moral enlightenment, but because of the serious and ongoing negative effects of foreign bribery by US multinationals on US foreign policy that was undermining important US allies, strategic partners, and client states during a period of great global contest.

There is another aspect of the FCPA that arguably militates against the Act's purported 'moral roots', which is also little examined and rarely asserted. This relates to the scope of the FCPA's prohibitions, which extend beyond foreign officials to capture corrupt payments to foreign political parties, party officials, and candidates for office.

Bribery of foreign political parties and candidates for office

Although it may be difficult to conceive of political parties and candidates for political office as 'foreign officials', this is the function of the Act. What is more problematic, it is submitted, is reconciling the fact that the US now has stronger restrictions on the private funding of foreign political parties and candidates for office than it does with respect to funding US politicians and political parties. In other words, conduct like that which

[179] Noonan (n. 4) xvi.

allegedly provoked 'moral outrage' in the US (i.e., foreign corrupt payments to political parties and candidates for political office) and led to the passage of the FCPA is legal if done in the US and is protected speech under the First Amendment to the US Constitution, but would be illegal and criminal if committed outside of the US.[180] If there is no evidence of *quid pro quo* corruption deals, one may make payments in the US to political parties and political action committees with few limits.[181] But if you undertake this conduct abroad, you may be caught by the long arm of the FCPA. If the FCPA moralists are right, the US now requires its firms and its citizens to act to a higher standard abroad than at home.

What could be the rationale for this curious state of affairs? Is it plausible that Congress was so morally offended by the arguable immorality of US firms making payments to foreign political parties and their candidates that it prohibited such conduct? Or is it more credible that Congress included this category of actors in the scope of 'foreign officials' because of the specific, negative consequences and risks to US foreign policy from US firms bribing abroad? With the legislative record and the events of this period considered critically, it is argued the clear weight of the evidence does not point to moral objections to such 'donations'; instead, it shows that the US Congress was deeply disturbed, even threatened, by US firms paying bribes to political parties and candidates for office because of the risks that this conduct posed to US foreign policy interests.

What then explains the continued stress on a justification for the FCPA that differs so markedly from the foreign policy rationale and the congressional record? Next, we consider certain characteristics to US domestic policy articulation that have arguably influenced or 'framed' the claimed normative rationale for the FCPA. It is hoped that this discussion may help one to discard any residue of the view that the FCPA was a product of 'moral outrage' by a chastened Congress.

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[180] See *Citizens United v FEC*, 558 U.S. 310 (2010).

[181] See *McCutcheon v FEC,* 572 U.S. 185 (2014); *Federal Election Campaign Act 1971*.

2. Domestic policy framing

It is a truism in international political analysis that Americans as a society dislike the rough language of realism and realpolitik, which focuses on security, competition, and self-interest. Instead, it is considered that Americans generally prefer the more hopeful language of liberalism, which invokes optimism, moralism and ethics.[182] The liberal approach, it is argued, accords better with how most Americans see themselves, and how they see the US: a generally benevolent state that is capable of constant improvement and which acts as a force for good in the world.[183] Because the deep rationale for the FCPA was arguably steeped in culturally undesirable realism, US lawmakers and officials rhetorically dressed the Act in the liberal trappings of morals and values that Americans are accustomed to. With foreign bribery, this was not a hard story to spin.

Today, the assertion that bribery is widely considered morally wrong is not controversial. Although this view may not be universally shared, it is generally accepted and has been considered so by many societies for many centuries. John Noonan's benchmark study of bribery describes religious and ethical prohibitions against bribery as far back as the Code of Hammurabi and in all the major religions of the world.[184] Domestic bribery in the US is also widely viewed as immoral; its long prohibition and history of major public scandals testify to this.[185] The average American would have little patience for lawyers' distinctions between illegal and legal bribery, 'foreign payments' or 'corporate commissions'. Most Americans perceive bribery, foreign or otherwise, as just plain wrong.

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[182] See Mearsheimer (n. 37) 25-26: 'Americans tend to be hostile to realism because it clashes with their basic values… In particular, realism is at odds with the deep-seated sense of optimism and moralism that pervades much of American society. Liberalism, on the other hand, fits neatly with those values.'

[183] Seymour Lipset, *American Exceptionalism: A Double-Edged Sword* (W.W. Norton, 1996), 51-52; Gabriel Almond, *The American People and American Foreign Policy* (Harcourt, Brace, 1968), 50-51.

[184] Noonan (n. 4); Philip Nichols, 'Outlawing Transnational Bribery Through the World Trade Organization' (1997) 28 *Law & Policy of International Business* 305, 321-22.

[185] See Teachout (n. 6); Laton McCartney, *The Teapot Dome Scandal: How Big Oil Bought the Harding White House and Tried to Steal the Country* (Random House, 2009).

However, it is important not to conflate an ostensible moral or ethical justification for the FCPA, *ex post facto*, with the fundamental rationale for the Act as it was articulated and debated in the legislative record. Although a widely adopted story has developed to frame foreign bribery as a universal moral issue, this should not be mistaken for the cogent reasons why US lawmakers passed the law to prohibit this conduct. It is these reasons that we are centrally concerned with. Put simply, just because there is a general moral objection to bribery does not mean this was also the legislative basis for the FCPA. Let us not shape the facts around a preferred narrative.

Arguably the most succinct repudiation of the widely claimed moral impetus for the FCPA (perhaps cited for the first time) is from someone who was intimately involved in the Act's conception. In a 1981 editorial condemning growing efforts to water down the FCPA at the start of the Reagan Administration, helpfully entitled 'Again, Why Congress Barred Bribery Abroad', Karin Lissakers explicitly rejects the values thesis for the Act and articulates plainly why Congress passed the FCPA:

> Passage of the law was not, as critics now charge, a misguided desire to impose American standards of ethics and morality on other countries. … Rather, Congress acted because it had become convinced … that the damage to the United States' foreign-policy interests from permitting these corrupt practices to continue far outweighed any short-term gains in exports and overseas-investment opportunities.[186]

Lissakers continues:

> [Senator] Church also noted: Morality in the business community is not our responsibility, nor is enforcing the law in other lands. What the Government and this Congress must concern itself with are the very real and serious political and economic consequences that spreading corruption can have for US interests at home and abroad.[187]

There exists publicly no more pithy and informed statement on why the US enacted the FCPA. With this, Lissakers makes clear that lawmakers were squarely focused on US foreign policy and national interest concerns. The impetus for the FCPA was neither US

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[186] Karin Lissakers, 'Again, Why Congress Barred Bribery Abroad', *New York Times*, 18 June 1981, A31. Lissakers was staff director of the Senate Foreign Relations Subcommittee on Foreign Economic Policy during the Church Committee hearings.

[187] Ibid.

morals, nor wholesome American values. In other words, it was realist concerns that drove the US to the FCPA, not this state's purported commitment to liberal institutionalism, international norms, or economic interdependence.

More subtly, David Kennedy has articulated:

> The goal of Congress was precisely to avoid the situation where US corporations undermined the stability and credibility of governments abroad.[188]

Professor Kennedy's comments speak clearly to the history examined above in which foreign bribery by US firms provoked precisely these types of situations. Indeed, Kennedy omits any consideration of the orthodox, values-based rationale that is proffered in the academy and government.

With the FCPA, lawmakers made clear that US national interests had to be safeguarded against the actions of rogue multinational firms intent on pursuing their narrow corporate interests. This observation was expressed explicitly in the Senate Committee on Finance, where it was observed that the diversity of interests of multinational corporations 'almost guarantees that conflicts will arise among the interests of the United States, the host country, the multinational corporation and its employees.'[189]

This analysis of the core US rationale for prohibiting foreign bribery is not simply an effort to correct the record. Nor is it meant to suggest that reconceptualising the justificatory arguments underpinning the FCPA will, or should, change how US authorities enforce the Act. There are many defendable arguments for laws against foreign bribery. For arguably uncontroversial reasons, domestic bribery is illegal in all functioning states. Many of those same reasons arguably apply to foreign bribery.

Rather, it is argued that the artificial prominence the US and others give to claimed moral rationales to prohibit foreign bribery have functioned to conceal the objective, documented, and particularistic rationale of the US to ban this conduct (i.e., the foreign policy rationale). For popular consumption, the justification for the FCPA is veiled in

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[188] Carrie Johnson, *National Public Radio*, 'Businesses Push Back On Foreign Bribery Law', 18 October 2011 (citing interview with Kennedy).

[189] Cited in Wayne Broehl, Jr., 'The Persisting Case Against the Multinational Corporation' (1996) 23(2) *Business and Economic History* 160.

liberal language evoking moral considerations and value appraisals, whereas the deep rationale for the FCPA betrays an interest-based, realist response to protect US foreign policy. By neglecting the foreign policy rationale for prohibiting foreign bribery in the US, and instead refashioning foreign bribery as a valence issue (i.e., an issue of broad consensus),[190] the US positioned itself to pursue an international agreement to ban foreign bribery.

For the US government, the FCPA is justified for well-founded reasons, including threats to US foreign policy provoked by US firms' engagement in this conduct. If some believe foreign bribery is also immoral and that the FCPA works to deter this immoral conduct, so be it. It is likely of little import to Americans that the FCPA was enacted because of the foreign policy problems caused by US firms' foreign bribery, while later marketing the Act as an exemplar of selfless American moral leadership.

In the case of foreign bribery, the liberal rhetoric that justifies the FCPA, couched in the language of values and morals, does not conflict with the realist consequences that justify the Act. Put simply, an American perspective on foreign bribery may justifiably conclude that foreign bribery is both morally wrong *and* can cause serious foreign policy problems. This conceptual accord between the confected justification (good morals) and the observed rationale (foreign policy) for the FCPA arguably provided a convenient off-ramp for US policymakers to depart from the values-bare path of *realpolitik* that Americans dislike, while enabling a justificatory merger onto the more hopeful and better perceived central artery of American liberalism.

Given the lack of conflict in the US between the values rationale and the foreign policy rationale for the FCPA, the cogent rationale for the Act may matter little to the analyst or lawyer concerned with the technical aspects of the law. In these pages, however, it is argued that the chimera of a moral rationale for the FCPA obstructs clear thinking about the motivations for the US campaign against foreign bribery, which this dissertation is centrally concerned with. In despatching the liberal myth about the moral foundations of

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[190] See Donald Stokes, 'Spatial Models of Party Competition', (1963) 57 *American Political Science Review* 368, 372.

the FCPA, we are thus better informed to critique the motivations for the US campaign against foreign bribery, and why it is arguably bound to fail.

Before transitioning to the birth of the US campaign against foreign bribery, it is useful to examine how the FCPA operates, as well as to consider the scale and scope of enforcement of the Act. One path to inform the thesis advanced in this Part—that the core rationale for the FCPA is US foreign policy considerations, not moral preferences—is to consider how well this theory explains US conduct as it enforces the Act.[191]

[191] See Mearsheimer (n. 36).

C. FCPA: FROM LAW-MAKING TO LAW ENFORCEMENT

The FCPA is a federal law principally designed to prohibit the bribery of foreign public officials in the conduct of international business. Under the Act (as amended), it is a federal criminal offence for US persons [192] (natural or legal) to induce a foreign government official to use their influence to affect any act or decision of that government or its instrumentalities for the purpose of retaining or obtaining business. The SEC and DOJ are responsible for enforcing the FCPA. The SEC is responsible for civil enforcement of the FCPA for firms that it regulates, whereas the DOJ is responsible for criminal enforcement of the Act for all entities and persons under its jurisdiction.

The Act does not cover bribery of domestic public officials in the US, which is prohibited at the state and federal level.[193] The FCPA also does not apply to so-called private or commercial bribery, such as when one business bribes another to gain an advantage over its competitors. This type of conduct is usually prohibited under other federal and/or state laws.[194]

The FCPA has two distinct bases for liability:

- the 'anti-bribery' provisions; and
- the 'books and records' provisions

The 'anti-bribery' provisions of the FCPA prohibit US persons and entities from making payments or providing anything of value to foreign government officials, foreign political party officials, and candidates for foreign political office, in order to obtain or to retain

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[192] Covered persons include: (1) Issuers: Any domestic or foreign entity that issues securities registered with the SEC or that is required to file reports under certain legislative provisions; (2) Domestic Concerns: Any US citizens, resident aliens, and corporations and other business entities organised under US state laws or having their principal place of business in the US; and, (3) Any Persons: Any persons acting within the territory of the US.

[193] See 18 U.S.C. § 201 *et seq*; 18 U.S.C. § 215; and 18 U.S.C. § 666.

[194] For example, the *Sherman Antitrust Act*, 26 Stat. 209, 15 U.S.C. §§ 1–7; see also, *Associated Radio Service Co. v Page Airways, Inc.*, 624 F.2d 1342. Commercial bribery is not expressly prohibited in a US federal statute; however, certain fraud-related statutes, such as the Travel Act, can be used to prosecute commercial bribery offenses. Many US states prohibit commercial bribery; see, e.g., *California Penal Code*, section 641.3; *New York Code*, Art. 180.

business.[195] Wilful violation of the Act is subject to severe criminal fines and/or up to five years' imprisonment.[196] Civil proceedings may also be initiated, and may result in fines and disgorgement equal to the amount of the gain.[197] The court can also increase fines up to twice the amount that the offender stood to gain through the illicit conduct.[198]

Recall that the FCPA does not only prohibit the bribery of foreign officials. The prohibitory scope of the Act extends to officials from foreign political parties and candidates for political office. This means the FCPA forbids relevant US persons and firms from making contributions to foreign political parties and candidates for political office for corrupt purposes. Although rarely used and seldom discussed, this prohibition sets the FCPA apart from most other anti-bribery laws and the Anti-Bribery Convention.

The 'books and records' provisions of the Act apply to issuers of US securities registered with the SEC.[199] This part of the Act provides a separate basis for liability if prohibited payments are not properly accounted for in the company's books and records and/or the company's internal control procedures are determined to be deficient. Penalties for violations of the 'books and records' provisions can be severe, including terms of imprisonment of up to 20 years.[200] Civil proceedings may also be brought against entities or individuals, and can result in fines and disgorgement orders equal to the amount of the gain. It is important to appreciate that the FCPA requires a foreign connexion and a business nexus in relation to the prohibited conduct.[201]

Because the FCPA has been amended significantly since its enactment, it is convenient to discuss these amendments briefly as they bear upon later consideration of the internationalisation of the FCPA and the US campaign against foreign bribery. There are

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[195] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

[196] 15 U.S.C. §§ 78dd-2(g), 78dd-3(e).

[197] Ibid.

[198] *Alternative Fines Act*, 18 U.S.C. 3571(d).

[199] 15 U.S.C. § 78m(b)(2).

[200] 15 U.S.C. § 78ff (Section 32 of the *Securities Exchange Act of 1934*).

[201] For US Constitutional reasons, federal criminal law does not apply where criminal conduct does not involve interstate or foreign commerce, or another federal interest.

two sets of important amendments to the FCPA: the '1988 Amendments' and the '1998 Amendments'.

1988 FCPA Amendments

The 1988 FCPA Amendments were made by a sympathetic Congress and Reagan administration[202] after years of criticism of the Act from the US business community and many Republican lawmakers.[203] Since its passage in 1977, the business community lobbied for the repeal and/or significant amendment of the FCPA. Business leaders argued that the FCPA hampered US firms' ability to do business abroad. It did not matter that the FCPA was rarely enforced, or that the few enforcement actions taken were relatively minor.[204] The business lobby argued that the unilateral nature of the FCPA had created an unfair advantage for foreign firms that were free to bribe foreign officials as US firms had done for decades.

These amendments maintained the major features of the 1977 Act, but significant changes were made to the level of knowledge required for criminal liability to be imposed for a violation of the 'books and records' provisions by incorporating the concepts of 'conscious disregard' and 'wilful blindness'. Other amendments were also made to permit 'bona fide', 'reasonable' and lawful gifts made in accordance with the laws of the foreign country.

Congress also added two defences to the Act: the local law defence, and the reasonable and *bona fide* promotional expense defence. These defences do not apply if the thing of value was 'corruptly'[205] given in return for an official act or omission. Penalties for violations of the FCPA were also increased. Finally, the FCPA 1988 Amendments

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[202] See *Time magazine,* 'Turning Back: Undoing Watergate Reforms', 1 June 1981; Christopher Byron, 'Big Profits in Big Bribery', *Time Magazine*, 16 March 1981.

[203] *Omnibus Trade and Competitiveness Act of 1988*, Title V.

[204] For much of the 1980s, e.g., there was not a single FCPA enforcement action.

[205] The FCPA does not define 'corruptly'. In drafting the statute, Congress adopted the meaning ascribed to the same term in the federal domestic bribery statute, 18 U.S.C. § 201(b). See H.R. Report (n. 145), 7: 'In order for a corporation to be criminally liable under the FCPA, it must be found to have acted corruptly. The word "corruptly" connotes an evil motive or purpose…'.

included an appeal from Congress to the US President to pursue a multi-lateral agreement among OECD states to prohibit foreign bribery:

> It is the sense of Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization [sic] of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section.[206]

1998 FCPA Amendments

Ten years later, the 1998 FCPA Amendments were made after President Clinton, with the broad approval of the US Senate, signed the Anti-Bribery Convention in 1997.[207] To implement the Convention it was necessary to amend the scope of persons, legal and natural, covered under the FCPA to include certain foreign nationals, such as officers of a public international organisation. But the 1998 Amendments were not limited to changes necessarily to implement the Convention.

An important change was also made to the scope of the FCPA that expanded the jurisdictional reach of the Act's anti-bribery provisions beyond the borders of the US.[208] These amendments extended the anti-bribery provisions to 'any person' acting corruptly while in the territory of the US 'in furtherance of' a bribe, or to do any other act in furtherance of a 'prohibited payment'.[209] With these amendments, the scope of the FCPA was no longer limited to US firms and persons that could also be prosecuted for foreign bribery undertaken by a foreign business partner. Now, the partners of *foreign* businesses could be prosecuted in the US under the FCPA, such as a 'foreign agent, foreign

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[206] *Foreign Corrupt Practices Act Amendments of 1988*, §§5003(d), 15 U.S.C. §§78dd.

[207] Namely, the *International Anti-Bribery and Fair Competition Act of 1998*. Thomas McInerney, 'The regulation of bribery in the United States' (2002) 73 *Revue internationale de droit penal* 81, note 6 (arguing the title of this law 'illustrates the extent to which US policy makers view the fight against bribery primarily as a competitive threat to US industry rather than a subject of moral concern.').

[208] H. Lowell Brown, 'Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?' (2001) 26 *North Carolina Journal of International Commerce and Regulation* 239.

[209] *Foreign Corrupt Practices Act Amendments 1988*, 15 U.S.C. §§78dd-1(g) and 78dd-2(i).

distributor, foreign subsidiary, foreign joint venture partner, or other foreign business partner that commits some act, no matter how insignificant, that implicates US authority and furthers corruption.' [210] The goal of the United States, the House Report accompanying the Bill declared, was 'the promotion of stronger, more reliable, and transparent foreign legal regimes that, in turn, make for more reliable and attractive investment climates.'[211] With this, the anti-bribery jurisdiction of the FCPA expanded vastly. Many foreign firms with little operational presence, experience, or connection to the US were now covered by the FCPA.[212]

With the origins and the basic framework of the FCPA behind us, it is necessary to consider next the enforcement history of the Act. When considering critically the motivations of the US to enact the FCPA, it is illuminating to examine how this state implemented the Act. Did US authorities vigorously investigate and prosecute alleged violations of the Act? Or was the FCPA a dead letter?

1. Enforcing the FCPA: record and trends

In this section we unpack differing perspectives on the enforcement record of the FCPA. It is hoped this will provide greater understanding of the will and practice of US authorities to enforce the FCPA, while drawing a line between the rhetoric about the Act and the reality of how this law has been implemented. This analysis provides context for later discussion about the development of the US campaign against foreign bribery and how the enforcement of foreign bribery laws may be influenced by states' political, economic, and other interests.

Notwithstanding the zeal of some officials against foreign bribery and related corrupt conduct, the operation and effects of laws against foreign bribery are not adduced from their theoretical application, but from their practical results. In other words, the proof of the pudding is in the eating. On this measure, the enforcement record of the FCPA tells a

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[210] Christopher Duncan, 'The 1998 Foreign-802 Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism' (2000) 1(i) *Asia Pacific Law and Policy Journal* 47, 23.

[211] US House Report No. 105-802 (House Commerce Committee), 8 October 1998.

[212] Michael Van Alstine, 'Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA' (2012) 73(5) *Ohio State Law Journal* 1321; Brown (n. 208) 239.

decidedly mixed story that is punctuated by long periods of little or no enforcement, combined with a focus on monetary settlements largely outside of the judicial process.

For many years the FCPA was touted as the 'gold standard' of laws against foreign bribery.[213] Relative to the meagre enforcement of foreign bribery laws in most other OECD member states, more than half of which had never prosecuted a foreign bribery case against a company as at 2018, this assessment appears reasonable.[214] But a deeper look at the FCPA reveals the rhetoric about this law often differs from the reality, including its enforcement record.

For convenience, the first 20 years of the FCPA (1977-1997) and the last 20 years or so (1998-present) are considered separately. The first period spans the enactment of the FCPA and the US push to internationalise the Act, whereas the second period covers the approximately 20 years since the ratification of the Anti-Bribery Convention.

a) The first 20 years

From the passage of the Act in 1977, and until the late 1990s, the FCPA was enforced sparingly. Despite major resistance from the US business community to the introduction of the FCPA, and the dire warnings from their lobbyists about the economic impacts of the Act, it was arguably a dead letter during this period. Although some enforcement efforts were made in the first two years of the commencement of the Act, these largely ceased after the inauguration of President Ronald Reagan in 1981, and amid continued opposition to the FCPA by US business lobbies.

For most of the first ten years of the life of the FCPA, there were no criminal or civil enforcement actions were undertaken at all. Indeed, from 1977 to 1995 there were only 16 prosecutions under the FCPA,[215] most of which involved small-time prosecutions of individuals, not the large firms often associated with foreign bribery in international

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[213] Today, however, the *Bribery Act 2010* (UK) is more often cited as the most comprehensive law against foreign bribery.

[214] See OECD, Working Group on Bribery, '2018 Enforcement of the Anti-Bribery Convention: Investigations, proceedings, and sanctions', December 2019. The Working Group on Bribery is composed of representatives from Parties and is responsible for monitoring the implementation of the Convention and related instruments.

[215] Cragg and Woof (n. 74) 17.

business. Under the Reagan Administration, US authorities had neither the will nor the resources to enforce the FCPA. This enforcement picture did not change significantly with the next administration when George HW Bush was elected president in 1988. During Mr Bush's one-term presidency there averaged only about two criminal prosecutions per year and one civil prosecution. These cases were also largely confined to individuals and resulted in relatively small fines.

Rarely is there any consideration of the 20 years after the enactment of the FCPA in which there was almost nil enforcement of the FCPA. It is useful to discuss this curious period because it impacts upon the arguments made throughout. How can 20 years of near zero enforcement of the FCPA be reconciled with the post-Watergate morality claims to justify the FCPA? Did US firms simply go 'cold turkey' and quit engaging in foreign bribery altogether?[216] Had the purported morals of the US government changed? Was foreign bribery okay again? Is it plausible that a major moral shift occurred (as purveyors of the normative story for the FCPA broadly claim), provoking the enactment of a severe anti-bribery law, only to be followed by years of seeming indifference to the FCPA by US enforcement authorities? This would be a peculiar outcome for a young criminal law purportedly founded in a nation's collective moral outrage.

The failure of the DOJ and the SEC to enforce the FCPA over these 20 years further challenges the claimed moral foundation of the Act. During this period, large US businesses mobilised in Congress and lobbied the Executive to repeal and amend the Act. All the while, the FCPA was pilloried by the business community. Although some may argue that the FCPA was not enforced because US firms were perceived to be at a competitive disadvantage to their rival firms internationally that continued to bribe freely,[217] this was not a new consideration; indeed, this matter was debated at length prior to passage of the Act. It was also largely dismissed by Congress as a delaying attempt by

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[216] David Gantz, 'Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus' (1997-98) 18 *Northwestern Journal of International Law & Business* 457, 462 arguing: 'there appears to have been no significant reduction in foreign bribery, even by US firms, in the nearly twenty years since the FCPA was enacted'.

[217] Rachel Brewster, 'Enforcing the FCPA: International Resonance and Domestic Strategy' (2017) 103(8) *Virginia Law Review* 1611 (arguing the US 'strategically under-enforced the FCPA' as US officials sought an international agreement to ban foreign bribery).

opponents of an anti-bribery law. Some in the business community and Congress even considered the FCPA could advantage US firms by enhancing their reputation for integrity.[218]

When William J. Clinton was inaugurated president in 1992, there were also few FCPA prosecutions, most of which were relatively insignificant cases against individuals.[219] In fact, there were no FCPA criminal prosecutions from 1995-1997 while the Anti-Bribery Convention was being negotiated and championed by the US. During this period, the FCPA arguably fits Michael Reisman's *lex simulata*: 'a legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied.'[220] The curious dormancy of the FCPA, however, would change dramatically after the Anti-Bribery Convention entered into force in 1999. Henceforth, there would be a newfound focus on enforcing the FCPA.

b) The last 20 years

After the FCPA was amended in 1998 to implement the Anti-Bribery Convention, and to expand the jurisdiction of the Act, the DOJ and the SEC embarked on increased enforcement efforts. Although these efforts began slowly, by the early 2000s they increased markedly. This period saw the rise and rise of what is pejoratively called 'FCPA, Inc.', as firms scrambled to beef up their compliance and legal teams and assess their risk of prosecution for historical illicit conduct.

From 2003-2015 the DOJ and SEC prosecuted a combined 166 FCPA enforcement actions, representing a five-fold increase over the annual average of the previous quarter

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[218] John Brademas and Fritz Heimann, 'Tackling International Corruption: No Longer Taboo' (1998) Sept/Oct *Foreign Affairs*.

[219] One exception is *United States v Lockheed Corporation, et al* (N.D. Ga. 1994). Lockheed pleaded guilty to conspiracy to violate the FCPA, paying $24.8 million in fines in relation to corrupt payments it made to influence Egyptian authorities to purchase Lockheed aircraft.

[220] W. Michael Reisman, *Folded Lies: Bribery, Crusades and Reforms* (Free Press, 1979) 31, cited in Philippa Webb, 'The United Nations convention against corruption: global achievement or missed opportunity?' (2005) 8 *Journal of International Economic Law* 191, 221.

century.[221] From 2004-2011 there was an average of approximately 10 enforcement actions against firms per year.[222] Before 2004, about three enforcement actions were resolved annually.[223] More striking was the tectonic shift in the level of sanctions imposed, including multiple settlements with the DOJ and SEC for hundreds of millions of dollars, many of which involved non-US firms.[224]

Although the headline settlements are immense, they obscure the many other substantial FCPA resolutions in the $25-100 million range.[225] Over the past twenty years or so, sanctions from alleged FCPA violations have added many billions of dollars to the US Treasury.[226] In fact, most of this money has come from non-US firms.[227] Naturally, these massive FCPA settlements have provoked consternation from leading non-US multinationals and politicians from these firms' home jurisdictions.[228]

Some have voice scepticism about US authorities' widespread use of Deferred Prosecution Agreements or Non-Prosecution Agreements to settle FCPA allegations.[229] Under these agreements, firms typically agree to admit a degree of 'bad behaviour', pay

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[221] Ellen Gutterman, 'Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act', (2015) 53(1) *Osgoode Hall Law Journal* 31, 41.

[222] Choi and Davis (n. 15) 409.

[223] Ibid.

[224] See Table 2 below.

[225] Nicholas McLean, 'Cross-national patterns in FCPA enforcement' (2012) 121 *Yale Law Journal* 1970; Thomas Gorman and WP McGrath, Jr., 'The new era of FCPA enforcement: Moving toward a new era of compliance' (2012) 40 *Securities Regulation Law Journal* 341.

[226] Leslie Wayne, 'Foreign Firms Most Affected by a US Law Barring Bribes', *New York Times*, 4 September 2012, B1.

[227] Joseph Rosenbloom, 'Here come the payoff police: what's behind the new boom in FCPA enforcement activity?', (2010) 32(6) *American Lawyer* S14(2).

[228] In France the FCPA is often referred to as a tool of 'economic war': see Jean-Michel Quatrepoint: 'Au nom de la loi … américaine', *Le Monde Diplomatique*, January 2017; Hervé Juvin, 'Sanctions américaines : la guerre du droit', *Le Débat*, n° 194, 2017/2; Luc Lenoir, 'Guerre économique: la France et l'UE 'complètement désemparées'', *Le Figaro*, 22 February 2019; Ali Laïdi, *Le droit, nouvelle arme de guerre économique: Comment les Etats-Unis déstabilisent les entreprises européennes* (Actes sud, 2019).

[229] Antoine Garapon and Pierre Servan-Schreiber (eds.), *Deals de justice: le marché américain de l'obéissance mondialisée* (PUF, 2013).

a fine to the DOJ and/or SEC, and sometimes agree to host a US approved monitor for a period to ensure compliance with the agreement. Moreover, firms routinely admit to violating the FCPA 'books and records' provisions, but rarely admit to violating the 'anti-bribery' provisions. In a sort of Kabuki theatre by the DOJ and SEC, firms are often named and shamed for 'violating the FCPA', but the settlement agreements usually relate to lesser charges of 'accounting violations'.

There are also growing suggestions that US authorities are 'in it for the money', in which the enticement of the DPA is the easiest way to pressure a firm to part with sizeable sums. Fuelling these suspicions, W. Jacobson, former DOJ Assistant Chief for FCPA enforcement, stated in 2010:

> The government sees a profitable program, and it's going to ride that horse until it can't ride it anymore.[230]

To appreciate the staggering financial stakes of FCPA sanctions over the past decade or so, Table 2 lists the top 30 FCPA enforcement actions to 1 January 2021.

[230] Rosenbloom (n. 227).

Table 2: Top 30 FCPA DOJ and SEC sanctions to 1 January 2021 (approximate amounts, net of offsets to other national authorities)

Rank	Firm	Year	US penalties & disgorgement	Global settlement
1	Goldman Sachs	2020	$1,660,000,000	$3,300,000,000[231]
2	Ericsson	2019	$1,060,000,000	
3	MTS	2019	$850,000,000	
4	Siemens	2008	$801,800,000	$1,561,000,000[232]
5	Alstom	2014	$772,290,000	
6	KBR/Halliburton	2009	$579,000,000	
7	Teva Pharmaceutical	2016	$519,279,000	
8	Telia Company	2017	$483,000,000	$965,773,000[233]
9	Och-Ziff	2016	$412,100,000	
10	BAE Systems	2010	$400,000,000	
11	Total	2013	$398,200,000	
12	VimpelCom	2016	$397,600,000	$1,760,000,000[234]
13	Alcoa	2014	$384,000,000	
14	Snamprogetti & Eni	2010	$365,000,000	
15	Novartis	2020	$347,000,000	
16	Technip	2010	$338,000,000	

[231] As part of its global settlement in this matter, Goldman Sachs paid penalties to authorities in Hong Kong ($350m), Singapore ($122m), and the UK ($126m). In a related fraud case, Goldman Sachs also agreed to pay Malaysian authorities approximately $2.5 billion.

[232] Separately, Siemens paid German authorities approximately $830 million.

[233] Telia agreed to pay the remaining amount between the Swedish Prosecution Authority and the Dutch Openbaar Ministrie.

[234] Vimpelcom paid a combined $795 million to US and Dutch authorities, with the US also seeking forfeiture orders of $850 million in several jurisdictions.

17	Airbus SA	2020	$294,000,000	$4,000,000,000[235]
18	Société Générale	2018	$292,500,000	$585,000,000[236]
19	Wal-Mart	2019	$282,000,000	
20	Panasonic	2018	$280,000,000	
21	JP Morgan	2016	$264,000,000	
22	Odebrecht/Braksem	2016	$253,000,000	$3,500,000,000[237]
23	SBM Offshore	2017	$238,000,000	$478,000,000[238]
24	Fresenius Medical	2019	$231,715,000	
25	JGC Corporation	2011	$218,800,000	
26	Embraer SA	2016	$187,000,000	
27	Daimler AG	2010	$185,000,000	
28	Petrobras	2018	$170,600,000	$1,786,000,000[239]
29	Rolls-Royce	2017	$170,000,000	$800,305,000[240]
30	Weatherford Int'l	2013	$152,600,000	

FCPA penalties and disgorgement orders over the past decade or so are staggering by any measure, collectively representing approximately 13 billion dollars. Total FCPA-related

[235] Airbus SE paid $4 billion to settle foreign bribery and related charges with the US, UK and France. Airbus paid France's PNF approximately $2.3 billion, the UK's SFO $1.09 billion, and the US approximately $294 million.

[236] In a co-ordinated settlement Société Générale agreed to pay France's PNF $292,776,444.

[237] Odebrecht paid $3.5 billion into a global settlement with the US, Brazil, and Switzerland, and, in June 2019, filed for bankruptcy protection. Combined, Braksem paid over $957 million to US, Brazilian and Swiss authorities.

[238] SBM settled with the Dutch Public Prosecutor's Office for related conduct, paying $240 million in disgorged profits and fines.

[239] Petrobras paid $682.5 million of this amount to Brazilian authorities; a related SEC disgorgement order of $933.5 million was offset by paying this amount into a settlement fund for a $2.95 billion US class action, alleging harm from Petrobras bribery: see, *In re Petrobras Securities Litigation* (Case no. 14-CV-09662) (SDNY) 28 September 2018.

[240] Rolls-Royce also paid the UK SFO £497 million and Brazil $25 million.

penalties and disgorgement orders since 1977 increase this amount by more than 50 per cent.[241]

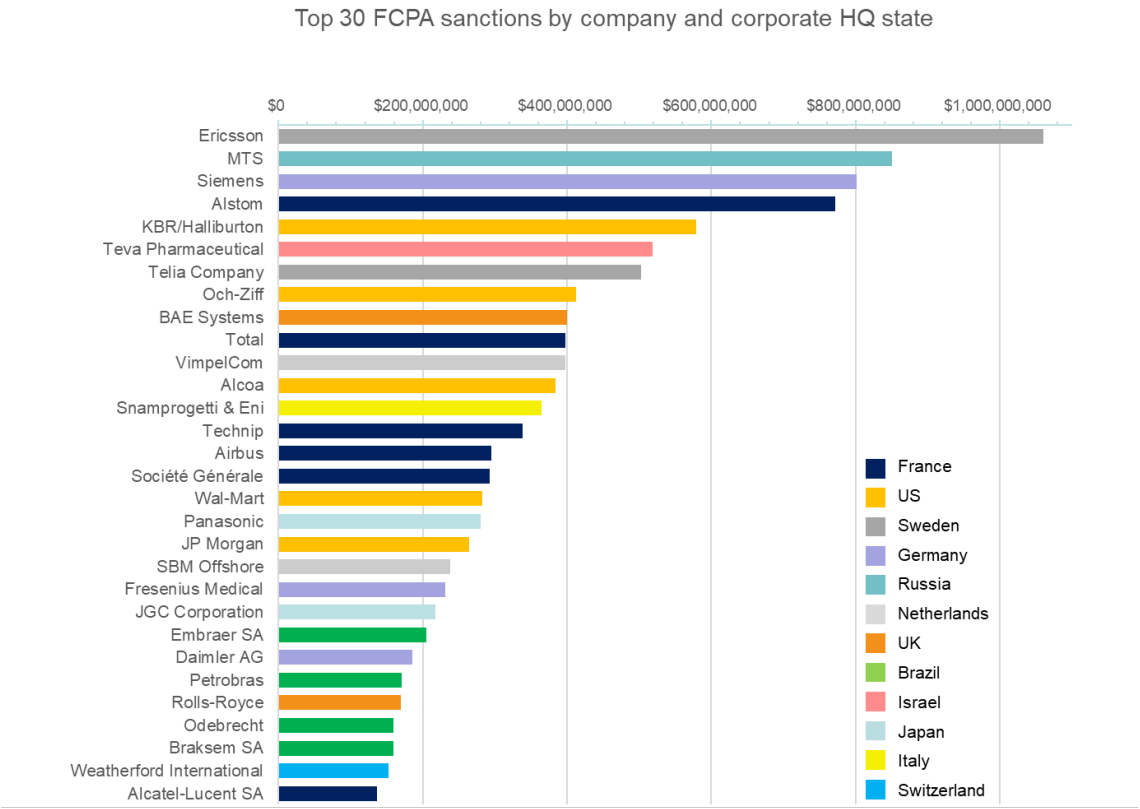
Table 3 depicts the top 30 FCPA sanctions by firm and corporate headquarters. It is evident that each firm sanctioned by US authorities in the above list was headquartered in a state that had ratified the Anti-Bribery Convention and implemented domestic laws to prohibit foreign bribery. Beyond the oft-challenged,[242] and oft-tenuous, jurisdictional nexus between non-US firms and the US in FCPA matters, these non-US firms may also have been targeted for US prosecution because each is based in states that are signatories to the Convention.[243]

[241] According to the Stanford *FCPA Clearinghouse*, total monetary sanctions imposed by the DOJ/SEC on entities since 1977 for FCPA and related violations, at 1 January 2020, exceed $15 billion. See <http://fcpa.stanford.edu/statistics-keys.html>.

[242] Leblanc-Wohrer (n. 56); Brown (n. 208).

[243] To buttress their claims for jurisdiction, US authorities often cite this fact.

Table 3: Top 30 FCPA sanctions: firm and corporate HQ (to 1 February 2020)



These tables exclude several major foreign bribery cases against individuals. For example, Mr Jeffrey Tesler, a UK national, was fined almost 149 million dollars in 2012 in relation to his involvement in FCPA-related offences.[244] In another individual prosecution involving massive foreign bribery and money laundering, former Treasurer of Venezuela, Alejandro Andrade Cedeño, a resident of the US, pleaded guilty in 2018 to conspiracy to commit money laundering, and was sentenced to 10 years in prison for laundering over one billion dollars in bribes.[245] Mr Cedeño agreed to forfeit one billion dollars to US authorities. While the case against Mr Tesler related to his role in the Bonny Island bribery cases in Nigeria involving several Western firms as part of the TSKJ

[244] *U.S. v Jeffrey Tesler, et al.* (Case No. 09-cr-00098), US District Court, Southern District (Texas), 2009.

[245] *U.S. v Alejandro Andrade Cedeño* (Case No. 9:17-cr-80242-RLR), US District Court, Southern District (Florida), 2018.

consortium,[246] the Cedeño case must be understood in the context of US-Venezuela international relations and geopolitical manoeuvrings of the US to punish former officials of a regime that it deems hostile to its interests.

This brief history of FCPA enforcement shows us that the US ban on foreign bribery was simply not a priority for the government, the DOJ and the SEC, during the first 20 years of the Act.[247] Until the jurisdiction of the FCPA was expanded to enable US authorities to prosecute foreign firms and their subsidiaries with some connection to the US, the FCPA was arguably a dead letter. However, after the Anti-Bribery Convention was ratified the US marshalled major resources into a global anti-bribery enforcement program, which has since ensnared dozens of US and non-US firms to net billions of dollars in penalties for its treasury.

c) Looking forward

The passage of the FCPA in 1977 was undoubtedly a watershed event that placed the US at the vanguard of combatting foreign bribery in international business. The FCPA stood without peer internationally for the next two decades and remains a benchmark law against foreign bribery. However, new criticisms of the FCPA have also emerged.

Professor Andy Spalding, for example, has argued that the FCPA constitutes a form of undeclared sanctions against developing states, functioning to deter Western investment in these nations.[248] Others charge that the FCPA is enforced selectively against foreign firms as a tool of US economic hegemony and protectionism, in which US firms routinely

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[246] This consortium was led by KBR, a former Halliburton subsidiary, and included Snamprogetti, Technip and JGC Corporation.

[247] Since the 1980s, DOJ officials must seek the approval of their Washington office before initiating foreign bribery cases. The DOJ's Fraud Section conducts all FCPA investigations and prosecutions, and co-ordinates closely with the Department of State.

[248] Andy Spalding, 'Unwitting Sanctions: Understanding Antibribery Legislation As Economic Sanctions Against Emerging Markets' (2010) 62 *Florida Law Review* 351.

receive a light touch from US enforcement authorities while the full force of the law is applied to foreign firms.[249]

Some critics of US measures against foreign bribery argue that 'anti-corruptionism' has ideological roots, which obscure and support a neo-liberal approach to economic development that advantages developed, liberal democracies and disadvantages developing states and their economies.[250] Others have asked critically: What is it all for? What are the unintended consequences of the US ban on foreign bribery? Who wins and who loses in the fight against corruption?[251] David Kennedy, for example, argues:

> Anti-corruption campaigning often mixes moral opprobrium with both economic theory (corruption stunts development) and faith in a universalist and rational rule of law. This can be a dangerous ideological mix. It might even be counterproductive for the campaign as a whole…[252]

On the other side of the debate, some argue that corruption, including foreign bribery, is a serious threat to the rule of law and national and international security through arguable linkages between 'corrupt regimes' and the spectre of international terrorism and organised crime.[253] There is also a growing effort to characterise corruption, particularly 'grand corruption', as a serious human rights violation that should be adjudicated before the International Criminal Court.

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[249] See Quatrepoint (n. 228) 22-23: 'En quelques années, les entreprises européennes ont versé près de 25 milliards de dollars aux diverses administrations américaines: plus de 8 milliards au titre du FCPA et 16 milliards pour le non-respect des sanctions économiques. Sur ce total, la facture pour la France dépasse 12 milliards de dollars (environ 11 milliards d'euros) !'.

[250] See Morag Goodwin and Sarah K. Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse' in Martine Boersma and Hans Nelen (eds.), *Corruption and Human Rights: Interdisciplinary Perspectives* (Intersentia, 2010) 223-9.

[251] See David Kennedy, 'The International Anti-Corruption Campaign' (1999) 14 *Connecticut Journal of International Law* 455.

[252] Ibid, 458.

[253] See Chayes (n. 33); Lanny A. Breuer, Assistant Attorney General, DOJ, address at the 26th National Conference on the FCPA, 8 November 2011. See also, Whitehouse, 'Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest', 3 June 2021.

These contested perspectives of the FCPA, its history, utility, and effects, have provided sustained intellectual motivation for this research into why the US enacted this path-breaking law. Few today would reasonably (and publicly) suggest engaging in foreign bribery is a legitimate business activity that should be permitted. Almost no one openly advocates for foreign bribery as a legitimate international business practice. That is, however, the extent of any consensus.

There remains real disagreement about the effects of foreign bribery, on economies, on governments, on corporations, and on societies generally. There is also significant disagreement about how, and the extent to which, laws against foreign bribery should be enforced. Some analysts, for example, point to the immense costs that businesses incur through compliance regimes and the multi-billion-dollar industry of 'FCPA, Inc.'[254] However, the focus of this dissertation is not on the effects of foreign bribery and related corrupt conduct or the ethical and moral dilemmas about bribery or corruption generally.

Looking ahead, we can assess the future enforcement profile of the FCPA from the statements of government officials capable of affecting enforcement levels through new policies and practices. At the top of the bureaucracy, the US president and his political appointees can influence the DOJ and SEC in their FCPA enforcement activities. With the election of Donald Trump in 2016 as US president, based on an anti-establishment platform, commentators were quick to suggest this would be the death knell for the FCPA, noting that as a private citizen in 2012 Mr Trump inveighed against the FCPA, stating:

> Now, every other country goes into these places, and they do what they have to do. It's a horrible law [the FCPA] and it should be changed. I mean, we're like the policeman for the world. It's ridiculous, a horrible law and a ridiculous law that stifles American firms doing business abroad.[255]

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[254] Joe Palazzolo, 'FCPA Inc.: The Business of Bribery', *Wall Street Journal*, 2 October 2012.

[255] Jim Zarroli, 'Trump Used To Disparage An Anti-Bribery Law; Will He Enforce It Now?', *National Public Radio*, 8 November 2017.

In the end there were no dramatic shifts in FCPA policy under the Trump administration; however, some important policy changes were made.[256] Highlighting the DOJ's focus on prosecutions of individuals, Deputy Attorney-General Rosenstein announced a new FCPA Corporate Enforcement Policy (CEP).[257] The CEP established a presumption that the DOJ would not prosecute companies if they voluntarily disclosed the offending conduct, co-operated with investigators, improved their compliance programs, and surrendered any illicit gains. The DOJ also implemented a 'pilot program' to encourage self-reporting, promising a presumption of declination in certain circumstances.[258]

These policy changes to the FCPA—a sort of 'confess and ye shall be saved'—raised concerns that firms would now be able to 'deal' their way out of this law.[259] Perhaps in no other area of US federal criminal law is there the option to confess your crimes, co-operate with authorities, promise not to re-offend and part with any ill-gotten gains, and in exchange receive a guarantee that you will not be prosecuted you for your crimes. Oddly, the CEP is not an option open to natural persons. Given that DPA/NPAs were developed precisely to benefit natural persons in certain circumstances,[260] policies such as the CEP arguably undermine further the purported moral foundations of the FCPA. If the US prohibition against foreign bribery is based primarily on morals and values-based rationales, it is peculiar that official redemption is extended only to legal persons.

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[256] Renae Merle, 'Trump called global anti-bribery law "horrible." His administration is pursuing fewer new investigations', *Washington Post*, 1 February 2020.

[257] Jaclyn Jaeger, 'Announcing the new FCPA Corporate Enforcement Policy', *Compliance Week*, 30 November 2017.

[258] In November 2017 this Pilot Program was made permanent and incorporated into the United States Attorneys' Manual.

[259] Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise With Corporations* (Belknap Press, 2014).

[260] Deferred prosecution agreements were originally aimed at individuals in circumstances that warranted a different approach. However, in the early 2000s, after the collapse of accounting firm Arthur Andersen, legal persons began routinely to benefit from these agreements. See US DOJ, Memorandum, 'Principles of Federal Prosecution of Business Organizations' (2003); Anthony Barkow and Rachel Barkow, *Prosecutors in the Boardroom Using Criminal Law to Regulate Corporate Conduct* (NYU Press, 2011).

Congress has also passed recent important changes to US anti-corruption policies. In March 2017, lawmakers repealed the Cardin-Lugar rule,[261] which required oil, gas and mining firms listed on US exchanges to disclose payments made to US and foreign governments for the extraction of oil, gas and minerals. The stated rationale for the Cardin-Lugar rule was to prevent foreign leaders from corruptly diverting payments from US firms for extractive activities, and to provide greater transparency for resource extraction in these countries. Through disclosure of these payments, and therefore the ability to audit corporate payments against government revenue, it was considered that citizens may be better placed to hold their government officials to account.[262] In advocating for the provision, Senator Lugar argued:

> [W]e're extremely interested in how they [African and Middle Eastern governments] wield their own power and financial clout within the country itself. Much of their own financial reserves come from the sale of the extractive industry's materials, many of which are generated by American companies. Allowing for greater transparency of government finances gives the United States more information about what actions these governments are taking.[263]

Like the rhetoric of the FCPA, in which 'anti-corruption values' dominate public discussion, proponents of the Cardin-Lugar rule relied on similar claims to justify the disclosure requirements.[264] But the critical analyst finds other, more self-serving interests at play too. With this rule, the US government sought to compel mining and energy firms to submit valuable data about the actions of foreign governments in contested, geopolitically important regions of the world. US firms would not provide this information willingly, and so were compelled to do so.

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[261] Siddhartha Mahanta, 'The House Kills an Anti-Corruption Measure', *The Atlantic*, 1 February 2017; Brewster and Buell, (n. 150).

[262] See Report to the Members of the Committee on Foreign Relations of the United States Senate, 110th Congress, 2nd session, 16 October 2008, 'The Petroleum and Poverty Paradox: Assessing US and International Community Efforts to Fight the Resource Curse'.

[263] Quoted in Jeremy Runnalls, 'The Republican case for transparency in the oil, gas and mining industries', *Corporate Knights*, 4 February 2015.

[264] Julien Topal and Perrine Toledano, 'Why the Extractive Industry Should Support Mandatory Transparency: A Shared Value Approach' (2013) 118(3) *Business and Society Review* 271.

With the experience of the bribery scandals of the 1970s, American lawmakers keenly understand that US multinational corporations can either further or thwart US foreign and economic policies. Naturally, the government prefers US firms to advance American interests. But these firms may find that their immediate corporate interests do not align well with the US interests of the day. Whereas US firms' devotion to shareholder value reigns supreme, US national interests can change quickly and dramatically with changes in leadership, events on the ground and the balance of power.

E. CHAPTER I CONCLUSION

This chapter analysed the history and precipitating events that motivated the US to enact the FCPA. At its core, this chapter argued that the fundamental rationale for the FCPA is based on protecting US foreign policy and foreign relations interests that were damaged because of US firms' widespread bribery of foreign officials and foreign political parties. This was contrasted against the orthodox assertion that the FCPA was passed in a fit of moral redemption, spurred by acute domestic political scandals, as Congress sought to revitalise wholesome 'American values' in politics and business.

Evidence supporting the argument that the FCPA is justified, above all, for foreign policy reasons, included statements of lawmakers investigating US foreign bribery scandals, statements of US government officials in then-classified diplomatic correspondence, and, later, the writings of US appellate courts examining the rationales for the FCPA. Evidence supporting the conventional view that the FCPA was enacted as an expression of American values was also considered.

This chapter also examined scholars' writings that assert a moral rationale for the FCPA, and found these conclusions rely largely on lawmakers' and others' unsupported assertions. More often, it was argued, commentators provided no evidence to support the purported 'moral leadership' of the US enacting the FCPA. It was also argued that the US enacted the FCPA for good realist reasons, but later marketed the law as a norm-driven, values-laden measure. The artificial prominence given to the moral aspects of engaging in foreign bribery, it was argued, concealed the objective, particularistic rationale for the FCPA. Finally, this chapter examined the record of enforcement of the FCPA, demonstrating it was rarely enforced for decades,[265] only to emerge as a powerful regulatory stick once the Anti-Bribery Convention was ratified and the jurisdiction of the Act was expanded to capture the conduct of foreign firms not previously within the jurisdiction of the FCPA.

The arguments advanced in this chapter have been made to demonstrate that the dominant understanding of the fundamental rationale for the FCPA is misconceived. These arguments also seek to demonstrate that the US ban on foreign bribery was passed for

[265] Cragg and Woof (n. 74) 116.

self-interested purposes that held arguably little relevance or advantage for other states. The persuasive power of the arguments made thus far is crucial to advancing the central thesis: that the US campaign against foreign bribery is bound to fail.

If, despite the evidence presented, one considers that the FCPA was not enacted primarily on foreign policy grounds, subsequent arguments in this dissertation about why the US campaign against foreign bribery is bound to fail may be unpersuasive as they highlight the decisive role of interest-based, realist politics as the US pursued its campaign internationally. It is for this reason that this chapter required a comprehensive investigation into the origins and the development of the FCPA, as well as a considered examination of the attempted moralisation of this law and its rationales in the academy.

This analysis has also prepared the analytical ground for the arguments to be made in Part 2, where we examine US measures to internationalise the FCPA. Would the US appeal to claimed 'universal morals' against bribery to persuade other states to ban this practice? Or would it candidly rationalise its prohibition against foreign bribery and confess the foreign policy problems it had suffered from US firms engaging in this conduct? In Part 2, we examine US strategies to internationalise the FCPA at the OECD and embark on its campaign against foreign bribery globally.

[W]e in the United States are in a unique position to spread the gospel of anti-corruption, because there is no country that enforces its anti-bribery laws more vigorously than we do
—US Assistant Attorney-General Lanny A. Breuer[266]

Part 2: A campaign is born: the FCPA goes abroad

Part 2 tells the story of the US campaign against foreign bribery, commencing with US measures to export its criminalisation of foreign bribery to OECD member states in the 1990s. It will be argued that this strategy—built on a shifting liberal narrative of shared values but underpinned by raw coercion and interests-based power politics—sowed the seeds of failure into the US campaign against foreign bribery. We then examine the responses and experiences of France and the UK to this campaign, and later as these states developed their own laws against foreign bribery. We trace the development and evolution of these states' regimes against foreign bribery and demonstrate France and the UK's resistance to enacting, and arguably later to enforcing, laws against this conduct. Finally, we examine several investigations and prosecutions of major foreign bribery scandals in France, the UK and the US. In these case studies, we consider how well the conduct of states fits with the rhetoric when major foreign bribery scandals arise.

Negotiating the OECD Anti-Bribery Convention

This Part commences with Chapter II, which examines US efforts to export its domestic ban on foreign bribery to OECD member states. More precisely, this chapter focuses on the US advocacy for, and negotiation of, what would ultimately become the OECD Anti-Bribery Convention. The central argument in this chapter is that in pursuit of its national interests, the US engaged in a calculating and coercive campaign to compel reluctant OECD member states to prohibit foreign bribery in international business transactions. Advancing this argument, this chapter considers critically the precipitating events leading to the ratification of the Convention. This analysis provides essential context for a critical understanding of why the US pursued the path it did, why we have the Convention we have, and, it is argued, why the US campaign against foreign bribery is bound to fail.

[266] US DOJ, Assistant Attorney General Lanny A. Breuer, address to the 28th National Conference on the FCPA, 16 November 2012.

After examining the arguable core motivations for the US to pursue its campaign to ban foreign bribery at the OECD, we then consider the experiences and motivations of France and the UK as they negotiated a potential multilateral ban on this conduct. Through this analysis emerges an arguable asymmetry of rationales and motivations to ban foreign bribery emerges between the US and other OECD member states, including France and the UK. It is these differing motivations (or lack thereof) to ban this conduct that arguably portends the failure of the US campaign against foreign bribery. Whereas the US had strong, interest-based rationales to internationalise its prohibition of foreign bribery, France and the UK (and other OECD member states) had strong, interest-based rationales not to ban this conduct (for example, economic self-interest). Against this resistance, the US resorted to a campaign of normative shaming, heavy diplomacy, and power politics to persuade these states to ratify the Anti-Bribery Convention.

Chapter II concludes with an overview of the Anti-Bribery Convention that considers the substance of this agreement, and its development over time, to lay the foundation for examining the development and implementation of laws in France and the UK prohibiting foreign bribery after these states ratified the Anti-Bribery Convention.

Global foreign bribery regime development

Chapter III considers the development of regimes against foreign bribery in France and the UK to demonstrate the divergent experience and evolution of laws against foreign bribery in the US with that of other Parties to the Anti-Bribery Convention. Following a similar analytical path undertaken with the analysis of the FCPA, this chapter examines the origins of the laws and policies against foreign bribery in these two states. In doing so, it details the debates and challenges concerning the development of the French and British legal regimes against foreign bribery. More critically, this chapter examines the dominant perspectives and experiences of these two states as they navigate the US campaign against foreign bribery, both during the negotiations of the Anti-Bribery Convention and since the ratification of this agreement.

Chapter III extends the analysis of the rationales to prohibit foreign bribery in France and the UK to engage in a critical examination of the investigation and enforcement of laws against this conduct in these states. Through examining a set of prominent investigations and prosecutions of alleged foreign bribery by French, UK and US firms, it is hoped to

foster a critical appreciation for how these states' regimes against foreign bribery are implemented in practice, at least in these cases. Together, these cases demonstrate how the US campaign against foreign bribery is arguably failing, as investigations and prosecutions of alleged major foreign bribery repeatedly fall victim to states' inadequate laws and asserted national, economic, and security interests.

Before commencing the substantive chapters of this Part, it is worth considering two preliminary matters about states' motivations to accede to the Anti-Bribery Convention. Dealing with these issues up front may head off points of criticism as well as provide essential context for the arguments to be made.

Why examine States Parties' rationales for acceding to the Anti-Bribery Convention?

Some may question the utility of examining the motivations and rationales of OECD member states to accede to the Anti-Bribery Convention. For example, it may be argued that states make international agreements for reasons not necessarily in accord with other contracting states. France may conceivably have been motivated to ratify the Convention for reasons that had little in common with the rationales of other Parties. Domestic politics, too, can play a big role in treaty making. Others may argue it matters not why a state acceded to the agreement—what matters is that it did. Notwithstanding *pacta sunt servanda*,[267] there is little to stop a state from entering a treaty that it has no intention to honour the obligations arising therefrom.

Moreover, different motivations for entering into an international agreement does not necessarily predict asymmetric implementation of the agreement. The requirements of a state's municipal law, domestic political matters, and local norms may well be stronger influences on a state's implementation of a treaty than the push or pull of its international legal obligations. There is also no reason why states may not have legitimate, yet different, motivations for agreeing to specific international policy goals. These motivations can be domestic or international in character, and may be focused on economic, political, or strategic objectives.

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[267] Under Article 26 of the Vienna Convention on the Law of Treaties, 'every treaty in force is binding upon the parties to it and must be performed in good faith.'

Nonetheless, in circumstances where Parties' motivations for entering into a treaty are unarticulated, inconsistent, a product of power politics, or appear to be based solely on promoting their national interests, the analyst should not be surprised to discover that problems arise between the Parties about the promptness and the quality of the implementation of the agreement. While such issues may be more obvious in the context of bilateral agreements—where we would normally expect clear, mutual policy accord between the parties—multilateral agreements like the Anti-Bribery Convention may indeed be justified according to rationales that are salient, specific, or unique to each Party.

Because the US campaign against foreign bribery relies in part on the purported international policy accord of the Anti-Bribery Convention, the nature and the quality of the underlying motivations and rationales of Parties to agree to the Convention are relevant to the thesis that the US campaign against foreign bribery is bound to fail. If, for example, some states perceived that the US banned foreign bribery in a fit of naïve moralism in the 1970s, and that the US campaign to internationalise the FCPA in the 1990s was motivated by self-interested economic reasons, it is important to consider critically how these perceptions may have affected their motivations to agree to the Anti-Bribery Convention.

A second point of potential criticism of the arguments made in this Part relates to the notion of a 'US campaign against foreign bribery'. It is explained here why, for example, it is not characterised as an 'international campaign against corruption' or a 'global campaign against foreign bribery'.

The 'US campaign against foreign bribery'?

In arguing that the US campaign against foreign bribery is bound to fail, this dissertation focuses its analysis on the differing motivations of certain states—principally the US, France and the UK—to ban foreign bribery and their implementation of laws against this conduct. In so doing, it is argued that the US is both the architect and the leader—the *sine*

qua non—of this campaign. However, some may argue it is better described as an international movement against foreign bribery that is led by the US and the OECD.[268]

One argument that may cut across the characterisation of a US campaign against foreign bribery is the fact that most states generally prohibit bribery (at least formally) through their domestic laws, thereby demonstrating a global consensus against bribery, whether domestic or foreign. It is also true that international agreements condemning foreign bribery and other corrupt conduct are increasing, including the United Nations Convention Against Corruption (UNCAC),[269] the African Union Convention on Preventing and Combating Corruption,[270] the Inter-American Convention Against Corruption,[271] and of course the OECD Anti-Bribery Convention.[272] Each agreement is widely-adopted and constitutes worthy evidence that states officially abhor bribery and related corrupt conduct, and have committed to prohibit and to punish this activity.[273]

However, the widespread prohibition of corrupt conduct, including bribery, arguably obscures the rhetoric of states from their record of meagre enforcement of anti-corruption and anti-bribery laws. In matters of foreign bribery, the quality of enforcement is where the rubber meets the road. As we saw with the US failure to enforce the FCPA for nearly twenty years, there is little credibility to be earned simply through enacting anti-bribery or other anti-corruption laws, or through the ratification of international agreements banning this conduct. Indeed, Parties to the Anti-Bribery Convention are routinely

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[268] See Jason Sharman, *The despot's guide to wealth management: on the international campaign against grand corruption* (Cornell University Press, 2017); Kennedy (n. 241); Jan Wouters, C. Ryngaert, A.S. Cloots, 'The International Legal Framework against Corruption: Achievements and Challenges', (2013) 14 *Melbourne Journal of International Law* 1.

[269] At 6 February 2020, there were 187 Parties to the UNCAC.

[270] Opened for signature 11 July 2003, 43 ILM 5 (entered into force 5 August 2006). At June 2020, 44 states have ratified this Convention.

[271] At July 2020, 34 states have ratified this Convention.

[272] At July 2020, each of the 37 OECD member states is party to the Anti-Bribery Convention. Seven non-OECD member states are also Parties to the Convention.

[273] See also, 2016 OECD 'Anti-Bribery Ministerial Declaration', which calls on 'all countries to fully implement their international obligations with respect to foreign bribery and corruption'.

rebuked by the OECD for their apparent failure to initiate investigations and prosecutions for alleged foreign bribery offences.[274]

In 2018, for example, the OECD Working Group on Bribery ('Working Group') reported that more than half of all Parties to the Anti-Bribery Convention have never sanctioned a company for a foreign bribery offence.[275] Instead of representing a 'global consensus' or international movement against foreign bribery, the apparent failure of so many Parties to enforce their laws against this conduct arguably demonstrates the hollowness of any purported international regime or norm against this conduct.

Moreover, apparent commonality between states' mutual commitments to prohibit foreign bribery and other corrupt practices tells us little about the drivers—i.e., the 'why'—that underpinned the decisions of these states to adopt the agreement or to enact the relevant laws. Instead, it is argued that a critical assessment of the motivations of these Parties to ratify the Anti-Bribery Convention depicts a US campaign against foreign bribery, rather than a genuine international consensus against this conduct.[276]

The scholar of international commercial bribery may note certain European states (primarily Germany and France) and Japan advocated for a hard law treaty to ban foreign bribery, instead of the soft-law approach that the US proposed through an OECD Council Recommendation.[277] Abbott and Snidal, for example, argue:

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[274] Including, e.g., Australia, Canada, Ireland, Italy, France, Spain, Sweden, and the Netherlands.

[275] OECD (n. 214).

[276] Unlike, e.g., the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer, which has been ratified by 197 states; or, the four Geneva Conventions, ratified by all United Nations member states.

[277] See Jean Cartier-Bresson, 'The Causes and Consequences of Corruption: Economic Analyses and Lessons Learnt', noting: 'Other countries, France and Germany in particular, insisted that only a convention could guarantee the binding character of precise and equivalent obligations by Member states.' (cited in OECD, *No Longer Business as Usual: Fighting Bribery and Corruption* (2000) 33). See also, Kenneth Abbott and Duncan Snidal, 'International action on bribery and corruption: Why the dog didn't bark in the WTO', in Daniel Kennedy and James Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002) 193.

> Suddenly, several European governments, having thus far vigorously opposed any action, performed an about-face and demanded that the OECD act through a legally binding convention.[278]

This may lead one to believe, rather simplistically, that a binding international agreement was advocated by these states, not only the US. Indeed, German officials have touted their nation's 'long-held' support for banning foreign commercial bribery.[279] If this line of argument—that the fight against foreign bribery is a truly international campaign—was compelling, it could undermine an important pillar of this thesis; namely, that it is fundamentally a 'US campaign' against foreign bribery.

However, the available evidence arguably demonstrates this perspective to be ill-conceived.[280] First, recall that the 1988 Amendments to the FCPA included a specific appeal from Congress that the US President pursue a multilateral agreement with OECD member states to prohibit foreign bribery.[281] Moreover, the goal of a binding, 'hard law' Convention was part and parcel of the US strategy at the OECD. Nonetheless, throughout these negotiations the US remained sceptical of the prospect of concluding a multilateral agreement and continued to push for OECD member states to pass their own versions of an FCPA.[282] The US, however, was prepared to move in stages to achieve its chief 'hard law' end, beginning with a 'soft law' mechanism with the 1994 OECD Recommendation of the Council on Bribery in International Business Transactions. Abbott and Snidal note

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[278] See Abbott and Snidal (n. 144) S167.

[279] See, e.g., Dr. Mattei Hoffmann, Ambassador of Germany to the OECD: '[W]e say that in Germany we regard ourselves in some ways as the mothers and fathers—or at least as the 'midwife'—of the OECD Bribery Convention', 21 November 2007, 'High-Level meeting: The OECD Anti-Bribery Convention: Its Impact and Its Achievements': <http://www.oecd.org/site/dafbriberyten/39867248.pdf> (accessed 1 July 2021).

[280] Moreover, it was the US that advocated for a treaty-level agreement against foreign bribery to be done under the auspices of the OECD.

[281] *Foreign Corrupt Practices Act Amendments of 1988*, §§5003(d), 15 U.S.C. §§78dd.

[282] See Mickey Kantor, US Secretary of Commerce, remarks before the Detroit Economic Club, 13 September 1996: 'Some member states believe the best route to this goal is through a multilateral convention. But I see no legal or practical reason why every OECD member state cannot enact legislation to achieve the same result as the [FCPA].' Available: <https://web-archive-2017.ait.org.tw/en/officialtext-bg9632.html> (accessed 1 July 2021).

that senior US negotiator at the OECD, Daniel Tarullo, described the underlying problem of foreign bribery as a:

> Prisoners' Dilemma with widespread transnational bribery as the equilibrium outcome. To overcome such strong interest incentives, [Tarullo] believed the ultimate product of OECD negotiations must be 'hard law': a legally binding convention.[283]

Although there was a pivot late in the negotiations at the OECD by Germany and France to preference a 'hard law' agreement to ban foreign bribery, this change of tack surprised their American counterparts and OECD officials from the Working Group. In fact, the US viewed this late shift by the French and German delegations as simply another delaying tactic as these 'recalcitrant' states sought to impede US proposals.[284]

As part of this 'hard law' push by Germany and France, these states reportedly proposed a draft convention based largely on European Union and Council of Europe precedent anti-corruption agreements, not based on the US FCPA. In one version of the draft treaty proposed, for example, the primary offence covered 'corrupting a public official of another country, but only if that country was also a party to the convention.'[285] This limited scope of corrupt conduct was not what the Americans had in mind. US officials reportedly 'boasted that they "beat the Europeans' heads in" over this'.[286] However, this was not the end of alternative approaches put forward by the Europeans.

Germany subsequently proposed that any such agreement should be negotiated at the United Nations (UN) level, whereas France favoured the World Trade Organisation (WTO). For the Americans, the German and French proposals to take the agreement to another forum altogether were cynical devices designed to obstruct or to delay an agreement. Given that the UN and WTO are more universal international governmental organisations than the OECD, and organisations in which US power and influence is more limited relative to the OECD, the Americans were steadfast against these proposals. But the US did support moving quickly to a hard law agreement and proposed that this should

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[283] Abbott and Snidal (n. 144) S164.

[284] See Cartier-Bresson, (n. 277) 32-33; Tarullo (n. 153) 679.

[285] Abbott and Snidal (n. 144) S168.

[286] Ibid.

be done at the OECD. Abbott and Snidal note how the US found its way out of this impasse:

> With Europe demanding a binding convention, the United States suspicious of obstructionist tactics, and TI supporting a continuation of the soft-law approach, OECD ministers broke the deadlock with a complex compromise embodied in the May 1997 Recommendation. Governments would attempt to negotiate a legally binding treaty by the end of 1997, but if they failed, OECD governments would move during the following year to adopt domestic criminal legislation pursuant to the May 1997 recommendation, including the agreed common elements.[287]

With this two-step agreement, the US achieved its objectives at the OECD. Even if the proposed treaty did not materialise, the US had extracted the agreement of OECD member states to enact domestic laws against foreign bribery, and on US terms.

Still, some may argue that although the US was the driver behind the Anti-Bribery Convention, it is not alone today in its efforts against foreign bribery. Despite little evidence of prosecutorial zeal to pursue foreign bribery cases across OECD member states,[288] there is recent evidence of an apparent increase in international co-operation between Parties in foreign bribery matters. US-German co-operation in the 2008 Siemens scandal is cited as an exemplar. More recently, apparent Franco-American co-operation and joint settlement with French bank Société Générale in 2018, and UK-France-US co-operation and joint sanctioning of French firm Airbus in 2020, demonstrate, *prima facie*, it is not only the US that is pursuing foreign bribery matters.

However, peeling back the layers of this story reveals another perspective that arguably defies the notion of free-willed co-operation between the US and other states on foreign bribery cases. Instead, what we find is arguably more cogently *faits accomplis* dressed up

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[287] The 'agreed common elements' covered the primary issues relevant to prohibiting foreign bribery, including jurisdiction and enforcement, elements of the offence, and principles of international legal assistance. See Abbott and Snidal (n. 144) S168.

[288] In the approximate twenty years between entry into force of the Anti-Bribery Convention in February 1999 and 31 December 2018, there were 818 legal and natural persons sanctioned in relation to criminal foreign bribery offences in member states. See OECD, Working Group on Bribery, 'Data on enforcement of the Anti-Bribery Convention', 18 December 2019.

as acts of 'international co-operation'. The France-US joint settlement with French bank Société Générale, for example, was the first instance of such comprehensive cross-border co-operation between France's Parquet National Financier (PNF) and the US DOJ in a foreign bribery matter. The Airbus settlement in 2020 is also cited as a 'new level' of co-operation between anti-corruption agencies in foreign bribery matters—in this case the DOJ, SFO, and the PNF—in which the DOJ expressed its appreciation to their French and British counterparts for their 'significant assistance'.[289]

A critical eye, it is submitted, should ask where these cases came from? Were they investigated by the PNF and proactively shared with the DOJ or SFO? On both counts, the answer is no; each case was initiated by non-French authorities, already in train, and headed to prosecution. On both counts, the PNF had little to gain by not co-operating; each would likely proceed with or without the co-operation of French authorities. The case against Société Générale in France was initiated only after the US had been investigating and building its case for two years before the matter came to the attention of the PNF.[290] Failure to co-operate with the DOJ in this matter offered no upside, either for the PNF or Société Générale, the latter of which could expect to be punished by US authorities for any perceived obstruction or lack of co-operation.[291] The Airbus case followed a similar path. It was not initiated in France, but in the UK after UK Export Finance, a government agency from which Airbus had obtained export credit financing,

[289] DOJ, Press Release, 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case', 31 January 2020.

[290] See Juliette Lelieur, 'La transaction judiciaire, les personnes morales et le droit pénal des affaires', in Kai Ambos and Stefanie Bock (eds.), *Questions actuelles et fondamentales du droit pénal des affaires* (Duncker & Humblot, 2019) 97.

[291] For example, if US authorities considered Société Générale had encouraged French authorities to enforce the French Blocking Statute to compel the bank not to provide proscribed information (see *Loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères*).

notified Airbus of its anti-bribery procedures and referred to its obligations to report all suspicious circumstances to the SFO.[292]

With the introduction in France in 2016 of a form of deferred prosecution agreement, the PNF had a strong incentive to put this regime to use to extract financial sanctions from these firms for alleged foreign bribery and other financial crimes. Co-operating with the UK and US authorities in these matters would increase the likelihood that the French treasury would benefit from the alleged misconduct of these firms (instead of only the US Treasury, as had long been the case). This was made clear by the head of the PNF, Éliane Houlette when remarking on the extraterritorial application of the Sapin II law:

> Elle [Sapin II] nous permet, quand les Américains s'intéressent à une société française, de dire 'stop, nous aussi nous avons notre loi, nous avons nos outils'.[293]

Instead of evoking co-operation and solidarity with American zeal to punish firms that engage in foreign bribery, what we find here is a calculated policy articulated by the PNF to blunt a perceived inappropriate, even unjust, targeting of French firms by the US.

Given the political capital the US has devoted to this issue over the years, and the inarguable level of influence the US has in foreign bribery matters globally, it is maintained that this is unmistakeably an American 'campaign against foreign bribery'. And while there may indeed be a rhetorical international fight against corruption, championed by international activists and interest groups, the writer and director of the campaign against foreign bribery is clearly the US.

With these two matters fleshed out, we turn now to Chapter II to examine US efforts to persuade OECD member states to ratify a multilateral agreement to prohibit foreign bribery. Through this analysis, we get to the core of how and why the US, UK, and France

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[292] UK Export Finance claim a lack of information provided by Airbus in relation to its Sri Lanka operations. See *R v Airbus SE*, Deferred Prosecution Agreement, Statement of Facts (Count 2), 31 January 2020.

[293] Emmanuel Jarry, 'France: Le PNF désormais installé dans le paysage judiciaire', *Zone Bourse*, 30 June 2019. [It allows us, when the Americans are interested in a French company, to say 'stop, we too have our law, we have our tools']. NB: English text in brackets […] in the footnotes is the author's translation.

agreed to the Anti-Bribery Convention. It is here that we find the most powerful evidence that arguably foretells the failure of the US campaign against foreign bribery.

II. The negotiating history of the OECD Anti-Bribery Convention: an American strategy of values, interests, and coercion

This chapter critically examines US efforts to forge a multilateral agreement with OECD member states to ban foreign bribery in international business. To understand the context and drivers behind these measures, it first focuses on the circumstances that led the US to advocate for an international ban on foreign bribery. It then critically examines the strategies and tactics that the US employed to persuade reluctant states to agree to its anti-bribery policy prescriptions. This analysis arguably tells us much about the willingness of these states to ban foreign bribery and may thereby serve as a powerful predictor of the success or failure of the US campaign against foreign bribery.

In pursuing this international policy goal to persuade OECD member states to ban foreign bribery, the US first deployed a liberal values strategy to 'name and shame' certain member states that were reluctant to adopt US proposals. However, this liberal rationale was not sufficiently persuasive to gain the assent of several major exporting states of the OECD. For those states that the US perceived as recalcitrant on this issue, the US shifted from its liberal, values-based rationale to ban foreign bribery, and resorted to power politics and coercive diplomacy to achieve its policy objectives. This included issuing open threats of market exclusion, punishing tariffs, and outright interference in some states' domestic political affairs.

The mobilisation of US power to pressure OECD member states to ban foreign bribery, as the US acted to shame and coerce its allies and partners into submitting to its proposals, arguably tells us much about why the US campaign against foreign bribery is bound to fail. By examining the role that US pressure played in states' decisions to ratify the Anti-Bribery Convention—here we focus on France and the United Kingdom—we may better apprehend the subsequent conduct of these states as they developed and implemented laws and policies against foreign bribery.

The central claim advanced in this chapter is that the US push for a multilateral agreement with OECD member states to ban foreign bribery was justified publicly by reference to liberal principles (such as shared values, open markets, and international institutions), but was executed to achieve self-interested US economic and foreign policy interests. In other words, American liberal rhetoric against foreign bribery provided cover for this state's

interest-based considerations in this matter. It is important to distinguish between these two stories—i.e., between the orthodox, values-driven narrative and the realist motivations to ban foreign bribery—to understand why the US campaign against foreign bribery is arguably bound to fail.

In focusing the analysis on the principal motivations of the US to persuade OECD Parties to foreign bribery, it is essential to avoid substituting officials' public statements against foreign bribery for a coherent analysis of the public record. Similarly, rationales to prohibit foreign bribery are commonly assumed by reference to bribery's widely-reviled, and poorly articulated, cousin concept: 'corruption'. Engaging the broad concept of corruption to do the justificatory work of specific laws and policies may add appraisive simplicity, but it too lacks critical consideration of precisely why the US, or any other state, banned foreign bribery in the first place.[294] Here, this task is advanced first by analysing why and how the US pursued it policies at the OECD to ban foreign bribery, and then by examining how other states responded to these American proposals.

Like the earlier analysis of the rationales and motivations for the FCPA, the arguments here contrast with the popular narrative that US advocacy for the Anti-Bribery Convention was motivated by American 'moral leadership' and liberal economic values as this state sought to convince its trading partners to 'do the right thing'.[295] A more discerning analysis, it is submitted, demonstrates that US motivations to pursue an international ban on foreign bribery were as self-serving as they were calculating, as coercive as they were offensive. In sum, the decisive motivations for the US campaign against foreign bribery, it is argued, are based on protecting and furthering this state's economic and foreign policy interests.

In contrast, France and the UK arguably acceded to the Anti-Bribery Convention out of submission to a coercive diplomatic and political pressure campaign orchestrated and executed by the US, not out of accord with 'anti-bribery values' or the other claimed rationales (e.g., shared values, international institutions, economic interdependence). This

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[294] See Kennedy (n. 241).

[295] R. Michael Gadbaw and Timothy J. Richards, 'Anticorruption as an International Policy Issue', in Geza Feketekuty (ed.), *Trade Strategies for a New Era: Ensuring US Leadership in a Global Economy* (Brookings, 1998) 223, 228.

analysis provides a window into a critical appreciation of why these states agreed to ratify the Convention, which extends beyond existing accounts of government officials and scholars that are typically focused on the perceived harms caused by foreign bribery and related corrupt conduct. Like the FCPA, here too there is a dearth of critical analysis of the history and events leading to the agreement to ratify the Anti-Bribery Convention.

What little scholarship there is on this topic commonly suffers from a US-centric perspective[296] that echoes a narrative depicting American efforts to 'level the playing field' for US multinationals *vis-à-vis* their international rivals in OECD states.[297] Although the *Commentaries* to the Anti-Bribery Convention provide an authoritative interpretation of this agreement, and are arguably the best single source of information about the scope and contents of the Convention,[298] this text is limited by its aims and its authors' trusted roles in these largely confidential negotiations.[299]

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[296] See, e.g., Tarullo (n. 153); Abbott and Snidal (n. 144); Spahn (n. 34).

[297] But see Abbott and Snidal (n. 144) S157-158, who report 'key turning points' in the development of the Anti-Bribery Convention, and the interaction of values and interests in the political and legal processes leading to its ratification. Though limited by its US centrism, this article benefited from interviews with nearly 30 individuals closely involved in, or having intimate knowledge of, the negotiations of the Convention.

[298] Mark Pieth, Lucinda Low, and Nicola Bonucci (eds.), *The OECD Convention on bribery: a commentary* (2nd ed.) (Cambridge University Press, 2014).

[299] Ibid, 20, noting: 'The negotiations behind the scenes and the extent of peer pressure necessary to convince state Parties are not discussed here.'

If we have to use force, it is because we are America; we are the indispensable nation. We stand taller and we see further than other countries…
—Madeleine K. Albright[300]

A. A TREATY IMPOSED: LIBERAL RHETORIC, REALIST TACTICS

After earlier efforts by the US at the UN and the OECD failed to reach a substantive agreement to ban foreign bribery, in the early 1990s the US embarked on a renewed diplomatic push to persuade OECD member states to criminalise this conduct. Acting on Congress' admonishment in the 1988 Amendments to the FCPA, calling for the Executive to negotiate a multilateral anti-bribery agreement at the OECD, the Clinton Administration eagerly revived these efforts.[301] In pushing for an international anti-bribery agreement, business lobbies, NGOs, some US firms, the media, and American lawmakers and government officials joined in a chorus of criticism of OECD governments in Western Europe and Japan that did not prohibit foreign bribery.

These efforts began to bear fruit for the US with the 1994 OECD Recommendation of the Council on Bribery in International Business Transactions.[302] This was followed by the 1996 UN Declaration against Corruption and Bribery in International Commercial Transactions.[303] After a period of contentious negotiations in the mid-1990s, and the application of significant pressure, US efforts were largely successful, culminating in 1997 with the agreement of all OECD member states to ratify the Anti-Bribery Convention.[304]

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[300] US Secretary of State Madeleine K. Albright, Interview on NBC-TV 'The Today Show', Columbus, Ohio, 19 February 1998.

[301] Tarullo (n. 153) note 31.

[302] Recommending, *inter alia*, that OECD member states take effective measures to deter, prevent and combat the bribery of foreign officials in connection with international business transactions.

[303] This Declaration commits UN member states to criminalise foreign bribery and to deny the tax deductibility of bribery, but it has no standing in international law.

[304] As of May 2018, the Convention has also been ratified by eight non-member states; *viz.*, Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Lithuania, Russia, and South Africa.

Aiming to shore up a faltering US economy and address significant trade imbalances with the relatively prosperous Western European and Japanese economies during this period, the US was intently focused on liberalising trade and advancing its export agenda. The Clinton Administration was, Tarullo recalls, 'committed as none before it to increasing US exports'.[305] The US also considered that foreign bribery by its international rivals was a significant barrier to achieving this goal. US officials argued that the American economy was losing tens of billions of dollars in exports to their international rivals in the OECD, and thus worked swiftly to elevate the issue of foreign bribery to a top priority of the Administration.

The US also alleged that many OECD member states acquiesced in foreign bribery. These claims were soon bolstered by reports from the Central Intelligence Agency (CIA). Ordered by the Clinton Administration in 1994 to collect intelligence relating to bribery in international business, the CIA assessed there was significant economic loss to US firms and the US trade position because of foreign bribery by firms from OECD member states. These assessments confirmed the suspicions of US officials, and US firms, who argued that the US and its firms were victims of ongoing, widespread foreign bribery by their international commercial rivals. The US would henceforth take these matters more seriously.

Daniel Tarullo, then the Assistant Secretary of State for Economic and Business Affairs, recalls that the Clinton Administration's definition of American interests in these matters ushered in an 'elevation of the issue [foreign bribery] to a position of daily management by a politically appointed sub-Cabinet official and by regular involvement of Cabinet officials.'[306] The impetus behind this new priority is made clear by Alan Larson, US Assistant Secretary of State for Economic and Business Affairs, who recalls:

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[305] Tarullo (n. 153) 676; David Metcalfe, 'The OECD Agreement to Criminalize Bribery: A Negotiation Analytic Perspective' (2000) (5(1) *International Negotiation* 129.

[306] Tarullo (n. 153) 677.

> Early in this administration [...] Secretary of State Warren Christopher reviewed the state of affairs on illicit payments, and decided that the time had come to put more political muscle behind our efforts in the OECD.[307]

With this, the US government readied itself 'to exercise substantial power in the OECD negotiations'.[308] Tarullo recounts:

> Because of shifts in the preferences of domestic interest groups and the government in power, the United States became more committed to an international agreement and then used its power, assisted by domestic political forces in some of the states, to press an agreement upon the rest of the OECD member states.[309]

Because the US chose unilaterally to prohibit its firms from bribing foreign public officials in 1977, and this state remained ostensibly committed to this ban, it had arguably created a situation in which it was effectively forced by its own policies to 'export' the US ban on foreign bribery via an international agreement. Only through a greatly expanded international legal regime against foreign bribery could the US negate the advantage that some in the US government and business community argued the FCPA conferred on non-American firms engaging in this conduct.

There were, of course, other options the US could undertake. It could have signalled to US firms that it would not prosecute FCPA matters where the firms' activity did not undermine US national interests. However, given US firms' historical record in these matters, a return to foreign bribery would be perilous and not without political risk. Although full repeal of the FCPA was unlikely for the domestic political reasons described earlier, the Clinton administration could have lobbied for further reform of the Act to limit its scope or to reduce its sanctions. Instead, American Secretary of State Warren Christopher[310] would pursue an ostensibly liberal campaign of shared values and free trade, combined with raw coercive power and threats of economic sanctions, to persuade OECD member states to ban foreign bribery in international business.

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[307] Cited in Metcalfe (n. 305) 134.

[308] Tarullo (n. 153) 677.

[309] Ibid 668.

[310] Ibid 676, note 31.

Dressed in the language of liberalism, the US push to internationalise the FCPA as the 'right thing to do' was resisted by governments sceptical of US goals. Japan, France, Germany, and the UK, for example, were not inclined to accept or sympathise with the claimed moral or economic rationales to prohibit foreign bribery that were championed by the US. Instead, these states viewed the campaign as a clever US economic measure intended to shore up their firms' lacklustre performance in international trade.

These Western European states, and Japan, had good reason not to accept the claim that the US banned foreign bribery on moral grounds, and was now simply providing ethical leadership to the world (as it was bellowed out of Washington). Officials from these OECD member states knew well the myriad of challenges to US foreign policy that arose out of the disclosure of widespread foreign bribery by US multinationals in the previous decades. Recall that many of these bribery scandals occurred in democratic and relatively affluent states allied with the US. Indeed, several of the most prominent of these affairs occurred in (Western) Germany, Italy, Japan, the Netherlands, and South Korea, many of which were by then OECD member states.

However, this opposition failed to challenge effectively the claimed moral high ground of the US-proposed agreement. Where there was an impression that the US was 'acting on its morals' in pursuing the internationalisation of the FCPA, it was simply met with derision by some European officials.[311] The Americans, it was argued, were engaged in a misguided, arrogant campaign to export their 'naïve moralism' and alleged 'puritan values' to the world.[312]

Other points of opposition centred on the argument that in some states commercial payoffs (i.e., bribery) were expected, even required, to do business effectively. While this may have been common practice, it was hardly defensible publicly. Perhaps more justifiably, some state representatives and national champions were concerned that if

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[311] See Paul Lewis, 'Straining Toward an Agreement on Global Bribery Curb', *New York Times*, 20 May 1997.

[312] Steven Salbu, 'The Foreign Corrupt Practices Act as a Threat to Global Harmony' (1999) 20(3) *Michigan Journal of International Law* 419; Kevin Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (OUP, 2019); Andy Spalding, 'Unwitting Sanctions: Understanding Antibribery Legislation As Economic Sanctions Against Emerging Markets' (2010) 62 *Florida Law Review* 351.

these ‘commissions’ ceased, they would be outflanked and shut out of some markets entirely by non-OECD competitors that continued to pay bribes.

What then explains why these states agreed to ratify the Anti-Bribery Convention? In a word, coercion. Put mildly, diplomatic and other pressure from the US and its proxies persuaded these states to agree to ratify the Convention. These states did not agree to adopt the Convention out of solidarity with the US, nor out of a desire to ‘lift the ethics’ of their firms. Although the experiences of France and the UK during this period tell different stories, they share common threads that arguably forecast the failure of the US campaign against foreign bribery.

1. Act I: the liberal values strategy

As noted above, the dominant narrative of the US campaign against foreign bribery at the OECD was imbued with liberal notions of values, morals and international norms to justify the international prohibition of this conduct. These liberal principles were then applied by the US in its negotiations with OECD member states as the ‘universal’ basis for the international criminalisation of foreign bribery. In other words, ‘morally superior’ US laws (i.e., the FCPA) were framed as the common ground for OECD member states to ban foreign bribery.

By acting first to prohibit foreign bribery, in an arguably self-interested manner to protect its foreign policy interests, the US effectively painted itself into a corner. Focused as it was on a uniquely American experience—i.e., foreign policy blowback provoked by the conduct of US firms abroad—the US was wedded to a policy it deemed necessary, but which provided no clear benefits or incentives to the wider community of states to prohibit foreign bribery. To achieve its aims under these circumstances, the US promoted the proposed multilateral agreement as a values-laden struggle to ban foreign bribery; or, more simply, a fight against corruption. There was clear strategic logic in the US presenting its initiative against foreign bribery as a moral one, as ‘the right thing to do’. Abbott and Snidal report that at the October 1993 OECD ministerial meeting, US sherpa Daniel Tarullo:

> [P]resented a broad rationale for multilateral action against transnational bribery. He argued not only US economic interests (which were not at all persuasive) and economic

> efficiency (which had failed in the past) but also the unethical nature of bribery and corruption and their harmful effects on democracy, governance, and development.[313]

Publicly framing the issue of foreign bribery as a universal, moral matter—instead of relying on economic efficiency arguments or foreign policy rationales—had the advantage of linking foreign bribery with most citizens' general revulsion for official corruption globally. What was unstated, and unmentioned by US officials, was the more self-serving, less universal rationale for this nation's push to outlaw foreign bribery in 1977 (that is, the severe consequences that widespread foreign bribery by American firms had on US foreign policy). Instead, at this stage of negotiations US officials and their proxies proffered 'doing the right thing' as a fundamental driver to ban foreign bribery internationally. Reinforcing this point, Abbott and Snidal argue:

> The issue of bribery and corruption thus brought together US commercial interests with appealing normative values. It allowed [the US Department of] State to address not only commercial unfairness to US firms and global economic efficiency but also democracy, good governance, and 'civic virtue' around the world. In our language, the State Department became an aggregator of values and interests. Had Tarullo—aided by [Transparency International] and [General Electric]—not seen the issue of transnational bribery in this dual light, the US government would not have taken up the issue or reopened negotiations at the OECD.[314]

The power of employing this values strategy to achieve US policy objectives lay in this state's ability to leverage broader repugnance for corruption in the domestic polity of most states (or at least in its principal commercial rivals in OECD member states). Put simply, a representative of a legitimate, democratic government could not be seen to be

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[313] Abbott and Snidal (n. 144) S163-S164.

[314] Ibid S163.

'for' bribery or corruption.[315] Not for long, that is. Only the most naïve, or foolishly bold, politician in a democratic state would take such a position.[316]

During the OECD negotiations, the US media, and some European outlets, widely publicised the purported rationale for pursuing an international agreement to criminalise foreign bribery as being based on 'American moral leadership'. When the OECD Council adopted its 1994 Recommendation, for example, Abbott and Snidal argue that 'it was the result of US success in bringing domestic political pressure, motivated by value considerations, to bear on European governments.'[317]

What did this domestic political pressure look like? In sum, it involved threats by US officials to leak allegedly incriminating information against certain governments (and their national champions) that resisted US anti-bribery proposals at the OECD. It also involved working closely with the media and so-called value entrepreneurs to engage in a shaming campaign to paint governments the US deemed recalcitrant as corrupt, or at least tolerant of corruption. US firms, the Americans argued, were doing the 'right thing' by abiding by the FCPA but were being unfairly disadvantaged by their rivals in Western Europe and Japan that continued to act 'unethically' by engaging in foreign bribery.

Coincidentally, media outlets also heavily publicised allegations of political corruption scandals in Western Europe.[318] Abbott and Snidal note the *Financial Times* labelled 1994 the 'Year of Corruption',[319] which, they argue, 'fundamentally changed the context of international negotiations',[320] by making the European public 'highly sensitive to issues

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[315] Similarly, Abbott and Snidal (n. 144), S150, argue '[l]atent value actors can be mobilized most effectively by casting an issue as a "valence issue": once an issue is framed in this way, virtually everyone will express agreement with it, at least in public.'

[316] However, it is not argued that engaging in foreign bribery is normatively equivalent to the domestic bribery of public officials.

[317] Abbott and Snidal (n. 144) S164.

[318] See, e.g., Pierre-Brossolette Sylvie, 'Le Tour de France de la Corruption', *L'Express*, 1 December 1994; Gail Edmondson, 'Europe's New Morality', *Bloomberg Business Week*, 18 December 1995, 26-30.

[319] *Financial Times*, 30 December 1994, at 13 (cited in Abbott and Snidal (n. 144) S164).

[320] Abbott and Snidal (n. 144) S164.

of bribery and corruption',[321] with the US State Department playing on 'European officials' fear of press and public criticism.'[322] For example, in 1995 *Bloomberg Business Week* reported:

> All over Europe, the high and mighty are encountering a backlash against corrupt practices that were once tolerated as a birthright of the elite. In 1995, an unprecedented number of dirty-money charges stung and toppled senior politicians, public administrators, and top executives. Among the victims: NATO General Secretary Willy Claes, Norwegian Central Bank Governor Torstein Moland, and Alcatel Alsthom Chief Executive Pierre Suard. The alleged offenses range from tapping public or corporate funds for self-enrichment to extorting kickbacks, dodging taxes, and setting up illegal political slush funds.[323] […]
>
> In France, the spectacle of 100 Parliament members and public officials placed under investigation has been particularly shocking.[324]

These allegations, spanning much of the European Continent, were then exploited by the US in a 'public diplomacy' campaign that was integral to its strategy to pressure fellow OECD member states it considered were impeding the progress of negotiations.[325] Supporting this thesis, Abbott and Snidal argue that the European press was the 'primary vehicle' by which US officials were able to link issues of bribery with public concerns about democratic accountability.[326] Elisabeth Spahn also recounts:

> The Europeans moved to negotiate only when, during a notorious corruption scandal inside Germany and in the European Union, the Clinton administration deployed domestic political pressure.[327]

In turn, this strategy placed significant, values-laden pressure on certain European governments to endorse the US anti-bribery campaign. Once these leaders had acquiesced

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[321] Ibid.

[322] Ibid.

[323] See Edmondson (n. 318).

[324] Ibid.

[325] Abbott and Snidal (n. 144) S164, arguing the US State Department 'relied heavily on value tactics such as shaming and normative persuasion'.

[326] Ibid S164.

[327] See Spahn (n. 34) 11.

in the American portrayal of foreign bribery as immoral, how could they not agree to its prohibition without the risk of being branded 'pro-corruption'? This was the position that several states found themselves in as the US ramped up its liberal values strategy to persuade states to ban foreign bribery and to ratify an international agreement against this conduct. Detailing the development of negotiations of the Anti-Bribery Convention, Abbott and Snidal note:

> Attempts to block agreement were overcome by sophisticated entrepreneurial leadership, including the selective admission of value perspectives into the proceedings. In this 'soft law' forum, the incorporation of values implicitly limited the arguments that could be made, until Europe's interest-based resistance was boxed in.[328]

By forcing the initial prominence of a values-based rationale to ban foreign bribery, the US sought to overrun the interest-based concerns of some states, such as France and Germany, that their economies would suffer if they agreed to ban this practice.[329] The moral justification for the US anti-bribery initiative at the OECD was further amplified by 'value entrepreneurs', such as the nascent NGO Transparency International ('TI'). TI inveighed against foreign bribery, particularly as it was engaged in by multinationals from developed European states. Abbott and Snidal recount the timely appearance of TI as a vital actor in the US push to ban foreign bribery in OECD states:

> [O]ne of the key steps in the OECD anticorruption effort occurred when officials in the Clinton administration combined American business interests that wanted a level playing field vis-à-vis their European competitors with NGO activists concerned with the value side of the issue.[330]

The strategic alignment of (corporate) interests and claimed values in matters of foreign bribery is exemplified by 'key initiator' Fritz Heimann, counsel to US industrial firm General Electric ('GE') and later chairman of TI's US chapter.[331] During negotiations at

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[328] Abbott and Snidal (n. 144) S163.

[329] Gutterman (n. 145) 74, notes, 'prior to the conclusion of the OECD Convention, the German government took no steps to implement the earlier OECD recommendations on bribery, and German business also opposed such efforts.'

[330] Abbott and Snidal (n. 144) S154.

[331] Ibid.

the OECD in 1994, Heimann summed up the interests at stake for his firm, GE, and their intersection with TI's advocacy activities:

> We tried in the past to lobby Congress to relax laws concerning corruption and bribe giving that were making US companies uncompetitive abroad. But trying to get Congress to vote for corruption was impossible, so we want other developed nations to adopt US-style legislation.[332]

GE was, therefore, heavily invested in an international agreement against foreign bribery and lobbied the US government intensively, arguing it had lost billions of dollars because of alleged foreign bribery by its foreign competitors (most of which are based in Europe or OECD member states).[333]

While TI's advocacy efforts were fruitful in some states (such as Germany, The Netherlands, and the US), in others they aroused suspicion and outright hostility. Gutterman argues that 'French business leaders did not trust TI and did not welcome its advocacy on matters related to transnational bribery.'[334] French officials also rejected the legitimacy of TI, considering it to be a proxy for the interests of the US and its firms.[335] In Germany, by contrast, TI, headquartered in Berlin, strongly influenced this state's ultimate backing of the Anti-Bribery Convention, and later the development of its foreign bribery laws.[336]

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[332] Quoted in Peter K. Semler, 'US Firms Shift Strategy, Push for Anti-Corruption Laws Abroad', *Journal of Commerce*, 17 April 1994.

[333] Abbott and Snidal (n. 144) S162-S163.

[334] Ellen Gutterman, 'The legitimacy of transnational NGOs: lessons from the experience of Transparency International in Germany and France' (2014) 40 *Review of International Studies* 391, 410. See also, Jean-Pierre Neu, 'Les industriels de l'armement montent au créneau contre la future loi anticorruption', *Les Echos*, 10 February 1999; Pierre Abramovici, 'Une ONG contestée, *Le Monde Diplomatique*, November 2000, p. 23.

[335] NB: the US chapter of TI was quietly disaccredited and disbanded in 2017 amidst allegations that it was too close to US corporates and was not investigating corruption in the US.

[336] Gutterman (n. 334) 408, noting: 'TI Germany played a key role in changing business attitudes and government policy towards foreign bribery.' See also, Pieth (n. 298), note 68: 'TI's intervention proved to be instrumental: it drafted a helpful letter signed by the [CEOs] of large international companies.'

The values-based rationale for the US initiative at the OECD to ban foreign bribery was reinforced with the support of major US firms and their lobby groups, such as the International Chamber of Commerce. The push for a multilateral agreement to ban foreign bribery was also supported by some international institutions—such as the World Bank and the International Monetary Fund—as they changed their approaches to dealing with corruption. Long regarded by the World Bank as a too-hot, 'political' issue—in which commercial bribery was also considered necessary to progress development projects efficiently, and to cut through 'red tape' and inefficient bureaucracies—these views were changing.[337] During this period, the World Bank joined other international institutions in adopting wide-ranging anti-corruption policies. James Wolfensohn, President of the World Bank, in a 1996 address to the Bank's Board of Governors, argued:

> [L]et's not mince words: we need to deal with the cancer of corruption. In country after country, it is the people who are demanding action on this issue. They know that corruption diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors. They also know that it erodes the constituency for aid programs and humanitarian relief. And we all know that it is a major barrier to sound and equitable development.[338]

Similarly, OECD Secretary General Donald Johnston argued at the time that the move to rid foreign bribery from international business was key to adapting the multilateral trading system to the globalised world economy. Foreign bribery, Johnston argued, undermined good governance, harmed economic efficiency and development, and distorted international trade.[339] However, the US strategy to embark on a values campaign to name-and-shame firms and governments in the OECD that did not support its proposal to

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[337] Abbott and Snidal (n. 144) S158. There was also a change of views in the academy about corrupt practices. Academic economists, many of whom had defended the alleged efficiency dividends to be gleaned from corruption and bribery in developing economies, had begun to extricate themselves from this position as more evidence emerged of the harmful effects of corruption, particularly in developing nations.

[338] James Wolfensohn, 'People and development: address to the Board of Governors', 1 October 1996, The World Bank.

[339] *International Trade Reporter*, 'OECD Agrees to Criminalize Bribery; US Averts Conflict With Other Members' (1997) 14:930; *International Trade Reporter*, 'Trade Policy: US, Europe at Loggerheads Over Talks to End Bribery in International Transactions' (1997) 14:1985.

criminalise foreign bribery proved insufficient on its own to defeat the interests-based considerations of some states.

Although these liberal tactics could not win the day of their own accord, they did pay dividends for the Americans insofar as many OECD member states accepted US proposals without resistance. Perhaps it was to be expected that the most resistant OECD member states were also host to the primary economic competitors to multinational US firms (i.e., France, Japan, Germany, and the UK). Framed by the theme of lifting other states' allegedly 'low morals' in this matter, the US had a hard time persuading some states of the wisdom of its proposed anti-bribery agreement. Abbott and Snidal note the US 'could not threaten to retaliate for inaction [of other countries] by relaxing its own legislation, since the "stickiness" of anticorruption values rendered that step politically infeasible.' [340] That is, the arguable pretence of values underpinning the domestic rationale for the FCPA had boxed the US in, thus hampering its ability to modify the Act without risking undesirable political repercussions at home.

Beyond continuing the long-standing and bipartisan strategic under-enforcement of the FCPA,[341] the US was left with few options but to resort to other tactics to obtain the agreement of these OECD member states to ban foreign bribery. For this task, the US layered onto its liberal values strategy a new rationale against foreign bribery that combined an economic argument with blunt pressure tactics against states that continued to resist the US. In the next section we consider the US shift to a liberal economic strategy in its efforts to persuade OECD member states to ratify an international agreement to ban foreign bribery.

2. Act II: the liberal economic strategy

The second limb to the US strategy to persuade OECD member states to criminalise foreign bribery was to highlight the economic loss it claimed US firms had suffered at the hands of non-US firms that engaged in foreign bribery. This conduct, the American delegation and its surrogates in the media argued, was tolerated by, connived in, and even

[340] Abbott and Snidal (n. 144) S162.

[341] See Brewster (n. 217).

incentivised by the policies and conduct of some OECD member states. For this front in its campaign to ban foreign bribery in OECD member states, the US deployed a liberal economic argument that centred on the notion of 'levelling the playing field' for US firms operating abroad.[342] Critically examining this strategy provides illuminating insights into the arguable core rationale of the US to push for a multilateral agreement to prohibit foreign bribery.

It is useful to start this analysis with President Clinton's signing statement to the 1998 amendment of the FCPA (enacted after the US ratified the Anti-Bribery Convention), which states, in part, why the US government pushed for this agreement:

> Since the enactment in 1977 of the Foreign Corrupt Practices Act, US businesses have faced criminal penalties if they engaged in business-related bribery of foreign public officials. Foreign competitors, however, did not have similar restrictions and could engage in this corrupt activity without fear of penalty. Moreover, some of our major trading partners have subsidized such activity by permitting tax deductions for bribes paid to foreign public officials. As a result, US companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at $30 billion per year. The OECD Convention—which represents the culmination of many years of sustained diplomatic effort—is designed to change all that.[343]

According to Clinton, the fundamental rationale to 'export' the US regime against foreign bribery to OECD member states was justified primarily on the economic policy grounds that such an agreement was needed to address claimed losses to US firms that were attributed to foreign bribery conduct by their international commercial rivals from OECD member states. The US argument for an international ban on foreign bribery also highlighted the fact that it had prohibited this conduct in 1977 with the enactment of the FCPA. Because of this longstanding prohibition, the US argued that its firms were disadvantaged by the conduct of their international rivals that continued to engage in

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[342] The seemingly neutral 'levelling the playing field' omits the fact the rules had been set by one state (the US), and the 'levelling' was simply the US insisting other states conform to US rules.

[343] William J. Clinton, Statement by the President (10 November 1998): <www.usdoj.gov/criminal/ fraud/fcpa/history/1998/amends/signing.htm>.

foreign bribery in their international business pursuits, while their American competitors were unable to do so, at least without risk of sanction.

US multinational firms and US-led international business lobby organisations also joined this diplomatic push.[344] Some in the American business community had apparently decided that foreign bribery was either too expensive or too risky, or could negatively affect the culture of their firms at home.[345] This change in attitude by some US firms and their lobby organisations betrayed a recognition that earlier efforts—by the business-friendly Reagan administration, Republican lawmakers, and US multinational firms and their lobbyists—to repeal or to weaken the FCPA were not successful. They now understood there was little likelihood of changing Congress' commitment to the FCPA.

There were also budding fears in the business community that the will to enforce the FCPA was gathering pace in the DOJ and the SEC, particularly with the new Clinton administration. While many had thus far considered the FCPA a 'dead letter', two important FCPA prosecutions did occur during this period, with large sanctions levied for the first time.[346] The outcomes of these cases may well have persuaded US firms that 'there was no way back from the FCPA'.[347]

At the OECD, and in the press, the US and its firms argued they were victims of international corruption, losing vast international business opportunities to their rival foreign competitors that continued to bribe foreign officials with impunity. The US and its proxies argued that its proposed multilateral ban on foreign bribery was necessary to 'level the playing field' in international commerce. This rationale, deceptively simple, remains widely accepted, yet rarely critiqued. For example, Nicola Bonucci, then OECD Counsel and Director for Legal Affairs, has written:

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[344] For example, General Electric and the International Chamber of Commerce.

[345] See Tarullo (n. 153) note 29; Abbott and Snidal (n. 144) S173.

[346] In 1992, GE settled with the DOJ and SEC, paying approximately $68 million, over foreign bribery and related conduct in relation to is corporate activities in Israel; see, *United States v General Electric Company*, 92-cr-00087, S.D. Ohio, 22 July 1992.

[347] See, e.g., Pieth (n. 298) 15-16.

> [T]he main reason for the multilateralization of the FCPA through the Anti-Bribery Convention and similar foreign bribery provisions in other treaties was not an ethical or moral one—it was because US companies felt, and rightly so, that they were in a competitive disadvantage vis-à-vis their main competitors![348]

US firms, so it was argued, operated under the 'unfair' burden of the FCPA, whereas their international competitors, particularly those from Western Europe and Japan, engaged in foreign bribery. OECD member states were the primary competitor exporting states to the US during this period and accounted for the majority percentage share of international business transactions globally. US officials alleged that rival firms from OECD member states (and elsewhere) were exploiting this 'unfair' advantage to the detriment of US business interests,[349] thereby harming the US economy.[350] For example, US officials later claimed that between May 1994 and April 1998, 239 international contracts totalling $108 billion were influenced by bribery payments.[351]

Signalling US resolve to stem the tide of this alleged unfair conduct, in 1996 US Secretary of Commerce Mickey Kantor stated:

> Let me give you some sense of what is really at stake here. Last year, the Commerce Department presented a report to Congress indicating that we had learned of 100 cases of foreign firms using bribery to undercut American firms' efforts to win international contracts worth about $45 billion since 1994. Already this year we have learned of about $20 billion in additional lost contracts. Bribery continues to be key in many export competitions, with companies offering illicit payments winning 80 percent of the decisions. Thankfully, American business leaders are not alone in being outraged by such goings-on. As bribery and corruption infect more and more business dealings and

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[348] Nicola Bonucci, 'The fight against foreign bribery and international law: an exception or a way forward?' (2013) *American Society of International Law, Proceedings –Anti-Corruption Initiatives in a Multipolar World* 250.

[349] Pieth, (n. 298) 12, note 18; Brademas and Heimann (n. 218).

[350] US General Accounting Office, *Report to Congress: Impact of Foreign Corrupt Practices Act On US Business,* 4 March 1981.

[351] Barbara George, Kathleen Lacey, and Jutta Birmele, 'The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions' (2000) 37(3) *American Business Law Journal* 485, 493.

> squander more and more resources, the worldwide business community has begun to give voice to its concerns.[352]

Similarly, in May 2001, the US Department of State released a report detailing the global extent of alleged foreign bribery by non-US firms, predominantly covering the period of negotiation of the Anti-Bribery Convention, stating:

> From early 1994 through early 2001, the United States Government learned of significant allegations of bribery by foreign firms in over 400 competitions for international contracts valued at $200 billion. The practice is global in scope, with firms from over 50 countries implicated in offering bribes for contracts in over 100 buyer countries during the seven-year period.[353]

This account was preceded by a well-placed editorial by R. James Woolsey, former director of the CIA, published in the *Wall Street Journal*. Entitled 'Why We Spy on our Allies', Woolsey demonstrates well the US perspective on foreign bribery:

> That's right, my continental friends, we have spied on you because you bribe. Your companies' products are often more costly, less technically advanced or both, than your American competitors'. As a result you bribe a lot. So complicit are your governments that in several European countries bribes still are tax-deductible.[354]

It is worth noting that the UK is left out of Woolsey's claims, presumably because the US had committed not to spy on this state under the Five Eyes joint intelligence sharing agreement, and not because UK firms did not engage in major foreign bribery.[355] Reinforcing Woolsey's sentiment, US officials repeatedly noted that many OECD member states incentivised their firms to engage in foreign bribery with their tax regimes that permitted bribe payments to be deducted as business expenses. Redeeming a portion

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[352] Kantor (n. 282); Paul Blustein, 'Kantor Weighs Sanctions to Fight Overseas Bribery', *Washington Post*, 7 March 1996.

[353] US Department of State, 'Fighting Global Corruption: Business Risk Management', May 2001, 'Corruption: Why It Matters'.

[354] See Woolsey (n. 28).

[355] Woolsey was drafted by the US State Department to pen this article as a response to an explosive report (the 'Campbell Report') presented to the European Parliament during this period that detailed revelations of widespread US spying and alleged economic espionage against several Western European states (including France and Germany). See Duncan Campbell, 'Report to the Director General for Research of the European Parliament on the development of surveillance technology and risk of abuse of economic information' (2000).

of one's bribes—usually passed through to the client through an inflated cost for service—was a clear financial incentive for firms contemplating bribery, and an arguable advantage for these firms relative to their US rivals.

Assessed critically, the argument for 'levelling the playing field' in international business with respect to banning foreign bribery implies accepting that US firms had ceased to engage in widespread foreign bribery, while their international rivals had not. While evidence of continued foreign bribery by firms from Europe and Japan during this period is not in dispute (it remained legal in these jurisdictions), and the continued tax deductibility of these payments in many states supports this assumption, there is no credible evidence that US firms had cleaned up their act and strictly complied with the FCPA. There is, however, evidence to indicate the contrary, as some US firms continued to engage in foreign bribery, with evidence of recidivism among large US firms.

The 'levelling the playing field' argument, also assumes that international competitors to US firms were winning business through foreign bribery that US firms otherwise may have won. Alas, in the shuttered world of international business, bribery, and public officials, information to corroborate this argument is not available. However, it would be folly to dismiss the potential for bribe payments to be decisive, particularly in jurisdictions dominated by corrupt senior officials, and in those sectors with a long history of illicit payments to government officials (e.g., defence, extractives, aerospace).

Finally, the 'levelling the playing field' argument assumes US firms were operating under a perceived or real threat of prosecution in the US if they were to violate the FCPA. Given the dearth of enforcement of the FCPA for its first 20 years that was considered above, this assumption lacks credibility. Sophisticated US firms, which had lobbied intensively for the repeal or reform of the FCPA in the 1980s, knew there was little prosecutorial appetite and few organisational resources at the DOJ or the SEC dedicated to FCPA enforcement during this period. Moreover, continued disclosures of major foreign bribery by US firms since the ratification of the Anti-Bribery Convention undermines the assumption that US firms' compliance with the FCPA was strong during the period of almost nil enforcement, which has since reversed during an era of more robust US enforcement of the FCPA.

While there are good reasons to be sceptical of the assumptions underlying these arguments put by the US to justify its call to 'level the playing field', entailing a good deal of speculation, there is clear evidence that foreign bribery remained a powerful tool for non-US firms seeking to conclude significant international business deals during this period. With the proviso considering his position as a US government official and his responsibilities at the time, Tarullo reveals a common US perspective on these matters:

> In 1994, one European official told me with disarming candor that his country's companies needed a competitive edge over their more efficient US competitors.[356]

Of course, this reported comment is self-serving of the US position. Nonetheless, it is arguable that non-US firms, unconstrained by laws against foreign bribery, and with many able to tax deduct such expenses, may have enjoyed a competitive edge against their American rivals by paying bribes. At minimum, US firms had been unable to deduct bribe payments as business expenses for tax purposes for many years. We can thus assume some relative disadvantage in this respect.

Nonetheless, the persuasive power of the Americans' economic argument to aid US firms it claimed were disadvantaged vis-à-vis their international rivals presented little justificatory force for OECD member states to ban foreign bribery.[357] US claims of liberal values and economic arguments to 'level the playing field' for US firms could not overcome resistance from states with strong, interest-based considerations to maintain the *status quo* (including France and the UK).

When the liberal strategy of 'levelling the playing field' did not achieve its goals, the US simply adopted new strategies and tactics to get what it wanted. This time, however, they were clearly based on realist principles. In other words, when the liberal tenets of shared values, multilateralism, and economic co-operation failed to get the job done for the US, it resorted to 'power politics' to achieve its policy objectives.

In this next section, we examine how the US mobilised interest-based considerations to persuade its partners in the OECD to agree to ban foreign bribery and ratify the Anti-

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[356] Tarullo (n. 153) 674, note 26. This is echoed by Woolsey, accusing European firms of making up for their purported competitive deficiencies with foreign bribery: see Woolsey (n. 28).

[357] Abbott and Snidal (n. 144).

Bribery Convention. Relying on economic coercion and power politics to extract these states' co-operation, this US conduct reveals the bad seeds of the US campaign against foreign bribery that arguably portends its failure.

3. Act III: the realpolitik strategy

Layered onto the liberal rationales to ban foreign bribery for good moral reasons and to 'level the playing field' for US firms was a largely unspoken strategy that drew heavily from the well of realist principles of international politics. When the values-shaming and liberal economic arguments failed to achieve compliance, the US resorted to the blunt third limb of its strategy: coercion. While the dominant narrative of the US was relative gains to be made by all in pursuit of a multilateral prohibition of foreign bribery, it was zero-sum economic interests and the logic of consequences that arguably provided the principal motivations for the US to pursue this policy ambition so doggedly.[358]

Although the US publicly justified its push for an international agreement to ban foreign bribery on the liberal grounds detailed above, it is argued that the core rationale of the campaign was conceived of and championed by the US to advance its foreign economic policy detailed in Act II and here in Act III.[359] In other words, the US dressed its campaign against foreign bribery in liberal clothing as it sought to further its realist national interests. US measures to internationalise the FCPA through the Anti-Bribery Convention were part of a strategy, as Gutterman argues, 'to level the playing field for US-based multinationals by enforcing a standard set of U.S.-led global regulatory rules, rather than a credible or efficacious policy of anti-corruption'.[360]

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[358] Under the logic of consequences, actors behave strategically to achieve their objectives, whereas under the logic of appropriateness actors' behaviour is biased toward social norms deemed 'right'.

[359] Foreign economic policy is integral to any successful foreign policy and involves the management of international economic flows. See Alfred Eckes and Thomas Zeiler, *Globalization and the American Century* (Cambridge University Press, 2003).

[360] Ellen Gutterman, 'Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act and its impact on the global governance of corruption' (2018) 18(2) *European Political Science* 205.

Similarly, the US campaign against foreign bribery is, it is argued, an instrument of US foreign economic policy,[361] in which this state advocated for the criminalisation of this conduct to achieve its self-serving economic interests. If the US had argued at the OECD that other states should prohibit foreign bribery simply because the US had done so, one may expect an unsympathetic response from its partner states. Officials from OECD member states—each with their unique interests, trade strategies, foreign policies, and international relations priorities—would be expected to look on in bemusement at such a request.

Moreover, if the US had argued that other states should prohibit foreign bribery because of purported risks to their foreign policy posed by such conduct, states would likely have been unconvinced of such a need given that they had not experienced the foreign bribery blowback like that which had so imperilled US foreign policy in the 1970s. Other states, of course, are not immune to such problems if their firms or citizens engage in similar conduct. France and the UK, for example, have suffered blowback from the bribery conduct of their firms and citizens abroad.[362] However, the effects of these scandals were limited primarily to these states' domestic affairs, doing little discernible harm to their respective foreign policies and international relations.

Recall that the foreign bribery 'problem' as presented here—i.e., the effects and repercussions to the bribe paying firms' host states—was arguably a uniquely American problem provoked by this state's firms' bribery abroad, which came into conflict with countervailing US foreign policy interests. Officials from OECD member states surely understood this history and given the relative lack of enthusiasm for prohibiting foreign

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[361] The US Department of State defines economic diplomacy as: 'harnessing global economic forces to advance America's foreign policy and employing the tools of foreign policy to shore up our economic strength'.

[362] See, e.g., the UK *BAE Al-Yamamah* arms deal scandal; in France, the *Karachi Affair*, the *Taiwan Frigates scandal*, and the *Agosta Affair*, each of which involved French defence firms and allegations of major foreign bribery. See also, the General Stehlin affair: a covert adviser to US defence firm Northrop Grumman, French General Stehlin was killed by a bus on 6 June 1975, mere hours after his name was disclosed in US Senate subcommittee investigations into Northrop. See, 'Gen. Paul Stehlin of France, Dies', *New York Times*, 23 June 1975.

bribery in the intervening years, they evidently cared little to follow the US down this path.

From here, we can see a certain order to the strategy that the US adopted in its campaign against foreign bribery: first, present the problem as a values-driven one, so as to apply normative pressure to shame and paint as corrupt actors those states that did not agree to US policies; second, because the US had already enacted, and remained committed to, the FCPA, even though it had almost never enforced this law, it repackaged the problem as one of fair commercial competition; third, and finally, rely on superior US economic power, threats and linkage diplomacy to compel those states that had not yet understood the lengths to which the US was willing to go to get its way in this matter.

When the liberal values and economic liberalism strategies of the US were exhausted or unpersuasive against several key states, and a multilateral agreement to prohibit foreign bribery remained elusive, the US simply increased the pressure on uncooperative states by adopting a decidedly *realpolitik* approach to the negotiations at the OECD. The tactics the US used against these states were underpinned by coercive diplomatic and political measures, including open threats of unilateral sanctions and tariffs,[363] exposure of alleged state or officials' involvement in domestic corruption, and a concerted 'name and shame' campaign calculated to harm the reputation of senior elected officials in these states.

Why did US officials choose to exercise this 'interest-based leverage'[364] in the face of resistance by some OECD member states to ban foreign bribery on US terms? It is argued that the US initial values strategy, while an effective tool to increase political pressure on officials in the targeted states, was simply a means to an end, and that end was founded in interest-based considerations (i.e., US economic interests). As it was argued that the FCPA was enacted on foreign policy grounds—not moral grounds—it is also argued that the US campaign against foreign bribery is based on this state's realist foreign economic policy interests. As the US pursued its self-serving foreign policy interests in enacting the

[363] Blustein (n. 352).

[364] Abbott and Snidal (n. 144) S162.

FCPA, it also pursued its self-serving economic interests in championing a multilateral prohibition of foreign bribery at the OECD.[365]

In sum, the US used its unrivalled power and influence to persuade and to coerce resistant states to comply with US international economic policy objectives. If this reading is accurate, it suggests the OECD member states that had no desire to ban foreign bribery adopted the Convention and prohibited foreign bribery in response to the coercive conduct and pressure of the US, which was then the sole superpower at its economic, diplomatic and military apex. In fleshing this argument out, we examine more closely what form this shift in tactics—from liberal values and liberal economic arguments to *realpolitik* conduct—would take.

With this shift in strategies, the US resorted to aggressive tactics that were roundly perceived (outside the US, that is) as coercive, even imperious.[366] An instructive example of the coercive approach adopted by the US is recalled by Spahn, who notes that the senior US negotiator at the OECD, Daniel Tarullo:

> carried a list of the ten largest bribe-paying companies in the world in his jacket pocket; when European negotiators resisted, he would tap his jacket pocket, threatening to release the list to the press.[367]

The none-too-subtle threat by this reported conduct was that Tarullo would make this alleged information public should certain country representatives—aimed squarely at France given this state's open resistance to US proposals at this stage—not come to heel and accept the will of the US. Abbott and Snidal, commenting on Tarullo's reported strong-arm tactics, note 'many Europeans saw these tactics as diplomatically inappropriate and bullying.'[368] Given many of the largest firms in France at the time were either state-owned or had significant state participation (such as defence firms DCN and

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[365] Similarly, see Gutterman (n. 360) (arguing that US measures against foreign bribery 'reflects US interests and not those of the millions of people around the world who are in desperate need of credible and effective strategies to curb the damage of complex corruption problems').

[366] Abbott and Snidal (n. 144) S164.

[367] Spahn (n. 34) 11; Abbott and Snidal (n. 144) S164.

[368] Abbott and Snidal (n. 144) S164.

Thomson-CNF), these threats were not perceived in France as simply hard-nosed American business tactics. In fact, they were deeply resented, and considered crude, coercive measures against France and its national champions.

To understand the full import of these threats by US negotiators, it is noted that several political corruption and campaign finance-related scandals had been churning through western Europe at this time. In France, the Elf-Aquitaine political corruption scandal[369] had reached the highest levels of government and had crossed into Germany to implicate Chancellor Helmut Kohl and other senior officials.[370] Chancellor Kohl was also embroiled in arguably the largest corruption affair in post-war German history in relation to a defence deal with Saudi Arabia.[371]

In Italy, the effects of the *mani pulite* ('clean hands') political corruption scandal were still fresh, in which thousands of people were suspected of public corruption, including many dozens of members of the Italian Parliament and hundreds of prominent Italian business figures.[372] In the UK, too, a 'cash for questions' scandal, involving the alleged bribery of parliamentarians, was in full swing.[373] In Belgium, judicial investigations into the Agosta-Dassault bribery scandal were well underway, later leading to the forced resignation of NATO Secretary General Willy Claes.[374]

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[369] Eva Joly, *Justice Under Siege: One Woman's Battle Against a European Oil Company* (Arcadia, 2006).

[370] Karl Laske, 'Un été 98. A suivre: l'affaire Elf (10)', *Liberation*, 23 July 1998; Craig Whitney, 'A Seamy French Tale of Sex, Politics and an Oil Company's Lost Millions', *New York Times*, 11 February 1999; John Heilbrunn, 'Oil and Water? Elite Politicians and Corruption in France' (2005) 37(3) *Comparative Politics* 277.

[371] Roger Cohen, 'Kohl Resigns German Party Post After He Is Rebuked for Scandal', *New York Times*, 19 January 2000.

[372] Mattia Feltri, *Novantatré. L'anno del terrore di Mani pulite* (Marsilio, 2016); Melinda Henneberger, '10 Years After Bribery Scandal, Italy Still Counts the Cost', *New York Times*, 24 February 2002.

[373] David Hencke, 'Tory MPs were paid to plant questions says Harrods chief', *The Guardian*, 20 October 1994.

[374] Craig Whitney, 'Belgium Convicts 12 for Corruption on Military Contracts', *New York Times*, 24 December 1998.

Unfortunately for these European states, the utility of instrumentalising these domestic political corruption scandals to advance the US policy priority at the OECD was not lost on the Americans. Instructively, Tarullo recalls:

> Attention to overseas bribery might further have complicated efforts to contain the harm from domestic bribery scandals that were at that time commanding such media and public attention. US officials thus learned that they were, unwittingly at first, affecting the domestic political situation in France, Germany, Britain, and other countries that had resisted international obligations to limit overseas bribery. Having learned of this effect, they added a new move to their tactical repertoire.[375]

Whether one judges credible Tarullo's recollection that these measures were done by the US 'unwittingly at first' is immaterial. What Tarullo makes clear is that the US decided to leverage these events in European domestic affairs to put pressure on those states it deemed resistant to US proposals to criminalise foreign bribery. Tellingly, Tarullo notes:

> Thus, in a turn of events that seems very far from today's world, efforts of the United States to exercise its power in pursuit of an international arrangement elicited a favorable reaction from European publics and, in accordance with liberal explanations for international behavior, helped shift the positions taken by European governments which, until that point, had been recalcitrant.[376]

Reinforcing this account, Abbott and Snidal argue 'Tarullo and his successors at the State Department continued their values-based "outside" tactics until the convention was adopted, while on the "inside" they negotiated hard over the mechanics of criminalization' of foreign bribery.[377] In other words, the rhetoric of liberal values and the force of realism (via interest-based tactics) were combined to serve the US foreign economic policy to internationalise the prohibition of foreign bribery.[378]

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[375] Tarullo (n. 153) 678-679 (footnote omitted).

[376] Ibid 679.

[377] Abbott and Snidal (n. 144) S165.

[378] Mark Pieth, the former Chair of the OECD Working Group on Bribery, alludes to these tactics (by unnamed states) during the negotiations in 'Taking Stock: Making the OECD Initiative Against Corruption Work', 13 October 2000, Working Group on Probity and Public Ethics of the Committee on Juridical and Political Affairs, Permanent Council of the Organization of American

Writing about the catalysts for anti-bribery reform during this period, Professor Mark Pieth considers that the 'harsh political pressure by the US' made it possible to adopt the 1997 Recommendation and the Anti-Bribery Convention.[379] In this context, the experiences of two states that resisted US efforts to impose its internationalisation of the FCPA at the OECD—France and the UK—tell different stories about their abilities to resist, to adapt, and to respond to US pressure and its campaign against foreign bribery.

It is argued here that France was pressured, indeed coerced, by the US to adopt the Anti-Bribery Convention, and therefore to implement domestic laws to ban foreign bribery. To advance this argument, we return to the negotiations of the Convention. For many in business and government in France, the US anti-bribery initiative was viewed as a self-interested economic measure, cloaked in moralism, for which US firms would benefit and French (and other European) firms would suffer.[380]

Arguably more than any other state, it was France that was targeted for the full suite of threats, coercion, and upbraiding by US officials in their efforts to obtain its submission. Far from accepting the moral posture of the US to ban foreign bribery, or its economic argument to 'level the playing field', many in France eyed the US campaign with deep suspicion and perceived it as a mercantilist policy intended to restore flagging US exports at the expense of their international rivals, including France.[381] Others also perceived it as unwelcome American meddling in the international affairs of sovereign states.[382]

States: 'Of course there is power play involved and sometimes things can get rough, especially when countries use the media to support their point in a crucial negotiation phase'.

[379] Mark Pieth, 'International Efforts to Combat Corruption', International Anti-Corruption Conference, 10 October 1999, South Africa (arguing that major trading partners realised collective action against corruption was in their common interest).

[380] Vincent Nouzille, 'Contrats: comment faire sans pots-de-vin…', *L'Express*, 25 February 1999.

[381] See Gutterman (n. 334), 417 (noting France and Germany opposed a multilateral approach to addressing foreign bribery).

[382] Jean Guisnel, 'Corruption, entre pratiques et condamnation' (2010/1) 52 *Géoéconomie* 23: '[L]es pays européens, dont la France, n'ont pas eu leur mot à dire dans la rédaction de ce texte qu'ils se sont fait imposer par la puissance américaine'. [European countries, including France, did not have a say in the writing of this text that was imposed by American power].

French officials were also reluctant to support the US-proposed ban on foreign bribery after influential French firms, particularly from the defence sector and the employers' organisation CNPF,[383] argued that bribery of foreign officials acted as 'a counterweight to political pressure often applied by high-level US officials in public procurement processes.'[384] In other words, heavy diplomacy by US officials to persuade foreign officials to choose American firms—for example, in South Korea or on the Arabian Peninsula—over a French firm for a major contract could potentially be mitigated by paying bribes.

If bribes were not paid, so it was argued, it would be impossible for French firms to enter some markets, let alone compete against US firms that benefit from the outsized diplomatic influence of the US State Department and other levers of US power abroad. Frank Vogl, for example, recalls a discussion with a senior French official who argued that in the defence sector:

> the French were forced to use bribes to compete with the major American companies, which received huge subsidies from the Pentagon and the US Export-Import Bank and enjoyed the unique advantage of—in the case of major deals—having the US president pick up the telephone to major foreign leaders and encourage them to buy American.[385]

If this were true, one could see how competitors to the US, such as France, perceived not a levelling of the playing field with the proposed ban on foreign bribery, but a tilting of the playing field in the interests of US firms.[386] Similarly, some argued that US firms would be the principle beneficiaries of the internationalisation of the FCPA as a result of

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[383] The *Conseil national du patronat français* (CNPF) was France's leading employers' organisation and is the predecessor to the current *Mouvement des entreprises de France* ('MEDEF').

[384] See, 'Trade Policy: US, Europe at Loggerheads' (n. 339).

[385] Frank Vogl, *Waging war on corruption* (Rowman & Littlefield, 2016) 181 (reporting discussions with diplomats and executives who argued bribery was necessary to compete against US firms that benefit from the 'huge power of the White House and US embassies around the world to twist the arms of host governments to buy American').

[386] Ibid.

their ‘head start’ over the past 20 years in crafting novel ways to continue to engage in foreign bribery. Jean Guisnel has argued:

> De l'avis unanime des praticiens du commerce international que nous avons consultés, cette règlementation (le FCPA) est bafouée en permanence par les plus grandes entreprises américaines, qui utilisent divers artifices pour s'y soustraire. En faisant payer les pots-de-vin par des filiales de droit étranger, située dans des pays n'appartenant pas à l'OCDE, après passage des fonds par des sociétés écrans spécialisées, immatriculées dans de paradis fiscaux.[387]

Today, some (usually Western Europeans) quietly argue that undue pressure by powerful states (a critique often aimed at the US) is wielded against weaker client governments effectively to close certain markets to international competition. If true, this may leave these firms with little option but to exit the market altogether, or resort to the bribery of foreign officials to overcome these perceived barriers to entry. States in Latin America, Asia, and the Arabian Peninsula, for example, have long been portrayed as the exclusive ‘preserve’ of the US and its multinational firms in matters of major international business, particularly as it relates to the procurement of defence materiel.

France, for example, has been disappointed more than a few times when its defence firms have attempted to enter these markets, only to be rebuffed late in the tender process after perceived meddling by senior US officials. Similarly, Francophonie Africa has been depicted as the *chasse gardée*[388] of Paris and its national champions, particularly in respect of strategic trade sectors, such as defence materiel and petroleum concessions. While the hard edge of colonial France, an imperial Britain, and an expansionary US may

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[387] Jean Guisnel, *Les pires amis du monde. Les relations franco-américaines à la fin du XXe siècle* (Stock, 1999) 275. [In the unanimous opinion of the international trade practitioners we consulted, this law (the FCPA) is permanently flouted by the largest American companies, who use various devices to evade it. Paying bribes through foreign affiliates located in non-OECD countries after funds have been transferred by specialised companies registered in tax havens]. See also *Intelligence Online*, ‘Le Monde du renseignement’, 11 November 1999: ‘Firmes américaine ont développé au cours des vingt dernières années un véritable savoir-faire pour extraire du cash et rémunérer les intermédiaires plus discrètement que dans les autres pays’. [American firms in the last 20 years have developed real know-how to extract cash and to pay intermediaries more discreetly than other countries].

[388] In English, ‘private hunting grounds’.

have faded after post-WWII de-colonisation, 'spheres of influence' clearly persist in respect of strategic trade and investment in certain parts of the world.

With these sceptical perspectives about the motivations of the US in its campaign against foreign bribery, French officials and the French international business community were, to put it mildly, unenthusiastic about US proposals at the OECD. Privately, there was real concern that French firms would be weakened by any move to criminalise foreign bribery. During the negotiations at the OECD, the French negotiating team was repeatedly hobbled by inconvenient allegations in the press of 'corrupt' or other illicit practices by French firms and alleged claims of French government connivance in this conduct. These allegations were amplified by saturated press coverage in the US and elsewhere.[389] Insider details of the negotiations of the Convention were also leaked to the media, often coupled with claims of 'unethical' business practices by French firms and resistance of senior French officials to ban foreign bribery.

As argued above, a major part of the US strategy at the OECD involved a concerted 'shaming' campaign of public diplomacy through US surrogates and the media. Deftly executed against France, this information campaign sought to link what the US perceived as France's obstruction of its proposal to ban foreign bribery with the French government's alleged connivance in domestic corruption and other illicit or potentially embarrassing practices.[390] During these negotiations, US officials excoriated France and its multinational firms as seasoned practitioners of foreign bribery. When it resisted US proposals at the OECD, France was branded a recalcitrant offender seeking only to delay and to dilute any potential multilateral agreement to ban foreign bribery.

As noted above, US public diplomacy campaign coincided with serious domestic political corruption matters churning across the European Union (including in France), which threatened to upend governments and ruin the careers of senior public servants, politicians, and leading businessmen. Gadbaw and Richards note that the French 'could not appear soft on corruption at a time when politically charged scandals were playing out in Italy and Germany and notorious corruption scandals involving French parties were

[389] See Edmondson (n. 318).

[390] Heilbrunn (n. 370); Lascoumes (n. 6).

starting to break.'[391] The US did not shy from exploiting these domestic political scandals to their advantage in the negotiation of the Anti-Bribery Convention.

The untimely emergence of some of these scandals was not viewed by French officials and the elite business community as simple coincidence. Allegations swirled that the US and its proxies were influencing the heavy publication of these matters in the media. These suspicions, it would seem, are confirmed by Tarullo's admission that the US used the media in a public diplomacy campaign to 'affect the domestic political situation in France' in response to this state's perceived recalcitrance.[392] Charitably interpreted, the US capitalised on, and amplified, domestic political matters in France (and elsewhere in Europe) by providing information to the media that was unfavourable to the government to force it to agree to the US anti-bribery initiative at the OECD.

From these states' perspectives, the US had meddled in the domestic political affairs of some of its most enduring allies in pursuit of its international policy objectives. While some may find this conduct highly inappropriate and undiplomatic, others may consider it justified in the circumstances. The point here is not to condemn or to applaud US conduct in this matter; rather, the negotiating history of the Anti-Bribery Convention is drawn out to demonstrate the lengths to which the US would go to obtain the reluctant assent of its chief OECD economic rivals to ban foreign bribery in international business. In arguing that the US campaign against foreign bribery is bound to fail, it is essential not to overlook or to dismiss the terms on which its primary international instrument—the Anti-Bribery Convention—was settled, and in which Parties' international obligations are engaged.

History is littered with the remnants of international agreements made under duress, coercion, or existential threat. The so-called 'unequal treaties' in 19th and 20th Century China—but also in Korea, Japan, and Vietnam—with Western powers are exemplars of the 'gunboat diplomacy' that characterised this era.[393] Although the strategies and tactics the US used against France did not reach this level of strong-arming, the pressure was

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[391] Gadbaw and Richards (n. 295) 228.

[392] Tarullo (n. 153) 678-679.

[393] Pär Kristtofer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford University Press, 2012).

tangible, the threats were real, and the interference in their internal affairs posed clear risks to this state's national interests.

Beyond the US's coercive diplomacy to counter France's resistance to its campaign at the OECD, US officials also ramped up the pressure with veiled and overt threats of sanctions against OECD states that impeded its proposals to ban foreign bribery. During one fractious period of negotiations, US officials threatened to impose unilateral trade tariffs against France, and other OECD states, if they continued to defy US anti-bribery proposals at the OECD.[394] These threats were amplified when, in 1996, Senator Arlen Specter sponsored the 'Fair Trade Practices Bill' ('FTP'). The FTP was sweeping in its scope and threatened severe consequences for states that continued to tolerate foreign bribery, and for foreign firms that continued to engage in it. The FTP, for example, empowered the US president with authority to impose punitive sanctions against states identified as 'not making a good faith effort to enact or enforce'[395] laws against foreign bribery.

The FTP would also permit the US to sanction foreign firms or persons deemed in violation of the FCPA where 'such conduct has placed a United States concern at a competitive disadvantage'.[396] The FTP provided for severe penalties against states for violating its provisions, including reductions in foreign aid or multilateral development bank assistance, and firms were threatened with total exclusion from US government procurement or put at risk of losing their licence to do business in the US.[397]

The FTP, although never enacted, sent a powerful message to states that were hesitant to adopt US policies against foreign bribery: even if they were successful in thwarting the US agenda at the OECD, there were other measures the US would take to pursue its

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[394] See Kantor (n. 282).

[395] JJ Norton and George Walker, (eds.), *Banks: Fraud and Crime* (Lloyds of London Press, 2000), 372 (citing the FTPA Bill).

[396] FTPA Bill, s.2(b)2(a), (b); s. 3(a)(1).

[397] FTPA Bill, s. 3(b)(1)(A), (B).

foreign economic policy in matters of foreign bribery.[398] Although US efforts to pressure France were ultimately effective in extracting an agreement to ratify the Anti-Bribery Convention and to criminalise foreign bribery, France was not alone in its resistance to US proposals at the OECD, which included Germany, the UK and Japan, among others.

United Kingdom officials also resisted US proposals to criminalise foreign bribery.[399] Gutterman notes a report stating that 'contrary to the UK government's position that it had "played a leading role in the negotiations" leading up to the Convention, Britain had in fact been a relatively passive participant.'[400] Like France, the UK was concerned primarily with the perceived economic impact that the US proposals would have on its sizable export industries, including its large and highly subsidised defence sector. The UK also understood that by following the professed economic aim of the US in this matter—'to level the playing field'—their firms would risk losing the powerful tool of foreign bribery in their international business pursuits. The UK thus lobbied for a period of internal review of the issue, followed up by actions deemed necessary by the individual governments. In other words, business as usual.[401]

Although the ratification of the Anti-Bribery Convention was widely perceived in the US as a triumph for American diplomacy and foreign economic policy, it is argued that US conduct in this matter has provided the essential ingredients for the failure of its campaign against foreign bribery. With this history of coercion, intimidation, pressure, and high-level threats, coupled with a wide-ranging public diplomacy front crafted to 'name and shame' states that resisted US policy proposals to ban foreign bribery, this campaign's failure was arguably baked in from its inception.

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[398] Kantor (n. 282): '[W]e have not hesitated to rely on American trade laws to head off unfair practices; on bribery and corruption we will put into use the available tools that will strengthen our hand.'

[399] Rob Evans and David Hencke, 'Parliament "Misled" over UK Efforts to End Bribery', *The Guardian*, 24 April 2000 (noting US officials argued 'there had been no sign of strong, active UK support for the convention').

[400] Gutterman (n. 145) 217.

[401] Rosie Waterhouse, 'Britain Spurns US Over Bribes', *The Independent*, 3 April 1994 (noting: 'An appeal by a senior United States official for Britain to adopt measures to prevent companies paying bribes to obtain contracts overseas has failed to change the Government's stance'.)

The use of these interest-based tactics to defeat the will of these states to resist US proposals arguably crystallized the rationales of these states to ratify the Anti-Bribery Convention, now firmly rooted in pressure and force applied by an external power (the US). Whereas the US adopted the FCPA to prevent its multinational firms from causing further foreign policy problems for the US government, these OECD member states adopted the Convention, and later their respective laws against foreign bribery, simply because the US had imposed it on them.

For the US, this was its 'unipolar moment', during the apogee of its economic, military, and political power. Behind the scenes, the US took off its liberal gloves of purported shared values to flex its realist muscles against its allies and partners in the OECD in a striking show of power politics, threats, and economic coercion. States foolish enough to resist the 'benign hegemony' of the US in this matter, as we have seen, were quickly shown the stick of *realpolitik*.

US foreign policy and coercion

Coercive conduct is part and parcel of the US pursuit of its foreign and economic policies, including against its traditional allies. Examples abound. In 2018, after the US withdrew from the 2015 multilateral Iran nuclear agreement, the Joint Comprehensive Plan of Action (JCPOA), a US sanctions regime against Iran snapped back into effect that same year. As is the norm in the US, sanctions under the relevant law—the *Countering America's Adversaries Through Sanctions Act 2017*—apply not only to US firms. And like the FCPA, the jurisdiction of this law is broad and has express extraterritorial effect.[402]

This unilateral decision by the US meant that many large European firms, among others, have either ceased their operations in Iran or exited the US market. None would run the risk of being made an example of by the US justice system and its punishing system of 'secondary sanctions'. Even though the JCPOA remained in effect between Iran, the European Union and several other states signatories to the agreement, these governments were near powerless in the face of this coercive US foreign policy. Due to their US

[402] H.R. 3364, Pub. L. 115–44.

business exposure, many international firms doing business in Iran had no effective choice but to comply with US foreign policy, law and its directives.[403] Bruno le Maire, France's Minister of the Economy and Finance, expressed his frustration with US threats to European firms who do business with Iran and other states, such as Russia:

> Voulons-nous, nous Européens, être des vassaux qui obéissent le doigt sur la couture du pantalon aux Etats-Unis et les laissent être les gendarmes économiques de la planète ?[404]

Calling for an EU-wide response to these coercive actions of the US, le Maire intimated fundamental changes in policy are needed, both within the EU and France, to deal effectively with the US on these matters:

> Ce qui est à la hauteur des enjeux serait que l'Europe soit capable elle-même de définir ses propres intérêts commerciaux, de dire ce qui est acceptable et ce qui ne l'est pas…[405]

France's foreign minister, Jean-Yves Le Drian, also argued forcefully:

> Nous disons aux Américains que les mesures de sanction qu'ils vont prendre les concernent, eux. Mais nous considérons que l'extraterritorialité de leurs mesures de sanctions est inacceptable.[406]

French firms are not the only ones to suffer the burden of US foreign and economic policy initiatives. American pressure on German firms operating in Iran was also significant. It has been reported, for example, that Iran-owned entities in Germany had their telephone and internet services disconnected because of the legal peril to Deutsche Telekom's via its exposure to the US market through its US-based subsidiary, T-Mobile.[407] In an

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[403] Several French firms with major investments in Iran, including Total, PSA, and Renault, left Iran under threat of US prosecution.

[404] [Do we Europeans want to be vassals who obey the US with a curtsy and a bow and let them be the policemen of the world economy?].

[405] Michel Cabirol, 'Extraterritorialité des lois américaines : la France veut un système similaire à celui des États-Unis', *La Tribune*, 18 October 2017. [What is at stake is for Europe to be able to define its own commercial interests, to say what is acceptable and what is not].

[406] Ava Djamshidi, 'Le Drian : "Nous condamnons toute tentative de porter atteinte à la sécurité d'Israël" ', *Le Parisien*, 10 May 2018. [We're telling the Americans that it's their business what sanctions they impose, but we consider the extraterritoriality of these measures unacceptable].

[407] Griff Witte and Erin Cunningham, 'While EU tries to bypass US sanctions on Iran, Trump administration amps up pressure', *Washington Post*, 3 February 2019.

undiplomatic display of American power, US ambassador to Germany, Richard Grenell, stated: 'German companies doing business in Iran should wind down operations immediately.'[408] In the US embassy in Berlin, the use of economic coercion against states like France and Germany to further US foreign policy were described triumphantly as the 'maximum economic pressure campaign'.[409]

There are other contemporary examples of the US resorting to interest-based leverage to achieve its foreign and economic policy objectives against the interests of its European partners. With the stated aim of reducing European reliance on natural gas from Russia, in December 2019 the US passed the *Protecting Europe's Energy Security Act* ('PEES Act') (incorporated as Section 7501 of the *National Defence Authorization Act 2020*). The PEES Act is aimed at stopping the completion of an undersea natural gas pipeline, called Nord Stream 2, that extends from Russia to Germany. The PEES Act requires the US State Department to identify any vessel involved in pipe-laying at depths of 100 feet or more below sea level for the construction of Nord Stream 2. It also requires the State Department to identify any non-US persons involved in business or transactions related to the construction or supply of such vessels.

Almost immediately, just as Nord Stream 2 neared its completion, Swiss-Dutch pipeline vessel *Allseas* abruptly abandoned the project, citing the new US sanctions risk. Considering the PEES Act authorises the US to freeze the property of all persons identified by the State Department, and the prohibition of entry into the US of 'corporate officers' of persons designated under the Act, few firms could overcome this threat. The US, willing and able to punish its allies and their firms for defying US foreign policy, then upped the ante as Russia's Gazprom made available one of its pipe-laying vessels to complete the final leg of the pipeline. In response, US lawmakers proposed a law to sanction any party involved in insuring vessels on the project or providing services to these vessels.[410]

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[408] Ibid.

[409] Ibid.

[410] Timothy Gardner and Patricia Zengerle, 'Senators Seek to Expand U.S. Sanctions to Insurance for Russia-Europe Pipeline' (2020), *Insurance Journal*, 4 June.

For European states financing and supporting this project, the economic coercion by the US is considered outright hostile. The German Minister for Economic Affairs Energy, for example, Peter Altmaier, stated: '[I]t is not right [for the US] to keep escalating this sanctions threat, which is extraterritorial and thus in conflict with international law.'[411] These states also see selfish economic motives at play given US goals to expand its liquified natural gas exports in western Europe.[412] The affected states understand clearly that the US will continue to use coercive, interest-based tactics to achieve its foreign and economic policy objectives, even at the expense of its allies' national interests. Indeed, the US arguably used the same approach to advance its campaign against foreign bribery.

Before we transition to consider the development and implementation of France and UK laws against foreign bribery, and examine several foreign bribery case studies, a brief overview of the Anti-Bribery Convention and its mechanics is provided. This section details the general scope and contents of the Convention and fleshes out signatory states' obligations. Illustrating some important limitations of the agreement, it also considers the 'enforcement' mechanisms of the Convention.

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[411] Ibid.

[412] Similarly, the seven-decade US embargo and sanctions regime against Cuba has long been opposed by the EU as extraterritorial overreach by the US, and unduly punitive of non-US firms wishing to invest in or do business with Cuba. The 2014 $8.9 billion settlement of French bank BNP-Paribas related, in part, to this firm's violations of US sanctions against Cuba. See DOJ, press release, 'BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions', 30 June 2014.

B. ANTI-BRIBERY CONVENTION: AN OUTLINE

The Anti-Bribery Convention is the first and only international anti-corruption instrument focused solely on the supply-side of foreign bribery of public officials in international business transactions.[413] In the interests of clarity about the international legal responsibilities of Parties to the Convention, this section considers the agreement's principal obligations, scope and jurisdictional matters, and Parties' sanction and enforcement obligations.

Principal obligations, scope, and jurisdiction

The Preamble to the Anti-Bribery Convention is a natural place to begin:

> Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.

This statement situates the high-level rationales for the Convention as centred on the moral and political concerns of foreign bribery, and the arguable economic, governance, and competition-related impacts of this conduct. However, this broad agreement is belied by a closer examination of the fraught negotiations of the Convention, primarily vis-à-vis the US and several Western European states and Japan.

Entering into force on 15 February 1999, the Anti-Bribery Convention established a set of standards that requires signatories to criminalise the bribery of foreign public officials in international business transactions.[414] This the principal obligation of Parties. Article 1(1) of the Convention details the scope and framework of this requirement:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain

[413] By contrast, the UN Convention Against Corruption is a far more ambitious agreement that covers a wide-range of corruption offences, such as domestic and foreign bribery, money laundering, embezzlement, and trading in influence.

[414] Under Art. 3(2), if a Party's legal regime does not have a corporate criminal liability statute, they must 'provide for non-criminal sanctions, such as fines'.

> from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

The Convention also requires Parties to ensure that the offence of bribery of a foreign public official applies both to legal and natural persons. Demonstrating its focus on the role of multinational corporations in foreign bribery, Article 2 requires Parties to establish the responsibility of legal persons:

> Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Parties must also establish jurisdiction over bribery of a foreign official where it is committed in their territory. If Parties have jurisdiction to prosecute their nationals for offences committed abroad, they must also establish jurisdiction where the offence is committed outside their territory by its nationals.[415]

Parties are required to take measures so that bribery and its proceeds may be seized and confiscated,[416] to consider the imposition of additional civil or administrative sanctions for bribery of foreign officials,[417] and to take measures to prohibit the establishment of off-the-books accounts for the purpose of bribing foreign officials or concealing such bribery,[418] and the establishment of civil, administrative or criminal penalties for such conduct. [419] Parties must also make provision for prompt and effective legal assistance to other Parties for the purposes of criminal investigations and proceedings within the scope of the Convention.[420]

Parties are not required to prohibit so-called 'facilitation' payments that are made to induce public officials to perform routine functions, such as issuing licenses or permits. Like the scope of the US FCPA, the Convention is limited in its application to bribery

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[415] Art. 4.

[416] Art. 3(3).

[417] Art. 3(4).

[418] Art. 8(1).

[419] Art. 8(2).

[420] Art. 9.

involving foreign public officials; it is not concerned with so-called 'private-to-private bribery'. Similarly, the scope of the Convention is limited to bribery in relation to international business transactions.

The influence of the FCPA on the scope of the Convention also extends to its focus on 'active bribery'.[421] The focus is on the bribe maker, not the bribe taker. The prohibitory scope of the Convention was also limited by political norms and principles of international criminal policy, which generally recognise that a state's jurisdiction does not normally extend to sanctioning foreign officials not subject to the jurisdiction of the prosecuting state.[422] In accord with this generally accepted principle, the Convention does not require Parties to criminalise the solicitation or receipt of bribes by foreign officials.

However, this did not stop the US from attempting to pursue this path. Attempts by the US to require Parties to criminalise foreign officials soliciting or receiving bribes proved controversial, as doing so would necessarily entail subjecting officials of one foreign state to another state's jurisdiction and laws.[423] Such an imposition, it was argued, would disregard the widely-accepted principles of territoriality and nationality as (usually) necessary to confer jurisdiction on a state.[424]

Additionally, the scope of the Convention does not extend to payments made to foreign political parties, party officials, and candidates for political office in defining a 'foreign public official'.[425] This matter was a point of extended acrimony between the US and

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[421] Pieth (n. 298) 67.

[422] Under customary international law, states may legally exercise jurisdiction on three primary bases: nationality, territoriality, and universality. However, there are nuances to each principle, and debate as to their interpretation and application. See Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed.) (Oxford University Press, 2015).

[423] But see US Senate Bill 3026, 'Countering Russian and Other Overseas Kleptocracy Act 2020', purporting to target demand side bribery, and clearly advancing US foreign policy interests.

[424] Bribery solicitation *per se* of a representative of a foreign state would not generally confer jurisdiction absent a territorial or nationality-based link. This complex area of law and international relations is by no means settled nor uniformly applied.

[425] The jurisdictional scope of the Convention is more limited than the FCPA and does not require signatories to regulate foreign subsidiaries of firms based in Parties; instead, its jurisdiction is limited to the widely accepted principles of territoriality and nationality.

several European states—particularly Germany, Belgium and France—experiencing domestic political strife at the time over allegations of illicit campaign financing.[426] David Gantz argues that despite the efforts of the US to extend the prohibition to include political party officials:

> this exclusion was a major disappointment to US officials, who believed that excluding political party officials would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials.[427]

This important difference between the prohibitory scope of the two regimes—the US FCPA and the Anti-Bribery Convention—is instructive because it points clearly to the historical events that underpinned the US rationale for enacting the FCPA as compared to the US rationale for its campaign against foreign bribery at the OECD.[428] Although including this category of bribery within the scope of the Convention was strongly advocated by US representatives, it was met with significant resistance. Most states objected to including bribery of political parties and candidates for political office, arguing that US attempts to do so represented unwarranted meddling in the internal political structures of sovereign states.[429] Ultimately, the US abandoned this proposal after gaining only the support of the Netherlands.

Sanctions obligations

Parties are required to apply 'effective, proportionate and dissuasive' penalties for violating relevant laws against foreign bribery.[430] In the case of natural persons, this is to include the deprivation of liberty sufficient to enable the provision of effective mutual legal assistance and extradition. What constitutes an 'effective, proportionate and

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[426] Abbott and Snidal (n. 144) S170; Tarullo (n. 153).

[427] See Gantz (n. 216) 459, 487.

[428] The FCPA expressly prohibits the bribery of political party and other officials, and the US sought to include this prohibition in the scope of the Convention. However, this was rejected by several states, including Germany and France, which saw it as improper interference in their nations' internal political systems.

[429] 'Trade Policy: US, Europe at Loggerheads' (n. 339): 'France and Germany have opposed the US initiative for some time, and are likely using the political exemption ploy as part of a greater effort to limit the implications of the treaty.'

[430] Art. 3(1).

dissuasive' penalty for foreign bribery is, however, a matter for individual Parties. This matter has been the subject of ongoing debate among Parties and the Working Group.

Enforcement obligations

Article 5 of the Convention recognises the role of prosecutorial discretion in Parties' legal systems, and the potential for that discretion to be influenced or abused in foreign bribery cases. Article 5 attempts to limit the potential for abuse of discretion by requiring Parties to commit to ensuring that investigations and prosecutions of alleged foreign bribery are not influenced by considerations of the national economic interest or the potential effect upon relations with another State or the identity of the natural or legal persons involved.

With the benefit of this basic outline, it is useful to examine the implementation and 'enforcement' aspects of the Convention to understand what Parties agreed to do to meet their international legal obligations under the agreement.

Implementation and 'enforcement'

On one level of analysis, the Convention has achieved much of its initial aims. It was negotiated and agreed rather quickly by all existing OECD member states, representing collectively a majority of global international trade. Each Party has enacted domestic laws prohibiting foreign bribery, thereby arguably meeting the fundamental requirements of the Convention. Indeed, most Parties enacted domestic laws banning foreign bribery within a few years from signing the Convention.[431] Seven non-OECD member states have also ratified the Convention,[432] arguably testifying to its broader appeal. It is also a requirement that each new OECD member state ratify the Anti-Bribery Convention.

On another level of analysis, however, Parties' enforcement of their laws prohibiting foreign bribery implies something different altogether. Few would suggest firms have been effectively deterred from engaging in foreign bribery simply through its illegality.

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[431] Some Parties took longer than others to implement legislation broadly perceived as compliant with the requirements of the Convention, such as the UK and France.

[432] Namely, Argentina, Brazil, Bulgaria, Costa Rica, Peru, the Russian Federation, and South Africa.

Given that bribery remains a multi-billion-dollar industry, with foreign bribery representing a considerable portion of that figure, one may conclude that there has either been a widespread implementation problem with the Convention or there is simply wholesale disregard for laws against foreign bribery.[433] Perhaps it is a mix of the two.

As a treaty that leaves implementation and 'enforcement' to the contracting parties in their respective legal systems, the enforcement measured considered here relate principally to the Convention's mechanism for 'peer review' of Parties' implementation of the Convention. Although it is a 'hard law' treaty creating binding legal obligations on its signatory states, the Working Group may only make non-binding recommendations concerning the implementation of the Convention; it does not have the power, for example, directly to sanction Parties for non-compliance.[434]

Through the Working Group, a four-phase analysis of each Party's implementation of the Convention is undertaken over a period. These monitoring phases are subject to a set of agreed principles memorialised in Article 12 of the Convention. The 2009 Recommendation, also binding on Parties, details the purpose, effectiveness, and equal treatment of the monitoring procedure. Monitoring occurs over the following phases:

- Phase 1 evaluates the adequacy of a Party's legislation to implement the Convention;
- Phase 2 assesses whether a country is applying this legislation effectively;
- Phase 3 focuses on enforcement of the Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2; and,
- Phase 4 focuses on implementation, issues tailored to specific country needs, and outstanding recommendations from Phase 3.[435]

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[433] No serious person would submit that foreign bribery has reduced so significantly as to warrant the apparent low levels of enforcement.

[434] However, the Working Group may indirectly 'sanction' states considered not to be meeting their legal obligations under the Convention through advocacy for increased scrutiny and repeated, intrusive peer-review of Parties' anti-bribery laws and policies.

[435] Phase 4 monitoring began in March 2016, with a focus on implementation of the Convention and related instruments.

The peer-review monitoring procedure has not been without controversy, and some Parties, notwithstanding the 'consensus minus one' rule, have rejected the findings of the Working Group on Bribery.[436] During quarterly meetings of the Working Group, representatives of some Parties have challenged other Parties for failing to implement recommendations raised during the preceding review processes, or conveyed claims of undue political interference in the investigation and prosecution of firms suspected of engaging in foreign bribery.

Indeed, the long-time Chair of the Working Group, Mark Pieth, was subject to repeated pressure campaigns by some Parties for perceived undue criticism of their implementation of the Convention, and in responding to shortcomings of their anti-bribery regimes raised as part of the peer-review monitoring process. It was reported, for example, that Italian Prime Minister Silvio Berlusconi sought Pieth's removal by taking his complaints to US President George W. Bush over comments Pieth made that were critical of changes to Italian laws and of Italy's efforts to address matters raised during the peer-review monitoring process.[437]

Pieth also came under significant pressure from the UK after disclosures of a massive foreign bribery scheme involving UK defence contractor BAE and Saudi Arabian government officials (see Chapter III B (2) below). UK officials, with the aid of the British press, threatened to veto the Chair's annual confirmation.[438] Other Parties also expressed their displeasure with the Chair's apparent determination to hold Parties accountable for their legal commitments under the Convention, including the governments of Canada and Sweden.[439] The United States, too, has challenged the Working Group for having the gall to criticise its anti-bribery enforcement efforts.[440] Despite these repeated challenges to the Working Group and the independence of its

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[436] Mark Bochetti, 'Mark Pieth: a profile', *MLex* (Special Edition), 1 March 2016, 5, 7.

[437] Jean François Tanda and Benita Vogel, 'Korruptionsbekämpfung: Mark Pieth tritt zurück', *Handelszeitung*, 27 March 2013.

[438] Bochetti (n. 436) 6.

[439] Ibid 5, 7.

[440] See Tarullo (n. 153) note 53.

Chair, the Convention has remained supported by its Parties (at least rhetorically), international institutions, and certain NGOs.

OECD Council Recommendations

Parties to the Anti-Bribery Convention also agree to accept the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions ('the 1997 Recommendation'), which details other, non-criminal measures for combating foreign bribery and appeals to Parties to:

- implement measures to require companies to maintain transparent accounts;
- adopt practices to deter corruption in public procurement;
- ensure independent external auditing requirements are adequate; and,
- encourage development of internal company controls.

The 1997 Recommendation also implored OECD member states to disallow the tax deductibility of bribery of foreign public officials. Up until this point, many states continued to permit their firms to deduct bribe payments as business expenses. This practice was ridiculed by the US negotiating team and the US media, which made it known that the US had ended these arguably perverse tax incentives as far back as 1958.

More recently, Parties also agreed to accept the requirements of the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business ('the 2009 Anti-Bribery Recommendation'), which succeeded the earlier recommendation on tax deductibility and includes agreed interpretations of certain articles of the Convention,[441] as well as calling upon Parties to improve co-operation and increase information sharing in foreign bribery investigations.[442] In 2018, the OECD embarked on a review of the 2009 Recommendation 'to ensure that the standards set out in the Recommendation remain relevant and effective

[441] Bonucci (n. 348) 248. NB: Mr Bonucci was OECD Legal Counsel and Director of Legal Affairs.

[442] OECD, 'Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (2009).

as new threats and challenges appear in the fight against foreign bribery'.[443] This review is scheduled to be completed in 2021.

[443] OECD, 'Review of the 2009 OECD Anti-Bribery Recommendation'.

C. CHAPTER II CONCLUSION

This chapter argued that OECD member states ratified the Anti-Bribery Convention not out of agreement with US advocacy to ban foreign bribery in international business, but out of submission to US pressure. This account contrasts with the common assertion that the Convention is a triumph of shared liberal 'Western values'. By closely examining why and how the US championed the internationalisation of the FCPA through the Convention, and by critically considering the rationales and conduct of France and the UK in adopting and implementing the Convention, the US campaign against foreign bribery arguably reveals itself as a self-interested policy designed to address foreign and economic policy problems unique to the United States.

We have seen that this self-serving American rationale—expedient for the US given the negative foreign policy experiences this state had with foreign bribery in the 1970s—held little objective benefit for other states to prohibit foreign bribery. For this reason, the US arguably fashioned its campaign against foreign bribery as an exemplar of American moral leadership, imposing on OECD member states its liberal medicine against purported illiberal practices. For many OECD member states, however, it was clear that the 'medicine' that is the Anti-Bribery Convention sought to treat an ailment suffered only by one state: the US. In other words, the US campaign against foreign bribery has been an attempt to solve American problems at other states' expense.

To be clear, it is not suggested that firms from these other states did not engage in foreign bribery. The point is that it was the US that suffered from the negative foreign policy effects of its firms engaging in foreign bribery. Later too, it was the US economy and its firms that were disadvantaged by the passage of the FCPA. Even in those OECD member states in which US firms had engaged in widespread foreign bribery (e.g., Italy, Japan, Germany), which provoked domestic scandals upon their disclosure, there was no appetite to prohibit their firms from engaging in this conduct abroad.

In this way, the Anti-Bribery Convention has served to heal economic wounds inflicted on American firms by the US government's decision unilaterally to ban foreign bribery. In other words, the US imposed the Convention on other OECD member states because it had banned foreign bribery, while its major international trade competitors (principally

France, Germany, Japan, and the UK) had not.[444] However, it was noted that this rationale assumes US firms no longer bribed foreign officials. There is no credible evidence to support this proposition, and international rivals to US multinational firms would give little credence to such a suggestion.[445] US measures to pressure OECD member states to prohibit foreign bribery has also burdened their firms with expensive compliance costs and the ever-expanding reach of US law enforcement authorities.[446]

These insights into the development and ratification of the Convention, it is argued, may help to explain why so few Parties have seriously enforced their respective laws against foreign bribery. Indeed, this analysis has prepared the ground to examine the experience of authorities and firms in France and the UK with their laws against foreign bribery and related corrupt conduct. This history is inseparable from the Convention and, it is argued, has undermined the prospects for achieving its stated purpose.

Against this history, it must be asked critically what other states stood to gain from adopting the Anti-Bribery Convention? If the objective answer to this question is that these states would no longer suffer the threat of US sanctions, economic coercion, and destabilising public diplomacy campaigns and political interference, this has likely influenced Parties' willingness to enforce their laws against foreign bribery. As with a forced confession, we should be sceptical of the fruits of the interrogation. Tainted by compulsion, their reliability and credibility are justifiably suspect.

Discussing the limitations of the US strategy to conclude a multilateral agreement banning foreign bribery, Tarullo has acknowledged that 'US pressure succeeded only in getting other countries to sign the Convention, not in changing the underlying game being

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[444] This assumes there was an impact on US exports *and* US firms no longer engaged in major foreign bribery. In fact, there is evidence that US firms continued to engage in this conduct: see, e.g., Lockheed in Egypt in the 1990s (*US v Lockheed Corporation*, et al., 94-cr-226) and General Electric in Israel (*US v General Electric Company*, 92-cr-00087).

[445] *Intelligence Online* (n. 387): 'Firmes américaine ont développé au cours des vingt dernières années un véritable savoir-faire pour extraire du cash et rémunérer les intermédiaires plus discrètement que dans les autres pays'. [American firms in the last 20 years have developed real know-how to extract cash and to pay intermediaries more discreetly than other countries.]

[446] US authorities routinely cite Parties' commitments and obligations under the Anti-Bribery Convention as justifying strong US enforcement measures.

played by other countries.'[447] Through American power, a multilateral agreement to prohibit foreign bribery was concluded, yet the Convention's purpose and effect was arguably stunted at birth by the coercive and self-serving conduct of the US.[448] Put simply, to obtain economic advantage the US leveraged coercive diplomacy over OECD member states otherwise disinclined to change their ways.

This approach to concluding the Convention, it is argued, succeeded only in replacing tacit acknowledgement of foreign bribery with its widespread prohibition in law. This has resulted in an international anti-bribery regime that is weakly enforced by most Parties, and quietly derided by many as an international trade measure foisted upon them by a US government either incapable of managing its multinationals' conduct abroad or unwisely engaged in legal-moralistic policy-making in international affairs.[449]

The stated objectives of the Anti-Bribery Convention have always stood in tension with the *realpolitik* that underpinned its creation. Indeed, the Convention, while contributing to the stigmatisation of foreign bribery, has been repeatedly undermined, sometimes by its loudest rhetorical champions, when their claimed national interests are threatened by the disclosure or investigation of alleged foreign bribery conduct. This further threatens the legitimacy and viability of the Convention, as other Parties perceive pretence and exceptionalism when some states act to bury 'inconvenient' foreign bribery scandals. We examine several such matters in the foreign bribery case studies at Chapter III.

For all their cultural differences, France and the UK share a rich history as former colonial empires. Today, both states maintain vast trade and deep political relations with many of their former colonial states, many of which find themselves on the demand-side of the

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[447] Tarullo (n. 153) 667, 680: 'Realist and liberal theories of international relations offer ready explanations of how the factors described earlier convinced governments to enter into an international agreement, but nothing in these explanations or in game theory suggests that these governments intended the resulting Convention actually to repress overseas bribery.'

[448] Barbara George, Kathleen Lacey, and Jutta Birmele, 'On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption' (1999) 32(1) *Vanderbilt Journal of Transnational Law* 1.

[449] George Kennan, 'Morality and Foreign Policy' (1985) 205:2 *Foreign Affairs* 64: 'I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems'.

foreign bribery equation. As we have seen, France and the UK (as well as Germany and Japan), both major global export economies with a long history of their firms engaging in bribery in international commerce, were long suspicious of US motivations to prohibit foreign bribery and shared a healthy scepticism for its campaign at the OECD. Simply put, neither wanted anything to do with this American initiative. In their own way, both states resisted US efforts to impose its will and policy prescription in this matter.

We turn now to consider how the ratification of the Anti-Bribery Convention was received in France and the UK. Was it met with broad support? Or was it derided as an act of American legal imperialism? Did France and the UK rush to implement the changes to their domestic laws required under the Convention, or did they lag and dissemble? Have Parties robustly enforced their laws against foreign bribery? Answering questions such as these, it is argued, will foster an informed, critical view about these states' motivations to ratify the Convention and to implement laws prohibiting foreign bribery. It is these motivations, it is argued, that provide powerful explanations for the likely future of the US campaign against foreign bribery.

Unless the prohibition against foreign bribery is applied consistently, there will be a race to the bottom from which it will be practically impossible to recover.
—Mark Pieth and Huguette Labelle[450]

III. Global foreign bribery regime development and selected case studies: France, the United Kingdom, and the United States

This chapter examines the development of laws against foreign bribery in France and the United Kingdom and considers several case studies of alleged major foreign bribery by firms from these states and the United States. In doing so, it draws out the evolution of these states' regimes against foreign bribery and related corrupt conduct. This chapter advances the claim that the US campaign against foreign bribery is bound to fail by demonstrating both France and the UK's reticence to enact, and later to enforce, their domestic laws against this conduct. With the history of foreign pressure and coercion to accede to the Anti-Bribery Convention and to enact laws prohibiting foreign bribery, these states moved hesitantly to implement regimes to suppress this conduct.

This chapter also considers several case studies of alleged foreign bribery in France, the UK, and the US. Here we find investigations and prosecutions of large-scale foreign bribery repeatedly fall victim to arguably inadequate laws and intervening political decisions that preference asserted economic, geopolitical and security interests. We examine the record of several foreign bribery cases to look beyond what states say they will do, to scrutinise what they in fact do. Here, the rhetoric of states and statesmen is tested against the reality of the conduct of their officials and national institutions. In other words, the policy to ban foreign bribery is tested against the praxis of enforcement.

The cases examined are, in a sense, typical. It is the nature of foreign bribery, inherently involving state officials and firms operating internationally, that the parties go to great lengths to conceal their conduct. Secrecy, political intrigue, intimation of wider government involvement, the presence of states' intelligence services, and the delicate balancing of states' national interests, are characteristic features of major foreign bribery

[450] Mark Pieth and Huguette Labelle, 'Making Sure That Bribes Don't Pay', OECD, editorial, 17 December 2012: <www.oecd.org/daf/anti-bribery/makingsurethatbribesdontpay.htm> (accessed 1 July 2021).

cases. These cases are not intended to prove the thesis that the US campaign against foreign bribery is bound to fail. Instead, aspects of several cases are presented as harbingers of this failure. They are circumstantial, but arguably persuasive, examples of failing regimes against foreign bribery, and provide a meaningful cross-section of 'grand corruption'.[451]

Because each case examined was investigated in developed, democratic states, with relatively significant resources devoted to them, they arguably represent ideal types from which to measure the degree to which these states are committed to investigating and responding effectively to allegations of major foreign bribery. These are not insignificant cases from poor states with few resources or investigative experience, nor did these cases occur in jurisdictions with demonstrably weak legal institutions and a fragile rule of law.

On the contrary, these states are exemplars of Western conceptions of democratic government and 'free market' economies. Each has highly-developed, well-funded and independent judiciaries, experienced prosecutors and investigators, an entrenched commitment to the rule of law, and a free journalistic corp. Nonetheless, several of these case studies demonstrate how these nations act notionally to meet their international legal obligations under the Anti-Bribery Convention yet enforce their laws against foreign bribery in a manner that undermines the Convention and arguably portends the failure of the US campaign against foreign bribery.

[451] Similar conclusions may have been drawn from major foreign bribery cases in other jurisdictions, such as Canada (SNC-Lavalin), Sweden (Ericsson), and Australia (AWB).

Quand le droit devient une arme de guerre économique
—Virginie Robert[452]

A. FRANCE: MORAL LESSONS AND *LA GUERRE ECONOMIQUE*

Unlike the argued core rationale for the FCPA, France's laws against foreign bribery are not the product of foreign policy concerns due to rogue commercial bribery by French firms operating overseas. Nor is the French regime against foreign bribery the outgrowth of a confected, or genuine, moral rationale by the French legislature. When foreign bribery scandals have emerged in France, there is little evidence of popular outrage or pressure on the French government.

Nonetheless, some authors argue that the French regime against foreign bribery developed out of domestic corruption scandals.[453] This conclusion may better apply to anti-corruption laws generally, which are often concerned with domestic political campaign finance matters and conflicts of interest from senior government officials coursing in and out of the private sector.[454] However, this rationale is not reflected in the development of France's laws against foreign bribery. It is essential that we do not misapprehend or misapply the legislative rationale of one law for another, even if both may properly be characterised as 'anti-corruption' laws. We are concerned precisely with understanding the motivations and the development of laws against foreign bribery in France.

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[452] Virginie Robert, *Les Echos*, 'Quand le droit devient une arme de guerre économique' 10 October 2016 [When law becomes a weapon of economic war]. See also, Stéphane Lauer, *Le Monde*, 'Sous couvert de lutte contre le terrorisme, l'extraterritorialité du droit américain est une arme de guerre économique' 30 December 2019; V. Rock Grundman, 'The New Imperialism: The Extraterritorial Application of United States Law' (1980) 14 *International Lawyer* 257.

[453] Heilbrunn (n. 370); Pierre Lascoumes, 'Condemning Corruption and Tolerating Conflicts of Interest: French "arrangements" regarding breaches of integrity' in J.B. Aubry, E. Green (ed.) *Corruption and conflicts of interests* (Edward Elgar, 2014); Yves Mény, 'La corruption: Question morale ou problème d'organisation de l'état?' (1997) 84 *Revue française d'administration publique* 585; Philippe Montigny, *L'entreprise face à la corruption internationale* (Ellipses, 2006).

[454] This practice is known as the 'revolving door'; in French, *pantouflage*.

Like many of their international counterparts, French authorities and politicians commonly invoke the arguable harms caused by foreign bribery and other corrupt practices, such as its contribution to poor governance in developing states.[455] However, these explanations, typically made *ex post*, offer little critical insight into the rationales for French legislators to enact laws against foreign bribery and related corrupt conduct. For this, we must consider these laws specifically, as well as the broader political milieu in which they were enacted.

As argued in Chapter II, France agreed to ratify the Anti-Bribery Convention, and therefore to ban foreign bribery, only after the US meted out powerfully coercive diplomatic measures and economic threats against France. These measures were combined with coincident political pressure from international institutions, widespread, adverse media coverage of domestic political corruption scandals, and the actions of certain foreign non-governmental organisations.[456] Put simply, France was pressed into agreeing to ratify the Anti-Bribery Convention by a concerted, calculated strategy of the US government to criminalise the conduct of foreign bribery by its international trading competitors in the OECD.

Unable to resist these escalating diplomatic and other pressures and unwilling to countenance the escalating threats of severe economic and political consequences for failing to agree to the Anti-Bribery Convention, France reluctantly bent to US power. Soon after, French officials had the disagreeable task of implementing this unwelcome agreement with domestic legislation to ban foreign bribery.

1. Anti-bribery regime development

Unlike the rich legislative history of the FCPA in the US, in France we do not have the benefit of thousands of pages of hearings in the *Assemblée nationale* in which the

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[455] See Élisabeth Guigou (former French Minister of Justice), 'Tout d'abord, la corruption sape la légitimité de l'État: véritable fléau qui affecte la bonne gestion des affaires publiques, elle ruine la confiance des citoyens dans la chose publique, elle altère la qualité du pacte social et met en péril celui qui en est le garant, l'État' (*Assemblée nationale*, JO-Débats, 14 December 1999) 10901. [First, corruption undermines the legitimacy of the state: a real scourge that affects good governance, it ruins the trust of citizens in the commonwealth, it alters the quality of the social pact and endangers the one who is its guarantor, the state.]

[456] Such as the Berlin-based NGO Transparency International.

motivations and the perceived impacts of legislating against foreign bribery are debated and articulated. Nor can we turn to publicly available *travaux preparatoires* of the Anti-Bribery Convention for a record of the negotiation of this agreement, most of which was conducted confidentially between OECD member states. Nonetheless, there is a record of substantive, albeit limited, parliamentary debate, scholarly commentary, and government decision making about these laws to consult to understand the development of the French legal regime against foreign bribery and related conduct. Like examining the origins and development of the FCPA in the US, understanding the roots of French laws against foreign bribery is critical to advancing the thesis that the US campaign against foreign bribery is bound to fail.

Pre-1999

Before France criminalised foreign bribery in 2000,[457] the criminal offence of bribery was limited to cases of 'passive' bribery (receiving a bribe) or 'active' bribery (giving a bribe) involving French persons entrusted with public authority, charged with a public service mission or holding an elected office.[458] The scope of these laws did not include the bribery of foreign public officials in connection with international business. In other words, foreign bribery was not illegal in France. In fact—as in most developed, Western, export-orientated economies—many large French multinationals engaged in foreign bribery.

Similarly, and like many European jurisdictions at the time, the expenditures associated with foreign bribery payments were also tax-deductible business expenses in France. To satisfy the French tax authorities, senior executives of bribey-paying firms, it is said, would personally attend to Bercy[459] once a year with their firms' closely guarded records

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[457] See *Loi n° 99-424 du 27 mai 1999 autorisant la ratification de la convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales* [Law n° 99-424 of 27 May 1999 authorising the ratification of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions]. The Convention came into force in France on 29 September 2000 along with the domestic implementing legislation.

[458] See Code pénal, Articles 433-1 and 432-11.

[459] Bercy, a suburb on the edge of Paris, is the administrative centre of France and home to its economic and finance ministries, and the tax authority, the Direction générale des Impôts (as it was then known).

of 'bribe deductions' detailing their beneficiaries,[460] after which these black books were swiftly returned to the corporate vault. Moreover, it was reported that '[a]ccording to a French secret service report, the official export credit agency of France paid around $2 billion in bribes to foreign purchasers of "defence equipment" in 1994.'[461]

Law of 29 January 1993—'Sapin I'

Initial measures by France to modernise its anti-corruption laws began with *Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques* [Law of 29 January 1993 on the prevention of corruption and the transparency of economic life and public proceedings] ('Sapin I'). Shepherded by Michel Sapin, the Minister for Economic Affairs and Finance under the Bérégovoy government, Sapin I was primarily focused on increasing the transparency of financing of French political parties after several scandals. This law aimed to clarify the accounts of political parties, regulate advertising services, commercial planning, public service delegations and real estate activities.

Sapin I did not address specifically the issue of foreign bribery in international business, and thus holds limited relevance to the task at hand; it is included here as background to the development of France's anti-corruption regime, and to note the important influence of Michel Sapin in this area of law and policy. Sapin I also established France's first bespoke anti-corruption agency, the Service Central de Prévention de la Corruption (SCPC).[462] The SCPC was led by a senior magistrate, appointed for four years by a decree of the President of the Republic. By 2014 the SCPC had small a staff of approximately 15, composed of judicial advisers and public officials from several ministries. The SCPC, operating out of the Ministry of Justice, played an essentially corruption prevention role and lacked powers of investigation or prosecution. According to its establishing law, after the Conseil constitutionnel [French Constitutional Court] acted to narrow its potential

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[460] After France agreed to ratify the Anti-Bribery Convention, a former French minister is reported to have remarked: 'I kept all the beneficiary files and I know how much each political party gets back. That may serve me one day.' See Nouzille (n. 380).

[461] S. Fiddler, 'Defence contracts "pervaded by graft"', *Financial Times*, 7 July 1999.

[462] [Central Service for the Prevention of Corruption].

investigatory role,[463] the SCPC's activities and resources were focused on centralising information for the detection and prevention of corruption and other breaches of probity, such as trading in influence by persons in public office, public corruption, and illegal conflicts of interests.[464]

Corrective Finance Bill 1997

After agreeing to ratify the Anti-Bribery Convention, France enacted a law to end the tax deductibility of bribes paid to foreign officials. Article 27 bis of the Corrective Finance Bill 1997 prohibited the deduction of amounts paid, or advantages granted, directly or through intermediaries, to foreign officials. This tax provision took effect on 18 July 1999, after the *Assemblée nationale* authorised the ratification of the Anti-Bribery Convention, but its operative provisions did not come into force until 29 September 2000.[465]

Importantly, this tax change was not retrospective and, after intense lobbying by French industry, applied only to contracts concluded during tax years beginning on or after 18 July 1999.[466] In other words, bribes that had been paid on contracts concluded before this date could continue to be deducted for tax purposes. This also meant that bribes could still be paid by French firms after France was a signatory to the Anti-Bribery Convention but had not yet implemented the relevant prohibitory law. The French rationale for limiting the scope of this law was because authorities understood there were significant, long-term bribe-affected contracts, including contracts with foreign states for strategic defence materiel.

However, the French approach to 'winding down' these tax deductions provoked open, stinging rebuke from US officials. France's 'go slow' attitude to phasing out these

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[463] Conseil constitutionnel, Décision n° 92-316 DC du 20 janvier 1993.

[464] *IRIS*, 'Quelle importance revêt le SCPC dans la lutte anticorruption ?', 20 May 2016 (interview with Xavière Simeoni, then head of the SCPC).

[465] Article 39-2 bis, *Code général des impôts*, as modified by *Loi n° 2000-595 du 30 juin 2000 modifiant le code pénal et le code de procédure pénale relative à la lutte contre la corruption*.

[466] US Department of State, First Annual Report to Congress on the OECD Antibribery Convention, *Addressing the Challenges of International Bribery and Fair Competition*, July 1999, 58.

practices, it was argued, showed it remained uncommitted to 'levelling the playing field' in international business. American indignation at the French approach to phasing out these practices was unconcealed, and quickly elevated to senior government officials. US Secretary of State Madeleine Albright, speaking to the World Economic Forum on 30 January 2000, publicly asserted:

> [A]n OECD convention entered into force last February, committing all signatories to adopt strong anti-bribery laws. But to date implementation by several key countries, including Japan, Britain and Italy, has been anything but strong. And in France, there are legislative proposals which would—in isolation—interpret the Convention as still permitting payment in the future of bribes promised in the past. It will be difficult to send a clear message against bribery if it appears that some countries take the path of principle while others simply take the contracts.[467]

French industry executives and officials countered that this was a necessary transition to the new 'rules of the game' that took account of existing arrangements, arguing that immediately stopping the deductibility of these heretofore legal payments would sabotage the economics of important projects and undermine France's foreign relations with partner states. These concerns were met with ridicule by US officials, who argued the Corrective Finance Bill was essentially a measure to legalise, and maintain the tax deductibility of, foreign bribery payments in respect of these contracts for many years to come. Following the OECD Council's Revised Recommendation of 1997,[468] and after significant diplomatic pressure by the US and its surrogates immediately to cease the tax deductibility of these bribe payments, France relented and adopted Article 39-2 bis of the General Tax Code:

> [F]rom the coming into force of the Convention on combating bribery of foreign public officials in international business transactions, sums paid or advantages granted directly or through intermediaries, for the benefit of a public official within the meaning of Article 1 (4) of the said Convention, or of a third party in order that the official acts or refrains from acting in the performance of official duties, with a view to obtaining or

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[467] Madeleine K. Albright, 'Address to the World Economic Forum', 30 January 2000: <https://1997-2001.state.gov/statements/2000/000130.html> (accessed 1 July 2021).

[468] See OECD, Working Group on Bribery, 'Phase 1 Report on Implementing the OECD Anti-Bribery Convention in France' (2000) 28.

> retaining business or another improper advantage in the conduct of international business, shall not be deductible from taxable profits.

Unfortunately, the concerns of France and its industrial champions about the potential impacts of immediately banning these payments were not unfounded, nor were they simply cynical ploys to continue bribing a bit longer, as the Americans had claimed. French officials and executives knew well that the foreign officials and related parties who had agreed to major commercial deals involving these *frais commerciaux exceptionnels* would insist on their terms being met, regardless of the new laws and policies against such practices in France.

Alas, France's decision to yield to this pressure to ban immediately these payments, and to cease their tax deductibility, may have provoked tragic consequences in the case of the Karachi affair, which is discussed below. But before examining several case studies and the political economy of scandals such as this, it is first necessary to consider further the development of France's anti-bribery legal regime.

Law of 30 June 2000 on the fight against corruption

With the new millennium, the bribery of foreign public officials in international business became a criminal offence in France following the enactment of *Loi n° 2000-595 du 30 juin 2000 modifiant le code pénal et le code de procédure pénale relative à la lutte contre la corruption* [Law of 30 June 2000 amending the Penal Code and the Code of Criminal Procedure relating to the fight against corruption] (the '2000 Law'). Henceforth, this law prohibited all persons from:

> proposing or making, without justification, any offer, promise, gift, present or advantage of any kind to an individual holding a public office or discharging a public service, mission or electoral mandate in a foreign state or within a public international organisation, for himself or for others, so that the relevant individual carries out or abstains from carrying out an act within his functions, duties or mandate or facilitated by his functions, duties or mandate with a view to obtain or maintain business or other undue advantage in international commerce.[469]

[469] Art. 435-3, Code pénal.

Individuals convicted of foreign bribery in France would face fines of up to €150,000 and maximum imprisonment of up to 10 years. Legal entities could be fined up to five times greater amounts, along with potential non-monetary penalties, such as exclusion from government contracts and/or prohibition from offering shares to the public.[470]

The 2000 Law also removed, in part, a much-criticised condition that required proving an anterior corruption pact. In other words, prior to these amendments there must have been evidence of a 'meeting of the minds' before the relevant corrupt act. With this amendment, however, the words 'at any time' were added to the definition of the relevant bribery offences to ensure that the prosecution need not establish proof of a meeting of the minds to seal the 'corruption pact' *before* the corrupt act.[471] However, this amendment was not the end of this matter as related issues considered below surfaced some years later.

Law of 13 November 2007 on the fight against corruption

In 2007, the *Loi n° 2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption* [Law of 13 November 2007 on the fight against corruption] ('2007 Law) was enacted. The 2007 Law was enacted principally to transpose the offence of bribery of foreign officials into the same terms as the equivalent offence in domestic law. The purpose of this change was to remove arguable ambiguity as to whether the relevant offence covered bribes paid to third parties (e.g., agents and sub-contractors).

The 2007 Law also revised the international trade criterion and the distinction between offences committed within and outside the EU by removing the words 'in order to obtain or retain business or other improper advantage in the conduct of international business' from the definition of the offence. The resulting broad scope of the 2007 Law (i.e., without the 'international' and 'business' criteria) distinguishes the French statute from the more limited scope of the FCPA, which explicitly requires a connexion with 'international business'.

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[470] See OECD (n. 468).

[471] See 2000 Law, Art. 1. See also, Working Group on Bribery, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France' (2012) 12.

New anti-corruption laws, new rationales?

As France updated its laws against foreign bribery and related corrupt conduct, its claimed rationales against this conduct also seemed to develop. In 2008, for example, a French government position statement on the fight against corruption justified its new anti-corruption measures as part of a programme of international co-operation, strengthening democracy, fighting organised crime, consolidating the rule of law, and guaranteeing fair competition.[472]

With minor differences, this list of otherwise worthwhile principles accords well with the rationales that US officials advanced in the 1990s to justify their campaign against foreign bribery. Indeed, these new French rationales echo the lingo of American liberalism—i.e., democracy promotion, free trade, and international institutions. However, we should be mindful of applying *ex-post* rationales or government statements against corrupt conduct to justify France's 'fight against corruption'. These statements should not be mistaken for objective reasons why specific laws were enacted. Instead, they are better understood as general declarations against corrupt conduct; they tell us little about France's policy positions and rationales specifically to prohibit foreign bribery.

Law of 17 May 2011 on the simplification and improvement of the quality of the law

Following criticism of several judicial decisions related to domestic corruption cases in France, the *Loi n° 2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit* [Law of 17 May 2011 on the simplification and improvement of the quality of the law] ('2011 Law) was enacted to clarify once again the elimination of the requirement to prove the solicitation, approval, offer, proposal or acceptance of a bribe must have preceded the act at issue. This law effectively dealt with the residual arguments that an anterior 'corrupt pact' be proven.[473]

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[472] Comité interministériel de la coopération internationale et du développement (CICID), 'Position de la France en matière de lutte contre la Corruption dans le cadre de son action de coopération', 15 February 2008.

[473] Jacqueline Riffault-Silk, 'La lutte contre la corruption nationale et internationale par les moyens du droit penal' (2002) 54(2) *Revue internationale de droit comparé* 639, 642 (discussing

Law of 6 December 2013 on the financial prosecutor of the Republic

After the so-called 'Cahuzac affair' in 2012,[474] and a strongly-worded rebuke by the OECD Working Group on Bribery in respect of France's meek efforts against foreign bribery, France passed the *Loi organique n° 2013-1115 du 6 décembre 2013 relative au procureur de la République financier* [Organic law of 6 December 2013 on the financial prosecutor of the Republic] ('2013 Law').[475] The 2013 Law established the Parquet National Financier (PNF), a specialist agency dedicated to prosecuting serious and complex financial crimes, including foreign bribery.

The 2013 Law also established a specialised investigation service, the Office central de lutte contre la corruption et les infractions financières et fiscales (OCLCIFF).[476] Penalties for bribing a foreign public official were also stiffened, raising the fine for natural persons to €1 million. For legal persons, the penalty was raised to €5 million, which could be increased by up to 10 times the proceeds of the offence.[477]

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the traditional position in French law that the offer or solicitation of corruption and the pact of corruption must have occurred prior to the relevant corrupt conduct).

[474] This involved parliamentarian Jérôme Cahuzac, who was the minister in charge of fighting against tax fraud, forced to resign over tax fraud allegations. See, *Le Monde*, 'Fraude fiscale: trois ans de prison ferme requis contre l'ex-ministre Jérôme Cahuzac', 14 September 2016.

[475] *Loi organique n° 2013-1115 du 6 décembre 2013 relative au procureur de la République financier*.

[476] [Central office for the fight against corruption and financial and fiscal offenses].

[477] Companies convicted of foreign bribery, and certain other offences, may also be excluded for a period from participating in public procurement; see Code des marchés public, art. L2141 (Exclusions de plein droit - Condamnation définitive).

En matière de lutte contre la corruption, la France ne saurait se satisfaire de l'existant
—Michel Sapin[478]

Law of 9 December 2016 on transparency, fighting corruption and modernising economic life—'Sapin II'

With the oblique words at the top of this page, Michel Sapin, Minister for Finance and Public Accounts under the Valls government, sought to justify the need for a new anti-corruption regime in France. The 'existing situation' Sapin refers to was likely the repeated condemnation by the Working Group on Bribery[479] and the enduring conviction of American authorities and certain NGOs that France was not doing enough to stop its firms from engaging in foreign bribery, nor in its efforts to investigate and prosecute alleged offenders.

By this time, the US had pursued multiple cases of major foreign bribery against French firms, and had extracted more than $1.5 billion in fines for alleged FCPA and related violations from French firms.[480] There was a strong perception, both outside and inside France, that the state was simply unwilling or unable to investigate and to prosecute effectively cases of serious foreign bribery.[481] In proposing amendments to an early version to the Sapin II Bill, lawmakers from both sides of politics evoked similar views as to why the law was necessary. Pierre Lellouche, Deputé and former Secretary of State for Foreign Trade, argued:

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[478] Propos prononcés par Michel Sapin, à l'occasion de sa communication en conseil des ministres le 23 juillet 2015 [In the fight against corruption, France cannot satisfy itself with the existing situation] Available : <www.economie.gouv.fr/transparence-ethique-et-justice-en-matiere-economique-et-financiere#> (accessed 1 July 2021).

[479] OECD, 'Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention', 23 October 2014: 'the Working Group expresses serious concerns for France's limited efforts to comply with the Convention…'.

[480] Including US settlements with Alstom (2014), Total (2013), Technip (2010), and Alcatel-Lucent (2010).

[481] Stéphane Bonifassi and Juliette Lelieur, 'L'incantatoire lutte contre la corruption de Christiane Taubira', *Le Monde*, 26 March 2015: 'Dans la seule affaire significative où une société soit passée en jugement en France, l'affaire Safran, notre pays a démontré de manière éclatante qu'il n'avait pas de politique pénale contre la corruption internationale'. [In the only significant case where a company was put on trial in France, the Safran case, our country has clearly demonstrated it has no criminal policy against international corruption].

> La situation est devenue très grave. Les organismes internationaux, notamment l'OCDE, nous reprochent de mal lutter contre la corruption. Au moins un grand pays étranger, qui est aussi l'un de nos alliés, les États-Unis, s'octroie le droit de faire lui-même la police au sein des entreprises françaises en infligeant des amendes, en obligeant à la mise en place de procédures de conformité et même en prononçant des interdictions de témoigner de ce que contiennent les accords passés avec la justice américaine.[482]

It was against this background that Michel Sapin introduced *Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*.[483] Colloquially known as the Sapin II Law, most provisions of this law came into force on 11 June 2017. The Sapin II Bill was hotly debated in the legislature and contested by industry groups, civil society actors, and the business community.[484] However, the legislative champion of the Bill, Michel Sapin, seemed challenged to defend the need for these significant amendments to the French legal regime to combat corruption, but particularly foreign bribery. Advocating for these changes, Mr Sapin argued:

> Je ne pense pas qu'il y ait plus de comportements délictueux chez nous qu'ailleurs. Mais l'absence de condamnations en France pour versements en particulier de pots-de-vin a créé un climat de soupçon envers notre pays que je juge infamant.[485]

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[482] *Assemblée nationale*, 'Rapport de la commission des lois sur le projet de loi, après engagement de la procédure accélérée, relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique', (n°3623), 26 May 2016. [The situation has become very serious. International bodies, including the OECD, accuse us of fighting corruption badly. At least one large foreign country, which is also one of our allies, the United States, grants itself the right to police French companies by imposing fines, requiring compliance procedures and even imposing prohibitions on testifying to the agreements with the American justice system].

[483] [Law of 9 December 2016 on transparency, fighting corruption and modernising economic life].

[484] The 57 articles of the Bill were reportedly subject to almost 1500 amendments in the *Assemblée nationale*: *LCI*, 'Corruption, lobbies, lanceurs d'alerte... La loi Sapin II arrive à l'Assemblée ce lundi', 6 June 2016.

[485] [I do not think there is more criminal behaviour here than elsewhere. But the absence of convictions in France for payments especially bribes has created a climate of suspicion towards our country that I judge defamatory.]

As with the impetus behind France's decision to ratify the Anti-Bribery Convention, so too are the policy rationales for Sapin II arguably a response to external matters, not domestic affairs. The 'problem' to be addressed, as characterised here by Mr Sapin, was a climate of suspicion against France, which he also considered unjust. This fundamental rationale for Sapin II arguably betrays its source as a law that France was pushed to enact by external forces and influences,[486] including the US, the Working Group, and certain NGOs. Justifying Sapin II soon after its enactment, Mr Sapin argued:

> Car il était inacceptable, y compris en terme de souveraineté, que les poursuites et les condamnations viennent des USA sur des entreprises françaises pour des faits commis hors du territoire américain et français à l'étranger. C'est à nous de faire notre police ! Et c'est ce que nous pouvons faire maintenant grâce à la loi Sapin II.[487]

By many accounts, French authorities had been lax in meeting their obligations under the Anti-Bribery Convention.[488] Enforcement of French laws against foreign bribery had been a matter of weak state concern, characterised by inadequate enforcement efforts and the perceived unwillingness of French authorities to co-operate with international investigatory and enforcement activities.[489]

With several prosecutions against French firms by US authorities, and the related loss of several major French firms to their American rivals after taking on major FCPA-related financial impairments, and with the threat of more of this to come, there was evidently a

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[486] Michel Sapin has elsewhere stated: 'Dans la lutte contre la corruption, la France a longtemps été considérée comme la lanterne rouge des autres pays' [In the fight against corruption, France has long been considered the red lantern (in last place) of other countries]. See Marie-Amélie Fenoll, *Décision Achats*, 13 April 2018.

[487] Ibid. [Because it was unacceptable, including in terms of sovereignty, that prosecutions and convictions come from the US to French companies for acts committed outside the US and French territory abroad. It's up to us to do our policing! And that's what we can do now thanks to the Sapin II law.].

[488] Hugh Carnegy, 'OECD hits out at France over bribery', *Financial Times*, 23 October 2012. See also, *Assemblée nationale*, 'Rapport d'Information Déposé par la Commission des Affaires Etrangères et la Commission des Finances, 3 février 2016, sur l'extraterritorialité de la législation américaine' (IV, A, 2.a), noting the Anti-Bribery Convention was quickly transposed into national law, but its application by the French judicial system has been slow and limited.

[489] See, e.g., the Alstom case: Danielle Ivory, 'Alstom to Plead Guilty and Pay U.S. a $772 Million Fine in a Bribery Scheme', *New York Times*, 22 December 2014.

belief in France that the US would 'back off' if French authorities would effectively 'prosecute their own'.[490] It was considered that Sapin II, with its device to negotiate settlements with firms accused of engaging in foreign bribery, would signal to US authorities that France was ready to adopt a similar posture against foreign bribery by French firms. After several years of increasingly strong rebukes and more invasive peer reviews under the aegis of the Working Group, Sapin II also represented to Parties to the Anti-Bribery Convention that France would henceforth adopt stronger, more modern policies against foreign bribery. Given that even the UK had updated its much-ridiculed laws against foreign bribery in 2010, the pressure on France to do the same was not insignificant.

Some non-governmental organisations also applied pressure on France's political leadership, particularly the Berlin-based Transparency International, to modernise its regime against foreign bribery. Much of TI's focus centred on supporting the establishment of a US-style deferred prosecution agreement in France, as well as increasing the protection of whistle-blowers after several scandals in France in which employees who reported alleged illicit or unethical conduct at their firms had been dealt with unfairly or were prosecuted for disclosing proprietary company information.[491] But for many commentators in France, one of the primary objectives of Sapin II was 'to set up an anti-corruption mechanism by requiring companies, under penalty of financial sanction, to become active participants in the fight against corruption'.[492]

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[490] Michel Sapin, 'A l'été 2015, je suis allé voir le chef de l'unité antifraude à Washington et je lui ai demandé pourquoi il semblait s'acharner sur l'Europe. Il m'avait répondu : "Parce que vous ne faites pas le job vous-même !"', quoted in, Emmanuel Botta, 'Les États-Unis, gendarme de l'économie mondiale, *L'Express*, 7 March 2019. [In the summer of 2015, I went to see the head of the anti-fraud unit in Washington and asked him why he seemed to be attacking Europe. He said, 'Because you don't do the job yourself!']

[491] Gaspard Sebag, 'How UBS Miscalculated and Wound Up With a $5 Billion Fine in France', *Bloomberg*, 22 February 2019 (noting Swiss bank UBS, which had lobbied French officials to introduce a US-style settlement mechanism, was unable to agree a deal with French authorities under the new mechanism; instead, it went to trial and was fined more than $5 billion.

[492] *Le Point*, 'Corruption: la loi Sapin II présentée mercredi en conseil des ministres', 29 March 2016, noting: 'Il nous manque une panoplie de bonnes mesures pour combattre et prévenir ces pratiques' [We lack a range of effective measures to combat and prevent these practices].

Although it is clearly based in part on the FCPA and the UK Bribery Act, Sapin II includes several French specificities. The basic components of Sapin II provide for:

- an anti-corruption agency to monitor the implementation of internal corruption prevention programs, with investigative and sanction powers (Agence française anticorruption or 'AFA');
- compulsory implementation of an anti-corruption compliance programme for French companies of a certain size;
- establishment of a mechanism for criminal settlements without admission of guilt (*convention judiciaire d'intérêt public* or 'CJIP'),[493] intended to apply to acts of bribery, money laundering of tax fraud, and related crimes;
- extension of whistleblower (*lanceur d'alerte*) protections and status; and
- expansion of criminal court jurisdiction for international acts of corruption.

These provisions demonstrate the influence of other states' laws against foreign bribery, but they also show the arguable effect of NGO policy advocacy. The requirement that larger firms have an anti-corruption compliance program, for example, is echoed in the UK Bribery Act 'failure to prevent' offence.[494] The CJIP and the provision extending extraterritorial jurisdiction to acts of international corruption are clearly analogues of the American-style deferred prosecution agreements, as well as the expansive jurisdiction of the FCPA and the UK Bribery Act. The extension of whistleblower protection provisions, which was subject to resistance by large French companies and significant debate in the legislature and at the Conseil d'État [French Administrative Court], demonstrates also the influence of civil society actors in this process.

With these developments in anti-corruption and foreign bribery laws in France, and a general understanding of their operation, we now move to discuss how these laws, and the US campaign against foreign bribery, are perceived in France.

Lessons in morality and la guerre économique

Like in the US, many in France give prominence to the purported moral foundations of the FCPA and the US campaign against foreign bribery. Perhaps the moral explanation

[493] [Judicial agreement in the public interest].

[494] See Section 6 of the Bribery Act 2010 (UK).

for US conduct in these matters confirms common perceptions of Americans as moralising and overly religious. Philippe Montigny, for example, recalls that the conviction of the American delegation at the OECD was quite different from the others, because, he argues, the issue of corruption in the US is less a question of law than it is a moral question:

> La conviction de la délégation américaine, comme nous l'avons vu, était tout autre et en tout premier lieu parce que la question de la corruption est aux États-Unis moins une question de droit qu'une question morale.[495]

Nonetheless, much of the business community in France, and some in government, see the FCPA and the US campaign against foreign bribery as a cunning economic measure that operates strategically to advantage US firms over their French and other international economic rivals.[496] Many in French big business held similar views during the negotiation of the Anti-Bribery Convention, and we should not be surprised that these perspectives

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[495] See Montigny (n. 453) 59: [The conviction of the American delegation, as we have seen, was quite different and first and foremost because corruption in the US is less a question of law than a moral question].

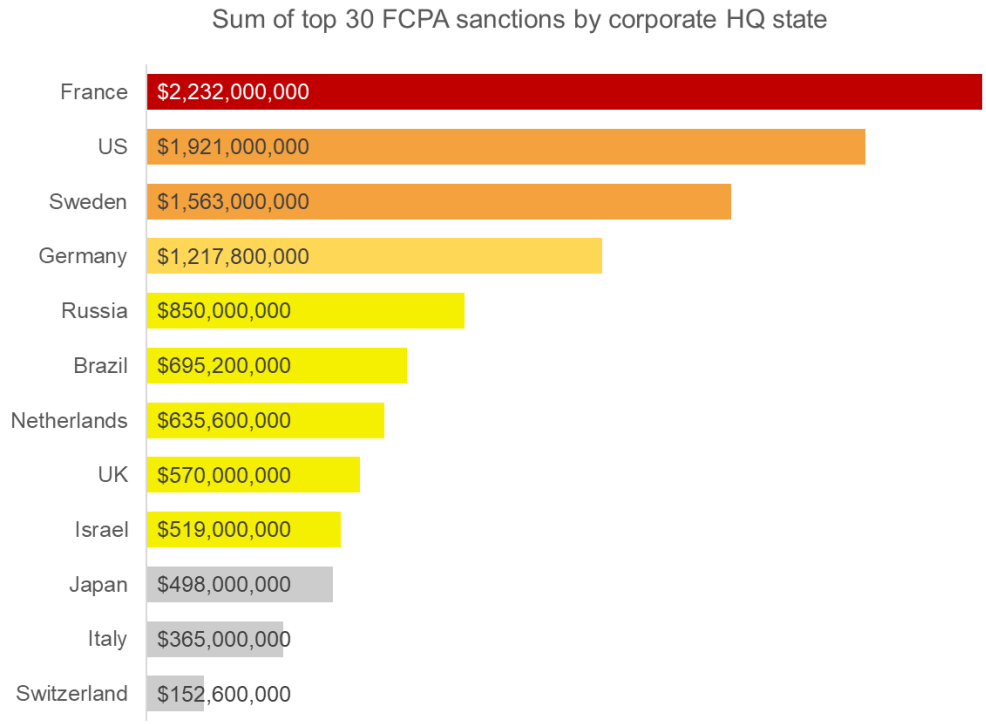
[496] See Robert (n. 452); Éric Denécé and Claude Revel, *L'autre guerre des Etats-Unis* (R. Laffont, 2005); Xavier Leonetti, *La France est-elle armée pour la guerre économique?* (Armand Colin, 2011) (NB: Mr Leonetti headed the economic intelligence division of the National Gendarmerie). See also, Sénat, Commission des affaires étrangères, de la défense et des forces armées, 'Projet de loi autorisant la ratification de la convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales', 17 décembre 1997, Rapport numéro 305 : 'M. Xavier de Villepin, président, a souligné l'importance particulière de la convention pour l'industrie de défense française, en insistant sur le contexte de "guerre économique" sur les marchés à l'exportation dans lequel il convenait de la replacer. Il a évoqué les inquiétudes des entreprises françaises, qui doutent qu'une telle convention fasse disparaître la corruption dans les pays qui l'ont jusqu'ici largement pratiquée pour l'accès à leur marché, et qui craignent que certains de leurs concurrents ne contournent la convention ou soient en pratique moins exposés à des poursuites pénales'. [Mr. Xavier de Villepin, president, underlined the particular importance of the convention for the French defense industry, insisting on the context of "economic war" on the export markets in which it was advisable to replace it. He spoke of the concerns of French companies, who doubt that such a Convention will eliminate corruption in countries which have hitherto largely practiced it for access to their market, and who fear that some of their competitors will bypass the Convention or are in practice less vulnerable to criminal prosecution].

endure.[497] The more direct French specialists and commentators in these matters submit that the US campaign against foreign bribery is part and parcel of an 'economic war' waged by the US against its foes, its allies, its friends, and its geopolitical rivals.[498] Lending credence to these arguments, the below chart demonstrates the relative position of French firms subject to US sanctions for alleged FCPA and related offences.

[497] Pieth (n. 379): 'The other industrialised states questioned the rationale of the unilateral move by the US. It was either perceived as an act of expansive moralism or they suspected a hidden hegemonial trade-agenda.' See also, Anja Jakobi, 'The changing global norm of anti-corruption: from bad business to bad government' (2013) (Suppl 7) *Zeitschrift für Politikwissenschaft* 243, 244: (noting France considered the campaign 'a ploy by the US government and US companies to regain competitive advantage').

[498] See Laïdi (n. 228) and Ali Laïdi, *Aux sources de la guerre économique* (Armand Colin, 2012); Quatrepoint (n. 228); Juvin (n. 228); Lenoir (n. 228). See also Neu (n. 334), noting: 'Selon les industriels français, les Américains, promoteurs de cette convention OCDE, ont ainsi conçu une véritable machine de guerre commerciale'. [According to French manufacturers, the Americans, promoters of this OECD convention, have thus designed a real trade war machine]; Senat (n. 496), Rapport numéro 305 : 'M. Michel Caldaguès a déclaré partager les préoccupations et les craintes du rapporteur. Il a évoqué l'influence des Etats-Unis dans l'élaboration de cette convention en soulignant que leur statut d'hyperpuissance leur permettrait d'user de leur influence politique pour conquérir des marchés, leurs entreprises se trouvant, de ce fait, dans une situation différente de celles des puissances moyennes'. [M. Caldagués shared the rapporteur's concerns and fears. He referred to the influence of the United States in drawing up this convention, stressing that its status as a superpower would allow it to use its political influence to conquer markets, since its companies were therefore in a different situation from those of the middle powers.].

Figure 3: *Sum of top 30 FCPA sanctions by state corporate headquarters (1 July 2020)*[499]



Clearly, French firms have been a priority for DOJ and SEC investigators over the years, particularly when compared to similarly-sized economies like the UK or Italy, both states with a long history of tolerating or facilitating major foreign bribery and related corrupt conduct. Speculating about why French firms fare so badly against the US authorities relative to others, the theories range from alleged failure to co-operate, inexperienced legal teams, cultural clashes, and strategic targeting. Choi and Davis, for example, observe an increase in US sanctions 'if the ultimate parent company of entities involved in the FCPA violation is foreign and if foreign regulators are involved in the action'.[500] They also report evidence that the 'SEC and DOJ impose greater aggregate sanctions for violations in countries with a lower GNI per capita and weaker local anti-bribery institutions, and a cooperation agreement with US regulators.'[501]

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[499] Data for this figure is from Stanford University's *Foreign Corrupt Practices Act Clearinghouse*. On file with the author.

[500] Choi and Davis (n. 15) 409.

[501] Ibid.

Some in France argue that French firms are disadvantaged by the US campaign against foreign bribery and harmed by alleged surveillance and industrial espionage by the US and its firms. They also argue that French firms have been unjustly targeted by US authorities for alleged foreign bribery occurring outside of, and having little connexion to, the US. Following several high-profile investigations and reports commissioned by the French government that highlighted the growing importance of economic intelligence to French industrial strategies,[502] the government and the private sector committed significant resources to tackling perceived challenges to its firms by rival governments and opportunistic foreign companies that may engage in industrial espionage and theft of intellectual property and trade secrets.

An early initiative arising out of these investigations was *l'École de Guerre Économique* [the School of Economic Warfare]. Inaugurated in Paris in 1997, the same year the Anti-Bribery Convention was concluded, the School of Economic Warfare provides information management and economic intelligence training to help French firms to compete more effectively in the global market. It has also sought to stress to its students, corporates, and the government the importance of 'economic intelligence' in the modern global economy. Following disclosures in 2015 by the WikiLeaks organisation that the US was spying extensively on many of its allies, including listening to the mobile phones of Germany's Chancellor Angela Merkel and a succession of French presidents (and other senior officials), evidence also emerged that the US was engaged in targeted, systematic intelligence collection concerning French corporate and industrial activities.

First published on 29 July 2015 by French daily *Libération*[503] and *Mediapart*,[504] a leaked information collection order from the US Director of National Intelligence (DNI) tasked the NSA with a sweeping economic espionage campaign of French companies. This order specifically included the interception of all 'impending French contract proposals or

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[502] See Commissariat Général du Plan, 'Rapport du Groupe Intelligence économique et stratégie des entreprises' in 1994 ('Martre report') and 'Intelligence économique, compétitivité et cohésion sociale', Ministère de l'Intérieur français, Rapport au Premier ministre (2003) ('Carayon report').

[503] Fansten (n. 28).

[504] Fabrice Arfi, et al., 'Moscovici et Baroin écoutés sur fond d'espionnage économique', *Mediapart*, 29 June 2015.

feasibility studies and negotiations for international sales or investments in major projects or systems of significant interest to the foreign host country or $200 million or more in sales and/or services'.[505]

The sectors targeted by this DNI order are broad, covering telecommunications, energy (including nuclear), transportation infrastructure and technologies, environmental technologies, and health care infrastructure, service and technologies (including biotechnology developments). In effect, this intelligence order meant that most of France's large multinationals, many of which are strategic in nature and have significant French state participation, were subjected to the permanent, unmatched intelligence apparatus of the US. Moreover, the intelligence collected through this order, going back as far as 2002, was marked to be shared with US partners in the Five Eyes Intelligence Alliance (Australia, Canada, New Zealand, and the United Kingdom), from which many firms compete directly with French firms in strategic industries.

Upon publication of the DNI order, French media and business executives reacted with a sense of betrayal and disgust. Missed overseas business opportunities were hastily re-examined and suspicions raised about failed deals. Long simmering suspicions reinforced that US economic espionage had influenced the demise of several important French firms later acquired by American multinationals—including Alstom, Alcatel-Lucent and Technip—under circumstances of financial distress and US authorities' allegations of foreign bribery. The takeovers of these French firms were, and remain, controversial in France, as they were each subject to US prosecutions for alleged foreign bribery offences during or just prior to their sale to competitor US firms. With these coincident charges and acquisitions, some in France argued that the nation was engaged in, and losing, an economic war, silently declared by its oldest ally: the US.[506]

Despite boiler plate commentary by US officials insisting there is a 'firewall' to stop the use of pilfered economic and commercial intelligence being diverted to benefit US corporate interests directly, it is clear that there are strong linkages between US foreign

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[505] Ibid.

[506] This charge has pedigree in France; see Jean-Jacques Servan-Schreiber, *Le Défi Américain* (Denoel, 1967), which raised similar claims against the US and its 'colonisation' of Europe.

policy and this state's economic and commercial interests.[507] In the Clinton era, during which the Anti-Bribery Convention was negotiated and ratified, these links were made prominent and urgent. Jeffrey Garten, then US Under-Secretary of Commerce for International Trade, has articulated:

> Throughout most of American history, commercial interests have played a central role in foreign policy, and vice versa. During the next few decades the interaction between them will become more intense, more important, more difficult to manage…[508]

For many in France, evidence of US economic espionage directed against French private enterprise confirmed their fears of unchecked spying by the US for commercial purposes, which had also been raised a few years earlier in the *Campbell report*.[509] Despite former CIA chief Woolsey's public dismissal that 'most European technology just isn't worth our stealing',[510] and his assertion that US spying on its allies was necessary to expose alleged foreign bribery by firms based in their allies' territory, commentators in France seized on these new disclosures as decisive evidence linking US international surveillance measures to the service of American corporate interests.

Just days prior to the WikiLeaks espionage disclosures, the *Assemblée nationale* passed a law to modernise the legislative regime governing the activities of its intelligence services.[511] This law was a measure in response to terrorist attacks in France, but it also contained new tools to protect and to further this state's economic and foreign policy interests.[512]

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[507] See Robert Blackwell and Jennifer Harris, *War by Other Means* (Harvard University Press, 2016).

[508] Jeffrey Garten, 'Business and Foreign Policy', *Foreign Affairs*, May/June 1997.

[509] *Campbell Report* (n. 355).

[510] Woolsey (n. 28).

[511] *Loi n° 2015-912 du 24 juillet 2015 relative au renseignement* [law on intelligence].

[512] Ibid Art. L. 811-3. For example, the law expressly mandated the use of France's intelligence services for the collection of information and extra-judicial surveillance relating to the defence and the promotion of the fundamental interests of the Republic, including major foreign policy interests, the prevention of foreign interference, and safeguarding the major economic, industrial and scientific interests of France.

In France politicians, journalists, and business executives argued that the US campaign against foreign bribery is a form of offensive economic diplomacy, often linked with this state's unilateral economic sanctions regimes.[513] Utilising the vast resources and abilities of its global surveillance and intelligence systems to maintain economic supremacy, so it is argued, the US uses these tools to discipline foreign states and firms that fail to hew to US foreign policy and its international economic policies.

In the US, this practice is more subtly termed geo-economics, economic statecraft, or simply foreign economic policy, and involves the use of economic instruments for geopolitical purposes and to implement US foreign policy objectives.[514] In this way, the US campaign against foreign bribery, including the FCPA and the Anti-Bribery Convention, are seen by some to serve as part of a broader strategy of US measures to further its economic power and global dominance. If this campaign happens to be against the national interests of France, it matters little to the US. Hervé Juvin argues:

> Les sanctions américaines contre les entreprises françaises et européens méritent l'attention. Elles révèlent une stratégie de mobilisation du droit dans la guerre économique, qui se traduit par un changement de nature de droit, placé sous la dépendance de l'économie et de la géopolitique.[515]

Similarly, laws against foreign bribery in France are also commonly characterised as unwanted American imports. The Sapin II reforms, for example, have been described as a form of American legal imperialism by the former Secretary of State for Foreign Commerce, Pierre Lellouche:

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[513] See, e.g., *1977 International Emergency Economic Powers Act* and *2017 Countering America's Adversaries Through Sanctions Act* (US).

[514] See Blackwell and Harris (n. 507); Ali Laïdi, *Histoire Mondiale de la Guerre Économique* (Perrin, 2017).

[515] See Juvin (n. 228). [US sanctions against French and European companies deserve attention. They reveal a strategy of mobilisation of the law in an economic war, which is translated by a change of the nature of law, placed under the dependence of economy and geography].

> Au fil de mon travail à la commission des Affaires étrangères, j'ai découvert la puissance du rouleau compresseur normatif américain qui revêt la forme d'un véritable impérialisme juridique et économique.[516]

Perceiving an excessive US influence over the form of Sapin II, and suspicion of its Anglo-American 'transactional approach' to criminal corruption investigations, some saw this law as an attempt to mimic the US.[517] Understanding that the motivations for French laws against foreign bribery are rooted in US economic and political coercion against France and its firms, it should not be surprising to find that there is little support in France for the US campaign against foreign bribery. The failures of France to enforce its laws against this conduct are, it is argued, better understood as the predictable reluctance of a strong-armed France to prostrate before the perceived American imperium. Jean-Michel Quatrepoint, for example, argues this US strategy of economic war and application of US laws extraterritorially is a threat to the French industrial sector:

> C'est évident. La menace, ce sont les Américains, car ils sont dans une stratégie identique à celle des Chinois, mais avec un temps d'avance grâce à leur statut de superpuissance. La réforme fiscale de Donald Trump est une machine de guerre économique redoutable, fort habile, que les Européens ont découvert trop tardivement. C'était pourtant dans le programme du parti républicain depuis de nombreuses années. Si l'on ajoute à cela l'extraterritorialité du droit américain et tout ce qui concerne les normes, cela traduit bien une réalité nous sommes en guerre économique. Trop longtemps, les Français n'ont pas voulu le croire. Dans le cas de l'extraterritorialité du droit américain, si l'Europe n'a rien à redire à cela, c'est parce que les Européens, et en particulier les Allemands, ont accepté de facto depuis des décennies la tutelle américaine.[518]

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[516] Raphaël Legendre, 'Au nom de la lutte contre la corruption, les États-Unis imposent leurs lois aux entreprises étrangères', *L'Opinion*, 5 June 2016 (quoting Lellouche). [In the course of my work at the Foreign Affairs Committee, I discovered the power of the American normative steamroller in the form of a real legal and economic imperialism].

[517] Garapon and Servan-Schreiber (n. 229) ; Eléonore de Vulpillières, 'Derrière le projet de loi Sapin 2, l'impérialisme judiciaire américain ?', *Le Figaro*, 7 June 2016.

[518] Jean-Michel Quatrepoint, 'La souveraineté industrielle de la France est-elle en danger?', *Areionews24*, 11 September 2018. [It's obvious. The threat is the Americans, because they are in a strategy identical to that of the Chinese, but a step ahead thanks to their status of superpower. Donald Trump's tax reform is a formidable, clever economic war machine that the Europeans have discovered too late. Yet it was in the Republican Party's program for many years. If we add

To the extent that France's laws against foreign bribery remain foreign imports, products of coercion and political pressure, and poorly justified in France, it is reasonable to expect a weak domestic interest and cognate lack of political will of the state in preventing and enforcing laws against this conduct. After all, they were never truly their own. Should this change, and French legislators and the executive act to develop meaningful justifications that are squarely in the interests of France to prohibit this conduct, we may observe an increase in political will to stamp out foreign bribery by French firms. Until then, a reluctant France will likely continue to resist the US campaign against foreign bribery, and thereby contribute to its failure.

In the next section, we extend our consideration of the French experience in the US campaign against foreign bribery through several case studies of French firms alleged to have engaged in foreign bribery.

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to this the extraterritoriality of American law and everything that concerns norms, it really reflects a reality: we are in economic warfare. For too long, the French did not want to believe it. In the case of the extraterritoriality of American law, if Europe has nothing to complain about it, it is because the Europeans, and in particular the Germans, have accepted *de facto* for decades American tutelage.]

Sagem n'avait pas besoin de graisser la patte de qui que ce soit, mais malheureusement, vous l'avez fait
—Olusegun Obasanjo, President of Nigeria[519]

2. Case studies

Here we examine several cases of alleged major foreign bribery by French firms. These cases represent, at June 2021, the few final dispositions of foreign bribery cases in France, and an opportunity to discern arguable shortcomings of France's prosecutorial practices to combat foreign bribery. This section also considers several cases in which French firms were prosecuted abroad in relation to alleged foreign bribery or related corrupt conduct, but have yet to face prosecution in France, or recently concluded minor settlements with insignificant actors. Taken together, these cases are arguably characteristic of a general lack of enthusiasm of French authorities to prosecute foreign bribery cases. Conversely, these cases may also serve as worthy examples of the effective independence of the French judicial system from the political interference observed in major foreign bribery cases elsewhere.

a) Safran—one step forward, two steps back?

Safran is a major French multinational high-technology company that produces aircraft and equipment for the aerospace and defence markets.[520] By any measure, Safran is a large and important firm in France; a 'national champion' that employs nearly 60,000 and turns over billions of euros in revenue annually. In 2017, the French Republic retained a significant minority interest in Safran.

In 2006, Safran found itself subject to formal allegations that it had bribed Nigerian foreign officials as part of its efforts to obtain a €170 million contract for the manufacture of 70 million electronic identity cards in Nigeria. Following repeated claims in the US, UK and Nigerian press that Safran had engaged in corrupt conduct in pursuit of this deal, a judicial inquiry into Safran was opened in France. This investigation centred on

[519] In 2005, Nigerian President Olusegun Obasanjo rebuked the former head of Safran over these alleged payments. [Sagem did not need to grease anyone's paw, but unfortunately, you did it]. 'Safran jugé en appel pour une affaire de corruption au Nigeria', *L'Express*, 17 September 2014.

[520] Safran was formed out of a 2005 merger of the former Sagem SA and Snecma SA firms.

allegations that Safran, formerly Sagem, and its agents engaged in 'active corruption' of Nigerian foreign public officials, as well as complicity and misuse of company assets, in pursuit of its corporate interests in Nigeria.[521]

Investigation and first instance trial

The investigating magistrates, *juges d'instruction*, in this case, Renaud Van Ruymbeke and Xavière Simeoni, are highly experienced judges with a strong reputation for unflinching, deeply probing examinations of matters of serious political and economic corruption in France.[522] Acting in a co-referral, the judges indicted Safran and two company executives, Messieurs Delarue and Perrachon, on charges of active corruption.[523] At trial, it was established that bribes had been paid by Safran agents to Nigerian foreign officials and their associates in the form of cash and gifts, including luxury watches, valued at more than €4 million.[524] The prosecution called for suspended prisons sentences for the alleged bribe paying Safran executives of 15 and 18 months, as well as a fine of €15,000 each.[525]

In the end, the court considered that evidence of a strict reporting line and the very hierarchical structure within Sagem, along with the understanding that Mr Delarue did not have the power to bind Sagem by his own actions, independent of the consent of his superiors, militated against his culpability in this matter. The court also decided that Mr Delarue had acted for the exclusive benefit of Sagem, free from any element of personal enrichment. The court reasoned similarly with respect to Mr Perrachon, and thus

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[521] Tribunal de Grande Instance de Paris, (n° 0600992023), Ministère Public c/ Delarue, Perrachon, Safran, 5 September 2012.

[522] Judge Van Ruymbeke worked on the Karachi case, the Elf-Aquitaine case, and the Taiwan Frigates scandal. Xavière Simeoni investigated the Taiwan Frigates case, and in 2016 was appointed to head the Service central de prévention de la corruption (SCPC). Jean-Pierre Thierry, *Taiwan Connection: Scandales et meurtres au coeur de la République* (R. Laffont, 2003).

[523] *Code pénal*, article 435-3 'De la corruption et du trafic d'influence actifs'.

[524] Thierry Lévêque, 'Le groupe Safran condamné à Paris pour corruption au Nigeria', *Challenges*, 5 September 2012.

[525] Valérie de Senneville and Alain Ruello, 'Safran condamné pour corruption active', *Les Echos*, 5 Septembre 2012.

dismissed the charges against both executives.[526] From the court's decision and reasoning, one can reasonably surmise the court may have considered that the wrong employees had been charged. Instead, more senior individuals from Sagem, with the appropriate level of company authority, may have been culpable for directing, engaging and approving the bribery.

Although the employees charged with paying the bribes were acquitted, in 2012 Safran, *qua* company, was found guilty of active bribery for making illicit payments of between €22,000-€36,000 to foreign officials in Nigeria. The court also found it was these illicit payments that led to the award of the identity card contract Safran had sought. Judge Van Ruymbeke sentenced Safran to a €500,000 fine, finding it had engaged in 'active bribery' of foreign public officials. With this decision, Safran earned the notoriety of being the first company in France convicted for engaging in foreign bribery.[527]

For many, this was an unexpected result because at trial the prosecution did not request a sentence against the company but left this matter to the court to assess. The conviction of Safran was therefore met with consternation by company executives and others in the business community; how could the individuals accused of foreign bribery be acquitted, but the company convicted? After all, a natural person must have authorised and paid these bribes. Safran vowed to appeal, commenting critically on the basis for the judgment:

> The good faith of the leaders of Sagem, in office when the acts of corruption were committed, having been admitted, this circumstance seems to exclude the criminal responsibility of the legal person Sagem.[528]

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[526] Tribunal de Grande Instance de Paris, (n° 0600992023), Ministère Public c/ Delarue, Perrachon, Safran, 5 September 2012 : [As a result, he acted on behalf of Sagem, which he also repeatedly stated, in the context of the commercial policy defined by the latter, and that he was responsible, at his own level, for and referring at each stage of the progress of the project to his superiors, to apply. Accordingly, the offense of bribery of a foreign public official can not be held against him].

[527] See Lévêque (n. 524).

[528] Safran Communication, 5 September 2012: 'La bonne foi des dirigeants de Sagem, en fonction lorsque les faits de corruption auraient été commis, ayant été admise, cette circonstance paraît exclure la responsabilité pénale de la personne morale Sagem.'

The appeal

In a much-criticised turn of events, the Public Prosecutor appealed the decision of the trial court.[529] In its appeal, the prosecution argued, in essence, that the Paris Criminal Court had gotten it backwards: Safran, *qua* company, should have been acquitted, whereas the executives accused of paying the bribes should have been convicted.[530] More precisely, the prosecutor argued that the evidence did not demonstrate the required level of corporate criminal responsibility of Safran for the acts of its agents.

Relying on Article 121-2 of the *Code pénal*, which provides for the criminal responsibility of corporations, the prosecutor submitted that the relevant acts had not been done on behalf of and for the benefit of the corporation. Importantly, Article 121-2 of the *Code pénal* requires that in order to impute criminal liability to legal persons the relevant acts must have been committed by the company's 'organs or representatives'.[531] On the other side of the case, the prosecution argued that there was sufficient evidence to convict the two Safran executives who were acquitted at trial.

Because companies in France are only liable for criminal offences committed 'by their organs or representatives', prosecutors must identify the individual who is alleged to have acted on behalf of the company.[532] Moreover, an employee, by his or her conduct, will not engage the liability of the company unless there is evidence of a relevant delegation of powers.[533] Compared to the relatively loose doctrine of *respondeat superior* as applied in the US,[534] for example, French legal principles imposing criminal liability on a

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[529] See Bonifassi and Lelieur (n. 481).

[530] The public prosecutor had initially sought dismissal of the charges against Safran.

[531] Dorothée Goetz, 'Responsabilité pénale de la personne morale: bis repetita placent !', *Dalloz Actualité*, 2 November 2017; Frederick Davis, 'Corporate Criminal Responsibility in France—Is It Out Of Step?', *Ethic Intelligence*, 14 April 2015.

[532] This reflects the case law in 2012; in 2018 the Cour de cassation issued new jurisprudence on this matter, and identification is no longer essential. See Cour de cassation, 14 March 2018, n° 16-82.117 (affirming the conviction of Total SA on the basis that the offence had been committed by its executive committee on its behalf).

[533] See Cour de cassation, chambre criminelle, 17 October 2017, n° 16-87.249.

[534] In the US, *respondeat superior* is a legal doctrine, common in tort cases and arising out of the law of agency, used to hold an employer legally responsible for the wrongful acts of its employees

company for the actions of its agents are arguably narrower and more strictly interpreted.[535]

In the end, the Court of Appeal decided 'the evidence did not compel a conclusion that there was an illegal' *quid pro quo*, required by law, that linked the evidence of the payments made with the fact that Safran was awarded the contract.[536] The Court of Appeal acquitted both Safran and the two employees.[537] For some observers this decision was fresh evidence that France was a bad student in the fight against international corruption, and remained in a suspect group of wealthy, developed states that have been unable or unwilling to prosecute effectively their firms that engage in foreign bribery. Hidden corporate payments to foreign officials were made in this case, this much is clear.

While some commentators were puzzled by the decision of the prosecutor to appeal the first conviction of a French firm for foreign bribery, this should not distract us from the substantive legal grounds upon which the appeal was ultimately decided. The decision of the Court of Appeal in this case was accepted as a cogent reading of the law and the facts.[538] There was no suggestion that the Court had erred, nor was there any hint of impropriety or unprofessionalism by the prosecutor in appealing the trial court's decision. Even if the prosecutor did not choose to appeal the first instance trial, Safran had immediately announced its intention to do so.

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or agents, if those acts occur within the scope of their employment or contractual engagement. See *United States v New York Central & Hudson River R. Co.*, 212 U.S. 509 (1909).

[535] Corporate criminal liability in France was long governed under Article 121-2 of the Code pénal, which limited such liability to specific laws only. With the enactment of the *Perben 2* law in 2004, corporate criminal liability was generalised and legal persons could now be held liable, in principle, for any violation of French criminal law: see *Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*.

[536] See Davis (n. 531). Frederick T. Davis, 'The Fight Against Overseas Bribery—Does France Lag?', *Ethic Intelligence*, January 2015.

[537] Frederick T. Davis, 'The Fight Against Overseas Bribery—Does France Lag?', *Ethic Intelligence*, January 2015.

[538] Bonifassi and Lelieur (n. 481): [This is not to criticise the decision of the Court of Appeal, which considered there was no bribery in this case (and so much the better for Safran), but the position of the prosecutor and the Ministry of Justice].

Until 2018, the Safran case represented the sole prosecution of a company in France to reach a final disposition for alleged foreign bribery.[539] The next case of foreign bribery in France would prove much more complex, contested, and circuitous in its path to resolution.

b) Oil-for-Food scandal: Total and Vitol

In 1996, the United Nations Oil-for-Food Programme (OFFP) was established under the authority of UN Security Council Resolution 986 to address mounting concerns that UN sanctions against Iraq were starving the civilian population and eroding international support for the maintenance of sanctions against Iraq in response to its invasion of Kuwait in 1990.[540] Under the OFFP, Iraq was permitted to sell its oil products to finance the purchase of humanitarian goods, including food, medicine, and equipment, under the supervision of a UN Security Council sanctions committee, the Office of the Iraq Programme (known as the '661 Committee').

By the time this program was terminated after the US-led invasion of Iraq in 2003, tens of billions of dollars' worth of humanitarian goods and equipment had been delivered to Iraq under the OFFP. However, an independent inquiry later demonstrated the OFFP was widely manipulated by the Iraqi government and rorted by hundreds of international firms. Below, the focus of our analysis is on two of those firms: Total (French) and Vitol (Swiss).

The Volcker report

In 2005, the final report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme ('the Volcker Report') showed that the Iraqi government received approximately $10.2 billion in illicit income from a combination of inflated oil surcharges, so-called after-sales service fees, inland transportation fees, and

[539] While there have been several high-profile prosecutions of French firms for allegedly engaging in foreign bribery, these have been pursued by other international authorities (principally the US), some of which are considered below at III(A)(2)(c).

[540] In August 1990 the UN Security Council adopted Resolution 661, imposing comprehensive sanctions on Iraq after its invasion of Kuwait.

smuggling.[541] Of this amount, the after-sales service fees and inland transportation fees amounted to $1.8 billion, received from 2200 companies from about 60 countries.[542] Many of these firms were involved in providing oilfield maintenance and lifting services to Iraq's beleaguered petroleum industry in exchange for crude oil vouchers, most of which came from the US, UK, Russia and France.

Before examining these two cases arising out of this scandal, it is important to provide some context. Following the invasion of Iraq, US and British authorities went to great lengths to characterise the OFFP as a gross failure of the United Nations and the other members of the Security Council responsible for overseeing the programme. In the *Wall Street Journal*, these attacks were directed at UN Secretary General Kofi Annan:

> Even now, the U.N.'s defenders like to paint Oil for Food as a great humanitarian effort slightly tarnished by a few overhyped instances of corruption. In fact, Oil for Food was a huge field of graft, helped by the fact that the man in charge of policing it was, based on the evidence Mr Volcker has collected, in the service of the bad guys.[543]

These allegations stretched far and wide, with the *Washington Post* opining:

> [M]ost of those allegedly receiving rewards were not Americans. The preponderance of lucrative contracts went to French and Russian companies, on the grounds that their governments opposed the sanctions regime and favored Iraq in the UN Security Council. Individuals who campaigned on behalf of Saddam Hussein in the West are also said to have been rewarded.[544]

What was elided in this reporting was that of the $3 billion in alleged 'French' OFFP contracts detailed in the Volcker report, 'more than $634 million went to French subsidiaries of American multinationals.'[545] US firm General Electric, for example, won

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[541] Independent Inquiry Committee into the United Nations Oil-for-Food Programme, Manipulation of the Oil-for-Food Programme by the Iraqi Regime, 27 October 2005, 40 ('Volcker Report').

[542] Ibid.

[543] *Wall Street Journal*, 'Oil for Fraud', 9 August 2005.

[544] *Washington Post*, 'Oil for Fraud', 2 November 2005.

[545] Katrin Bennhold, 'Full access pledged for UN inquiry: France offering data in oil-for-food probe', *New York Times*, 27 October 2004.

deals with Iraq worth $445 million. Halliburton received $127 million, and more than $300 million went to subsidiaries of British firms.[546]

The Volcker report picked up on these nuances, noting: 'Iraq's preference for French companies and the limited number of recipients in France for Iraqi crude oil led certain companies to pass themselves off ... as being French-based.'[547] Indeed, the Volcker report cites a letter from a French official to an Iraqi official in Paris in 1998, in which he expresses his government's concerns:

> regarding the increase in British and American companies as well as others who exploit the decision of the Iraqi leadership in providing priority to conducting business with French companies by signing contracts with Iraq through their offices in France.[548]

In other words, Anglo-American firms set up hidden subsidiaries in Paris to pass themselves off as French. Nonetheless, this case analysis is limited here to two firms prosecuted in France for alleged foreign bribery in this matter. The Total and Vitol cases are included by necessity because they represent the first conclusive convictions of companies in France for foreign bribery offences. However, these cases are arguably anomalies, representing an exception to the rule that very few of the firms involved in corrupt conduct as part of the OFFP were prosecuted globally.[549]

2013 Prosecution (Total and Vitol)

On 8 July 2013, in a blockbuster case involving 20 defendants—including the CEO of Total, a former Interior Minister of France, and several former diplomats—alleged to have engaged in foreign bribery and related corrupt conduct in relation to the OFFP, the Paris court of first instance acquitted all those charged, including French petroleum major

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[546] Ibid.

[547] Volcker Report (n. 541) 47.

[548] Ibid.

[549] Two American firms, GE and Johnson & Johnson, agreed to pay penalties over related corruption allegations. Vitol was also pursued in the US for its conduct in Iraq, pleading guilty in 2007 to bribe-related larceny charges and agreeing to pay $17 million in penalties. See Chad Bray, 'Vitol Pleads Guilty In Oil-for-Food Case, *Wall Street Journal*, 20 November 2007.

Total and the Swiss energy and commodities trader Vitol.[550] The Court decided that none of the offenses were made out (bribery of foreign officials, influence peddling or misuse of company assets). In sum, the Court held that foreign bribery could not be proved because the recipient of the payments was the state of Iraq (therefore, a foreign public official had not personally enriched himself).

With respect to Vitol, because the firm had resolved a case on similar facts with the US authorities in 2007, the court held that by operation of the *ne bis in idem* rule further prosecution in France was foreclosed on *res judicata* grounds.[551] Although the prosecution had previously called for the case not to proceed, this decision was appealed with respect to most defendants (including Total and Vitol).

2016 Appeal (Total and Vitol)

On 26 February 2016, the Paris Court of Appeal quashed the lower court's decision and found Total guilty of engaging in foreign bribery. Total was fined €750,000, which was the maximum relevant fine at the time.[552] Vitol was also found guilty of engaging in foreign bribery and fined €300,000. One of the defendants was acquitted, and eleven other defendants were fined from €5,000 to €100,000.[553] However, Total and Vitol, and other defendants, vowed to appeal to the Cour de cassation.

2018 Final appeal

Two decades after the alleged foreign bribery, and after reaching the highest court in the land, on 14 March 2018 the Cour de cassation affirmed the decisions of the Court of Appeal.[554] France finally had its first and second convictions of companies for engaging

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[550] Tribunal de grande instance de Paris, (11ème chambre correctionnelle), 8 July 2013.

[551] See Juliette Lelieur, 'Créativité judiciaire en faveur des entreprises françaises dans l'affaire Pétrole contre nourriture II' (2015) *Dailloz –AJ pénal* 540.

[552] Total SA CEO Christophe de Margerie died tragically in 2014; former Interior Minister Charles Pasqua died in 2016.

[553] *Le Parisien*, 'Pétrole contre nourriture : amende de 750.000 euros en appel pour Total', 16 February 2016.

[554] Cour de cassation [French Court of cassation], 16-82.117, 14 March 2018, reported in (2018) Bull crim n° 3, 45.

in foreign bribery. In this historical judgment, the Court dealt with a variety of points of appeal, including jurisdictional objections related to *ne bis in idem* claims, matters concerning the characterisation of the offence of corrupting a foreign official (such as issues of personal enrichment and local law exemptions), and the extraterritorial application of laws prohibiting foreign bribery and related corrupt conduct.

Importantly, the court held that resolution of a foreign bribery case abroad under a DPA/NPA (like Vitol) would not bar authorities in France from prosecuting on the same facts in circumstances in which some of the facts had occurred in France.[555] The Court held that although the principle of double jeopardy applied, it did not apply to foreign sovereigns. In other words, unless another agreement were to apply,[556] *ne bis in idem* and the decisions of foreign courts will not act to bind the French state against prosecuting an extraterritorial case where there is a factual connection to France. With this decision and the relative lack of precedent in France on such matters, much was settled.

c) Société Générale and selected other cases

In 2018, France's PNF and the US DOJ announced the first co-ordinated resolution of a foreign bribery case.[557] This case, in which French bank Société Générale admitted making over $90 million in corrupt payments to officials in Libya, resulted in Société Générale entering into a DPA in the US, and a subsidiary pleading guilty to conspiracy to violate the anti-bribery provisions of the FCPA. Éliane Houlette, the inaugural head of the PNF, considered it an important event both because it represented the first CJIP for

[555] For example, although it was not alleged Vitol committed corrupt acts on French territory, Vitol was convicted because it had used a French diplomat as an accomplice, who made relevant calls from France and who had received corrupt payments in a French bank account.

[556] Concerning intra-European matters, see, e.g., Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985, and Article 50 of the Charter of Fundamental Rights of the European Union of 7 December 2000, cited in Lelieur (n. 551) 540.

[557] DOJ, Press Release, 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate', 4 June 2018.

foreign bribery conduct in France under Sapin II, and the first sharing of foreign bribery-related sanctions between France and the US.[558]

The DPA required Société Générale to pay a penalty of more than $860 million to the US and France, $585 million of which related to the bank's foreign bribery conduct in Libya (the remaining $275 million was imposed for financial market manipulation). Of this amount, the DOJ credited Société Générale approximately $292 million toward the bank's agreement with the PNF, which represented 50 per cent of the bribe-related criminal penalty otherwise payable to the US. Importantly, the DOJ did not require Société Générale to undergo a period of intrusive, court-enforced monitorship. Instead, under the CJIP agreed with the PNF, the bank would be subject to a monitoring regime in France by the Agence Française Anticorruption.

Three important aspects of this case set it apart from previous sanctioning of French firms in the US for alleged foreign bribery. First, the degree of co-operation between the PNF and the DOJ in resolving this matter. Co-operation and assistance between French authorities and US authorities in matters of alleged foreign bribery by French firms has been very limited.[559] Second, the joint sanctioning and sharing of criminal penalties between these two jurisdictions was without precedent.[560] Third, it was also unprecedented to negotiate a monitorship in France with a French monitor, instead of the US and a DOJ appointed monitor.

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[558] Valérie de Senneville, 'Société Générale solde deux litiges majeurs pour 1,3 milliard de dollars', *Les Echos*, 4 June 2018: 'C'est un événement important', a tenu à souligner Éliane Houlette la procureure du PNF car c'est la 'première CJIP pour corruption internationale signée par le PNF et le premier accord' de partage de sanction avec le DoJ'. See *Intelligence Online*, 'SocGen case heralds new era for legal diplomacy', 13 June 2018.

[559] Total's $398 million settlement with the DOJ in 2013 for alleged foreign bribery in Iran was the first co-ordinated action by French and US authorities in a foreign bribery case; however, there was no joint sanctioning or penalty sharing in this case.

[560] Elsewhere in Europe there have been several joint investigations and sanctioning of European firms for foreign bribery; see, e.g., the Siemens case in 2008, which involved simultaneous settlements in Washington, D.C. and Munich, or the 2017 Telia case involving the US, The Netherlands and Sweden.

Some professionals working in the anti-corruption sector, particularly in France, saw this case as representing a brave new world of international co-operation against corrupt conduct, and the arrival of the PNF and the AFA as credible new actors, willing and able to investigate, to prosecute, and to extract serious penalties from firms that engage in foreign bribery or other financial crimes. In many ways, this case represents an exemplar of the international co-operation that Mr Sapin sought to accomplish with the Sapin II law, without which this case would have been resolved in the US and likely without the close assistance of the French authorities.

Whether this case represents a fundamental change underway to France's approach to investigating and prosecuting major foreign bribery cases remains to be seen. The Sapin II law is relatively young, and there may well be an emerging willingness by authorities in France to co-operate internationally in certain circumstances.[561] If this case proves more than a one-off, it may reasonably be characterised as a liberal success story of international co-operation, and work against the thesis that the US campaign against foreign bribery is bound to fail.

But will the PNF be as helpful to the DOJ the next time the US brings an enforcement action against an important French firm for alleged foreign bribery? Will the quality of this co-operation depend on the personalities at the helm of the authorities? More critically, would Washington reciprocate a call for assistance from Paris where it involved alleged major foreign bribery by a US national champion? With the US-inspired extraterritorial reach of Sapin II, such a circumstance may well present itself soon.

Given the charged history of the negotiations of the Anti-Bribery Convention, and the common perception in France that its industrial jewels have been targeted by the US for economic and strategic purposes, genuine co-operation between these two states on such matters is, it is argued, not likely sustainable. Instead, a return to realism on such issues

[561] For example, the long-running investigation of the Franco-German Airbus Group by authorities from the UK, France, and the US, in which it has been reported a magistrate in the PNF encouraged co-operation with UK and US counterparts. See Sophie des Déserts, 'Éliane Houlette, procureure sous pression', *Paris Match*, 11 July 2020.

appears nigh as France, and other major EU states,[562] move to reorient their foreign policies to privilege economic nationalism and sovereigntist concepts in an increasingly multipolar international system.[563] We see this shift underway, for example, in the words of France's Minister of the Economy and Finance, Bruno le Maire, expressing his dismay with the extraterritorial application of US economic laws such as the FCPA:

> Le commerce mondial doit être fondé sur un principe d'équité et de stricte réciprocité des règles. Ce n'est pas le cas aujourd'hui.[564]

Instead of liberal notions of international co-operation or shared values, here le Maire invokes a central tenet of realism—i.e., reciprocity—to respond to perceived overreach by the Americans. This shift in France toward greater reliance on realist principles in international politics has also been highlighted by President Emmanuel Macron when launching his ambitious 'Initiative for Europe: A sovereign, united, democratic Europe', arguing 'pour construire l'Europe de demain, nos normes ne peuvent être sous contrôle américain…'.[565]

The case studies considered thus far cover several of the most prominent foreign bribery cases in France, and they represent a cross-section of French industrial champions from the petroleum, defence, and financial sectors. In these cases, we observe the halting development of France's regime against foreign bribery, both from a legislative and jurisprudential perspective. With the Safran case, we see the tensions of previously hidden, but tolerated conduct tested against new, arguably inadequate laws and dated jurisprudence, which frustrated early attempts to prosecute foreign bribery offences.

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[562] Germany, for example, has signalled similar moves against the extraterritorial application of unilateral US sanctions affecting their firms and strategic energy projects. Mathias Brüggmann, 'Frontalangriff der USA: Deutsche Wirtschaft wehrt sich gegen Drohungen wegen Nord Stream 2', *Handelsblatt*, 16 July 2020.

[563] See generally, William Drozdiak, *The Last President of Europe: Emmanuel Macron's Race to Revive France and Save the World* (Public Affairs, 2020).

[564] Cabirol (n. 405). [World trade must be based on the principle of fairness and strict reciprocity of rules. This is not the case today].

[565] Ministère de l'Europe et des affaires étrangères, 'Discours du Président Emmanuel Macron sur la stratégie de défense et de dissuasion devant les stagiaires de la 27e promotion de l'école de guerre', 7 February 2020. [to build the Europe of tomorrow, our norms cannot be under American control].

While the Oil-for-Food scandals are clearly *sui generis*, their eventual appearance before the highest court in the land and this Court's historic judgment in the Total and Vitol cases arguably demonstrated the conviction of the French authorities to prosecute alleged foreign bribery conduct, even in unique cases such as these. With the Société Générale resolution, there is a clear commitment to implement Sapin II and its associated settlement agreements. This case also demonstrates a new level of co-operation between the French and American authorities in matters of foreign bribery.

But there are other French foreign bribery cases that tell us a different story of France's willingness to play by American rules in matters of major foreign bribery. Below, we consider several prominent cases of alleged foreign bribery by French firms that have featured only recently in the French courts or resulted in minor settlements with insignificant actors. In some of these cases, French firms have settled with US authorities for alleged foreign bribery and related offences, causing some to question why these cases were not dealt with by the justice system in France.[566]

While some may point to evidential challenges behind the few enforcement outcomes in France, or differences in the laws of the relevant jurisdictions,[567] others have argued there has been no coherent government policy against this conduct.[568] Separately, some contend there is a lack of effective independence of prosecutors to investigate and to

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[566] Sénat [French Senate], Commission de lois, Mission d'information 'Droit des entreprises, enjeux d'attractivité internationale, enjeux de souveraineté', 11 March 2015, Antoine Garapon: 'La France avait implicitement choisi une justice faible, n'intervenant pas sur les questions de corruption, de sorte que les poursuites auxquelles nous avons renoncé sont désormais conduites par la justice américaine, et que les amendes infligées par elle alimentent le Trésor des États-Unis.' [France had implicitly chosen weak justice, not intervening on questions of corruption, so that the prosecutions which we waived are now conducted by the American justice system, and the fines imposed by it feed the Treasury of the United States].

[567] For example, the application of *ne bis in idem* principles or pre-Sapin II issues related to the extraterritorial application of France's laws against foreign bribery. Although *ne bis in idem* principles may apply to the criminal prosecution of natural persons in France, this remains a developing area of law. See, European Court of Justice, 11 February 2003, Gözütok and Brügge, (joined cases C-187/01 and C-385/01), [30-31]; Cour de cassation, chambre criminelle, 17 January 2018, No 16-86.491.

[568] Bonifassi and Lelieur (n. 481).

prosecute French firms for alleged foreign bribery and other corrupt conduct.[569] To explore these issues further, we now consider several cases involving French firms or persons that have recently concluded in France, and others that long ago settled with US authorities but investigations in France have not advanced.[570]

Taiwan Frigates scandal

In 1993, Thomson-CSF, a state-owned French defence, aeronautics and security firm, concluded a $2.8 billion contract with Taiwan to supply six *La Fayette* class frigates. It would turn out that Thomson-CSF, through its intermediaries, had allegedly paid $500 million in bribes to conclude this deal, or as Minister for the Budget, Michel Charasse called them, 'frais de prospection de marché' (market prospecting fees).[571] These payments, Charasse would later argue, were entirely legal and regular, as they were made seven years prior to the Anti-Bribery Convention and its transposition in French law.

As such, this case presents limited application to the primary arguments of this dissertation. It is nonetheless illuminating for our purposes because it may indicate how the French state will respond to allegations of bribery and related corruption when matters of its national and security interests are claimed to be at stake.[572] The bribes in this case were allegedly paid not only to Taiwanese officials to cement the deal, but also to prominent members of China's Politburo to buy their acquiescence in the supply of these French warships to Taiwan.

Following the discovery of some of these payments as part of an investigation into another corruption scandal involving the French petroleum firm Elf-Aquitaine, an investigation commenced in 2001 into whether portions of these bribes returned to France in the form

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[569] Seeking to address this long-standing matter in the context of prosecuting corruption offences, in June 2020 the Minister of Justice published the 'Circulaire de politique pénale en matière de lutte contre la corruption internationale' [Memorandum of criminal policy on combating international corruption]. This policy document establishes, *inter alia*, the central role of the PNF in the fight against transnational corruption and foreign bribery.

[570] Although these types of investigations appear to founder for years in the French justice system, the protracted nature of these matters is certainly not unique to France.

[571] *L'Obs*, 'Frégates de Taïwan: Charasse se défend', 28 May 2004.

[572] See Thierry (n. 522).

of illicit retro-commissions to finance French political parties (much like the Watergate affair).[573] However, after several years of attempts by the judiciary to obtain information from the customs department were rebuffed on the grounds of national defence secrecy. The investigation was dismissed in October 2008 for a lack of evidence, with the frustrated investigating magistrate Renaud Van Ruymbeke noting: 'les refus réitérés des pouvoirs publics ayant pour effet de conduire les investigations dans une impasse'.[574]

Taiwan, however, later sued Thomson-CSF (now known as Thales) for breach of an anti-corruption clause in the contract that forbade these types of 'commissions' to be paid to intermediaries. In 2010, the ICC International Court of Arbitration ordered Thales to pay €630 million. With the French state's ownership interest in the shipbuilding firm DCN, which received about 70% of the works under the contract, it was the French government that paid 72.5% of this amount.[575] Because these payments were legal in France at the time, this case does not interact directly with the US campaign against foreign bribery. However, it does demonstrate that France has clearly been willing to prioritise its perceived national interests over domestic judicial investigations into alleged illicit conduct.

Technip: the Bonney Island scandal

The first judicial investigation in France of alleged foreign bribery offences concerned the French engineering and oil-services firm Technip over its involvement in a staggering corruption scandal in Nigeria. Between 1995 and 2004, Technip and its joint venture partners—Snamprogetti (Dutch-Italian), Halliburton-KBR (USA), and JGC (Japan)—paid $182 million in bribes to officials in Nigeria to secure contracts to build four liquefied natural gas trains on Bonny Island, Nigeria for the Dutch petroleum firm Shell, in a deal reportedly worth six billion dollars.

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[573] Roland-Pierre Paringaux, 'Le second scandale des « frégates de Taïwan »', *Le Monde Diplomatique*, November 2008, 10.

[574] Renaud Lecadre, 'Frégates : un pot-de-vin peut en cacher un autre', *Liberation*, 13 June 2011. [Repeated refusals by the public authorities led the investigations into a deadlock].

[575] *UPI*, 'Thales pays up in Taiwan frigate battle', 15 July 2010; *Le Monde,* 'Affaire des frégates: Thales condamné à payer 630 millions d'euros à Taïwan', 3 May 2010.

The initial investigation in France, commenced in Paris in October 2002 and referred to Judge Van Ruymbeke in October 2003, soon grew to involve serious allegations involving former Halliburton-KBR CEO, Dick Cheney (at the helm of Halliburton during most of the relevant period).[576] Judge Van Ruymbeke reportedly went so far as to notify the French Justice Ministry in 2003 that then US Vice President Cheney may be summoned to give evidence, or could be indicted as a result of his investigations.[577] However, the principle actors in this case would ultimately not face French justice, but the US courts.

In 2008, the CEO of KBR, Jack Stanley, was sentenced in the US to 30 months in prison.[578] A British lawyer who acted as the key middleman in this affair, Jeffrey Tesler, was sentenced to 21 months in prison and forfeited $143 million. In 2009, KBR settled with the DOJ and paid a fine of $579 million for FCPA violations. In 2010, Technip entered into a DPA and settled with US authorities, agreeing to pay $338 million to resolve FCPA charges. In that same year, the Dutch-Italian firm Snamprogetti settled with US authorities over alleged FCPA violations, agreeing to pay $365 million. In 2011, the loop was closed on the Bonny Island joint venture partners when Japan's JGC agreed to pay $218.8 million to settle FCPA-related charges. Collectively, the criminal fines and forfeitures from the Bonney Island cases exceeded $1.6 billion.[579]

What happened to the Technip case in France? Not much to date. In 2013, two former executives of Technip were sentenced to fines of €5,000 and €10,000 for corruption of a

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[576] Keith Richburg, 'French Judge Probes Unit of Halliburton', *Washington Post*, 21 January 2004, A23.

[577] Doug Ireland, 'Will the French Indict Cheney?', *The Nation*, 29 December 2003.

[578] Chris Baltimore, 'Ex-KBR CEO gets 30 months for Nigeria scheme', *Reuters*, 24 February 2012.

[579] After settling with US authorities in this case, Technip merged with US firm FMC Technologies. Apparently failing to change its stripes, in 2019 TechnipFMC announced it would pay $301.3 million to resolve further anti-corruption allegations with US and Brazilian authorities: TechnipFMC, Press Release, 'TechnipFMC Reaches Global Resolution of U.S. and Brazilian Legacy Investigations', 25 June 2019.

foreign public official, far below the penalties recommended by the prosecutor.[580] Judge Van Ruymbeke is reported to have co-operated with US authorities in this matter and sent material to the US that implicated Technip in corrupt conduct in Nigeria.[581]

The French authorities may have had jurisdictional challenges because of the timing of the alleged corrupt conduct, part of which occurred prior to France's ratification of the Anti-Bribery Convention and transposition of this agreement into domestic law in 2000. However, given Van Ruymbeke's investigation also covered the alleged misuse of company assets (*abus de biens sociaux*), the termination of the first French investigation of a French firm for alleged foreign bribery and related corrupt conduct inspired little confidence that authorities would pursue these matters vigorously.

In 2019, TechnipFMC was under investigation by France's PNF for alleged corrupt conduct in Brazil and the African continent, for which it had set aside $70 million in anticipation of reaching an agreement with authorities in Paris.[582] It remains to be seen whether any settlement with the PNF is restricted to these recent allegations of foreign bribery or whether it will delve deeper into TechnipFMC's pre-merger history as a French firm.

Alstom

In 2014, the DOJ dubbed its prosecution of French firm Alstom the 'largest-ever foreign bribery resolution'. In this case, the DOJ received little co-operation from the firm or from French authorities and was reportedly frustrated in its investigation by both.[583] In many ways a typical foreign bribery case by an industrial giant, Alstom allegedly paid

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[580] *L'antenne*, 'Deux anciens de Technip condamnés pour corruption', 31 January 2013; *Africa Energy Intelligence*, 'How Technip avoided a trial', No. 689, 18 December 2012.

[581] Charles Fleming and Russell Gold, 'Paris to Seek Global Aid in Probe Of Halliburton, Others in Nigeria', *Wall Street Journal*, 23 December 2003.

[582] *Capital*, 'TechnipFMC dans le viseur du PNF', 12 February 2019.

[583] Pierucci and Aron (n. 141); Jean-Michel Quatrepoint, *Alstom, scandale d'État* (Fayard, 2015); Anne Michel, 'L'enquête sur l'affaire Alstom-General Electric passe entre les mains du Parquet national financier', *Le Monde*, 18 July 2019.

$75 millions in bribes to foreign officials in several countries, including Indonesia, Saudi Arabia, Egypt, to secure major contracts to provide power-related services.

However, Alstom was, in large part, acquired by its American rival General Electric (GE) in controversial circumstances just as it was being prosecuted by US authorities for alleged FCPA violations. Although the Alstom and GE leadership, and some allege the DOJ, agreed that GE would pay any impending FCPA penalty, the DOJ later forbade GE from doing so.[584] As this fine turned out to be $772 million, it significantly impaired Alstom's precarious financial position at a strategic moment for the firm.[585]

Not only was Alstom required to pay this record FCPA penalty, the agreed purchase price with GE was not adjusted to reflect this change of circumstances. Alstom shareholders, therefore, paid this fine as well as an amount that had certainly been factored into the purchase price based on the agreement that GE would pay any such fine. This case, and the co-incident acquisition by GE, remains highly controversial in France and has been the subject of investigations and parliamentary inquiries into the conduct of the Alstom CEO, Patrick Kron, and Emmanuel Macron, who, as Minister of Economy, approved the acquisition.[586]

Despite pleading guilty in the US to foreign bribery offences in what was then the largest-ever foreign bribery resolution with the DOJ, with one of its executives jailed in the US, no foreign bribery case was ever publicly known to be lodged against Alstom in France. Had the French authorities judged Alstom had paid its dues sufficiently to the Americans? Or perhaps there were jurisdictional problems that could not be overcome given the alleged bribery went back to the early 2000s.

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[584] See Pierucci and Aron (n. 141); Joel Schectman, 'The Morning Risk Report: Alstom Shows Corruption is No Deal Breaker', *Wall Street Journal*, 24 December 2014.

[585] *BBC News*, 'Alstom to pay $772m fine to settle bribery charges in US', 22 December 2014, noting: 'When GE agreed the €12.4bn takeover deal, both sides said the US firm would take on all of its liabilities, including possible official penalties.'

[586] *Assemblée nationale*, 'Commission d'enquête sur les décisions de l'État en matière de politique industrielle, notamment dans les cas d'Alstom, d'Alcatel et de STX', 31 octobre 2017, (Rapporteur, Guillaume Kasbarian); 'L'affaire Alstom-General Electric transmise au parquet national financier', *Challenges*, 19 July 2019.

The Karachi affair

The so-called 'Karachi affair' began in 1994 when French shipyard DCN (Direction des constructions navales), a firm then owned by the French state, negotiated the sale of three Agosta class submarines, and a subsequent arms contract, to Pakistan. Some reports indicate these two deals were valued at 90 billion French francs.[587] These contracts were allegedly concluded on the back of vast bribery by DCN agents of Pakistani foreign public officials, including senior military commanders and this state's secret services.[588] Of course, these payments were not illegal in France at the time.

These deals also reportedly involved significant 'retro-commissions' or 'kickbacks', which typically involves the seller offering higher commissions than necessary so that it can recover, often for illicit purposes, a part of these commissions through an intermediary. The retro-commissions, reportedly equivalent to millions of euros, were allegedly used as a slush fund (*caisse noire*) by France's outgoing Prime Minister, Edouard Balladur, in his unsuccessful 1995 presidential campaign against Jacques Chirac. Upon his electoral victory, President Chirac banned these retro-commissions and is reported to have stopped the payments to Pakistani officials soon after.[589] This move deprived Chirac's political rivals of significant financial resources, but it also angered those foreign officials and their associates who were expecting to be paid for their 'services'. The Karachi scandal, however, did not end with this. The worst was to come several years later.

On 8 May 2002, only three days after Chirac's re-election as president, while France commemorated the allied victory over Nazi Germany, tragedy struck in Karachi, Pakistan. During the morning bus run to pick up DCN employees at their hotels to take

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[587] Fritz Heimann and Mark Pieth, *Confronting Corruption: past concerns, present challenges, and future strategies* (Oxford University Press, 2018) 76. After adjusting for inflation and the fixed rate of the French Franc following France's conversion to the Euro in 2002, the purchasing power of this amount in 2017 equalled approximately €18.8 billion.

[588] Ibid. These payments were standard practice in this sector and legal in France at the time. In this same year, 1994, DCN agreed to sell three La Fayette class naval frigates to Saudi Arabia for approximately $3.4 billion.

[589] Ibid.

them to the shipyard where they worked on the Agosta submarines that Pakistan had purchased, a 'suicide bomber' followed the bus to the hotel pick-up point and detonated his vehicle. The vehicle was laden with high-explosives, killing 14 people, including 11 DCN employees. Initially, al-Qaeda and affiliate Islamist organisations were considered prime suspects. However, evidence soon emerged purporting to link Chirac's decision to stop the bribe payments with the bombing.[590] In other words, the bombing was an act of revenge for the failure of DCN (and by extension, France) to make good on the bribe-affected Agosta deal.

Decades later, this matter remained under active judicial investigation.[591] In 2017, former Prime Minister Edouard Balladur was placed under formal investigation in the specialist Cour de justice de la République[592] over allegations that retro-commissions from this deal were used illegally to finance his failed election campaign. In May 2019, after nearly five years of investigations, the court's investigating committee referred its case to the public prosecutor of the Cour de cassation for possible trial of Mr Balladur and his former defence minister, François Léotard.[593]

On 15 June 2020, after more than 25 years, the Paris Criminal Court convicted six defendants, including former senior political advisers and French officials, over retro-commissions from Pakistan and Saudi Arabia in 1994.[594] Some received lengthy

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[590] Ibid, noting the bomb was sophisticated and contained military grade explosives, suggesting an act of revenge by Pakistan military forces for France reneging on the bribe agreements.

[591] In 2014, Judges Renaud Van Ruymbeke and Roger Le Loire issued a report noting €327 million in bribes had been paid between the Agosta deal with Pakistan and Saudi Arabia frigate deal. See Gérard Davet et Fabrice Lhomme, 'Affaire Karachi : ce que les juges reprochent à Balladur et Léotard', *Le Monde*, 11 February 2014.

[592] The Cour de justice de la République (CJR) is a French specialist court established to try offences allegedly committed by members of the Government in the exercise of their functions. At the time of writing, the status of this court is suspended and its jurisdiction is mooted to be abolished in preference for the Paris Court of Appeals.

[593] *Le Point*, 'Affaire Karachi : fin des investigations visant Balladur et Léotard', 13 May 2019.

[594] *Le Point*, 'Affaire Karachi : prison ferme pour les 6 prévenus dans le volet financier', 15 June 2020.

custodial sentences, while other received suspended sentences. The cases against messieurs Balladur[595] and Léotard in the Cour de justice de la République continue.

At least two lessons can be learned from the Karachi affair: first, there are real dangers involved in engaging in, and later reneging on, foreign bribery agreements with powerful state actors and their agents; second, succumbing to foreign pressure to undo such financial arrangements made as part of a major trade deal can do real harm to a state's national interests, and may provoke tragic consequences for a state's citizens.[596] Below, we revisit this theme when considering the UK BAE case study.

Alcatel-Lucent

In 2010, Alcatel-Lucent, then a global French telecommunications firm, was charged in the US with violating the FCPA in relation to its alleged conduct in more than a dozen states across Latin America, Southeast Asia, and on the African continent. Opting to resolve the charges and agree to a DPA, Alcatel-Lucent, and three of its charged subsidiaries, admitted to bribing officials in Costa Rica, Honduras, Malaysia, and Taiwan, and agreed to pay more than $137 million in penalties to US authorities.[597]

In the lead up to the corporate settlement, senior executives from the firm were also charged, including French citizen Christian Sapsizian, a long-time employee of the firm who was its deputy vice president for Latin America.[598] After becoming a co-operating witness and pleading guilty to two counts of violating the FCPA, Sapsizian was sentenced in 2008 to 30 months in prison and a forfeiture of $261,500 for bribing officials from a

[595] The trial of Mr Balladur in the CJR commenced 19 January 2021.

[596] In a similar case, though without the human tragedy, in September 2018 the then state-owned French defence firm, GIAT Industries SA, was involved in an arbitral dispute with a consultant arising out of a $3.6 billion deal to sell hundreds of Leclerc combat tanks and armoured vehicles to the United Arab Emirates. Sven Becker and Michael Sontheimer, 'The Shadowy Arms Trade: A Look Back at a Questionable Tank Deal', *Der Spiegel*, 28 September 2018.

[597] DOJ, Press Release, 'Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation', 27 November 2010.

[598] *U.S. v Christian Sapsizian, et al*, Docket No. 06-CR-20797-PAS (12/19/06).

Costa Rican telecommunications authority, and a senior government official.[599] It turned out that the senior government official was none other than the former Costa Rican President, Miguel Ángel Rodríguez. In 2011, Rodriguez was convicted in Costa Rica for 'instigating corruption' and accepting bribes from Alcatel-Lucent and sentenced to five years in prison. However, in 2012 an appeals court threw out this conviction. Back in France, this case would take many years to progress. In 2017, the firm and individuals charged were acquitted after the court ruled it was unable to identify the body or representative that had acted fraudulently on behalf of the company.[600] On appeal, in May 2020 the firm was convicted and sentenced to a fine of €150,000 for foreign bribery; two former employees were acquitted.[601]

While these cases in France may confirm for some an historical unwillingness of the authorities to prosecute firms for alleged foreign bribery and related corrupt conduct,[602] they also arguably serve as counter-examples of the effective independence of the judicial system from the type of political interference we see elsewhere in major foreign bribery cases.[603] In the next section, we move across *la Manche* to examine the development of the United Kingdom's regime against foreign bribery and related corrupt conduct. We then consider a case study of major alleged foreign bribery in the UK that arguably betrayed this state's rhetorical commitment to the US campaign against foreign bribery and its international legal obligations under the Anti-Bribery Convention.

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[599] DOJ, Press Release, 'Former Alcatel CIT Executive Sentenced for Paying $2.5 Million in Bribes to Senior Costa Rican Officials', 23 September 2008.

[600] *Le Figaro*, 'Corruption au Costa Rica : Alcatel-Lucent condamné en appel en France', 21 May 2020.

[601] *Capital*, 'Alcatel-Lucent condamné pour corruption', 20 May 2020. In June 2021, the Cour de cassation rejected a further appeal by Alcatel-Lucent: see Arrêt n°768 du 16 juin 2021 (20-83.098).

[602] Eva Joly, for example, has denounced French judicial authorities' perceived failures to prosecute corruption cases effectively.

[603] For example, in Canada, the SNC-Lavalin scandal; in the UK, the BAE matter, and in the US, the Kazakhgate case.

B. UNITED KINGDOM: SPECIAL COMMISSIONS, SPECIAL RELATIONSHIP

Like France, the UK legal regime to combat foreign bribery and related corrupt conduct is an outgrowth of the US campaign against foreign bribery. UK laws against foreign bribery are not founded in foreign policy problems caused by UK firms, nor are they a product of any moral undertaking against this conduct. In fact, quite the opposite was true as it was official UK policy for decades to permit such payments. Like the experience in France, and in contrast to the US, there was scant public pressure or moral misgivings about British firms engaging in foreign bribery. Arguably corrupt conduct by UK firms overseas largely stayed abroad, both in the public mind and with respect to British authorities.

After the UK ratified the Anti-Bribery Convention, some things changed and some things did not. Official rhetoric against foreign bribery and related corrupt conduct became common, but major foreign bribery by some of the largest UK firms remains a perennial issue more than twenty years later. UK leaders and officials today, like their American and French counterparts, commonly cite the arguable harm to developing nations from corrupt conduct. However, to understand precisely the development of the UK regime against foreign bribery, it is necessary to delve into the relevant legislation.

As argued above, the UK agreed to ratify the Anti-Bribery Convention, and therefore to ban foreign bribery, only after the US meted out powerfully coercive diplomatic measures and economic threats against states that resisted its proposals. Although the US was more measured in its attempts to persuade the UK to adopt its proposals at the OECD than it was against France, for example, the UK also acceded to this agreement only due to US pressure. This is arguably betrayed by the UK's anti-bribery regime development in the ensuing years, and its approach to applying foreign bribery laws in a subsequent matter of truly grand corruption by a British national champion.[604]

[604] See the BAE case study below at Chapter 3 B(2)(a).

1. Anti-bribery regime development

Prevention of Corruption Acts 1889-1916

The UK experience developing its laws against foreign bribery, and its perspective on the US campaign against this conduct, is arguably best summed up by the fact that after the UK ratified the Anti-Bribery Convention on 14 December 1998, it decided not to make any changes to its Victorian-era *Prevention of Corruption Acts 1889-1916*.[605] Despite repeated criticism from the US, the Working Group,[606] and various NGOs detailing the inadequacy of these antiquated laws to meet the requirements of the Convention, the UK steadfastly resisted, maintaining:

> The domestic legislation which will enable the United Kingdom to implement the Convention is already in place, and does not require amendment.[607]

Considering the UK had long been aware of its firms' involvement in major foreign bribery, this policy position was remarkable. Unlike many other industrialised states that could claim varying levels of ignorance about the conduct of their private firms abroad, the UK government was uniquely well-informed of its firms' overseas bribe payments due to a post-war law limiting the international movement of UK currency.

The *Exchange Control Act 1947* was a currency control law that limited the amount of money a UK resident could take or invest abroad.[608] Intended to act as a safeguard against disorderly capital outflows and pressure on the sterling during wartime, the *Exchange Control Act* enabled the Bank of England to supervise closely its capital outflows. In other words, to the extent that UK firms and subjects obeyed this law, Her Majesty's Government was systematically informed of the amount and nature of these payments,

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[605] This legislation included the *Public Bodies Corrupt Practices Act 1889* (UK), the *Prevention of Corruption Act 1906* (UK), and the *Prevention of Corruption Act 1916* (UK).

[606] Russell Hotten, 'OECD report attacks British failure to tackle corporate bribery and corruption', *The Telegraph*, 16 October 2008.

[607] UK Department of Trade and Industry, Explanatory Memorandum, submitted to Parliament with proposal for ratification, Statement of Brian Wilson, cited in Schroth (n. 60) at note 118.

[608] The *Exchange Control Act 1947* was repealed in 1979 by Prime Minister Margaret Thatcher, who denounced it as a socialist measure: see Joseph Collins, 'British Abolish Controls On Foreign Currency', *New York Times*, 24 October 1979.

and the details of the reported beneficiaries. This rather unique position of the government was plainly documented in a 20 April 1976 confidential memorandum to Whitehall:

> One of our principle difficulties is that the Government, through the Exchange Control, has positive knowledge, and is clearly involved in a way in which Governments in other advanced industrial countries are not.[609]

In the Annex to this memorandum is a note by the Treasury and the Bank of England relating to the issued of 'special commissions', in which the following point is raised:

> In the UK in contrast to many of our competitors, e.g., Germany, Japan and the USA, special commissions come to the notice of the authorities where they are associated with visible exports because an exchange control consent is required for their payment; and applications to the Bank of England come in from day to day. In that sense the UK is at a disadvantage.[610]

Plainly, the UK government had full knowledge of, and routinely authorised on a 'day-to day' basis, these 'special commissions'. Demonstrating the methodical approach that the UK took to managing these 'special commissions', private British banks were expressly delegated authority to authorise such payments up to £50,000.[611] The Bank of England could authorise amounts of up to 10% of the value of the contract. Where the prospective payments were to exceed 10% of the value of the contract, the matter was to be referred to the Treasury.[612]

In other words, the UK government directly authorised these payments. It should be noted here that this memorandum was drafted in the context of the disclosures of widespread overseas bribery by US firms in the 1970s, and as the resultant congressional hearings, investigations, and issues were being considered by other states. The conclusions reached in this memorandum are notable for their candour. While stating Her Majesty's

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[609] UK Department of Trade memorandum, 'Special Commissions and Allied Payments', to JE Herbecq, Civil Service Dept., Whitehall, 20 April 1976, 6. On file with the author.

[610] Ibid Annex 1.

[611] Ibid.

[612] Ibid.

Government 'is opposed to bribery on both principle and for economic reasons',[613] the Department of Trade advised against any unilateral action by the UK Government in matters of overseas bribery, arguing:

> We cannot afford to lose overseas business—and much business is at stake—by adopting holier policies (as opposed to attitudes) than those of other industrial nations.[614]

Given this official pedigree, and the UK reticence to ratify the Anti-Bribery Convention or update its anti-corruption laws, few would be surprised to learn there was nil foreign bribery enforcement under the *Prevention of Corruption Acts 1889-1916*.

Anti-terrorism, Crime and Security Act 2001

After significant criticism from the US, the Working Group,[615] and NGOs, the UK Parliament inserted Part 12 into the *Anti-terrorism, Crime and Security Act 2001* to make explicit that the common law offence of bribery and the relevant sections of the *Prevention of Corruption Acts 1889-1916* were intended to capture modern foreign bribery conduct, such as bribe-takers and their agents and principals operating outside the UK, and were applicable to foreign public bodies and authorities.[616] These reforms also extended the territorial reach of UK anti-corruption laws to offences by UK nationals or body corporates committed outside of UK territory.[617]

While this law is centrally concerned with anti-terrorism following the attacks on the US in September 2001, Part 12 of the *Anti-terrorism, Crime and Security Act 2001* provided greater clarity to the law on international corruption in the UK, and partially responded to criticism that the existing legislation did not meet the requirements of the Anti-Bribery Convention. The UK Government, for its part, asserted that Part 12:

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[613] Ibid.

[614] Ibid, 6.

[615] OECD, Working Group on Bribery, United Kingdom, Phase 1 'Review of Implementation of the Convention and 1997 Recommendation' (1999), 24, noting 'the Working Group has serious concerns on the applicability of UK law to bribery of foreign public officials'.

[616] *Anti-terrorism, Crime and Security Act 2001*, Part 12, s. 108.

[617] Ibid, s. 109.

> [P]ut beyond doubt that the law of bribery applies to acts involving officials of foreign public bodies, Ministers, MPs and judges; and to 'agents' (within the meaning of the 1906 Act) of foreign 'principals'.[618]

The anti-bribery component of the *Anti-terrorism, Crime and Security Act 2001* was a temporary measure to address concerns about the suitability of UK laws against foreign bribery. As it had been for several decades following domestic corruption scandals in the 1970s, a modern UK anti-corruption law was still being debated in Parliament.[619] This apparent lack of interest in the UK for tackling foreign bribery was soon to be influenced by swirling and persistent allegations of grand corruption involving UK defence contractor BAE Systems, the Kingdom of Saudi Arabia, and what became 'the deal of the century'.[620] Before examining this case below, we consider the most significant shift in the UK's foreign bribery regime development.

Bribery Act 2010

After another decade of delay, in 2010 the UK finally summoned the will to overhaul its foreign bribery regime with the *Bribery Act 2010* ('Bribery Act'). The *Bribery Act* came into force on 1 July 2011 and was widely regarded as an improvement to the UK's legal regime to combat foreign bribery. Many hailed it as an improved version of the FCPA, 'the toughest anti-bribery legislation in the world',[621] and a model of contemporary anti-corruption law.[622]

In brief, the *Bribery Act* makes it an offence to:

- bribe a foreign public official;

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[618] See [32] of the Explanatory Notes to the Act.

[619] Royal Commission on Standards of Conduct in Public Life (1974-1976); Law Reform Commission Report, 'Legislating the criminal code: corruption' (1998).

[620] David Pallister, 'The arms deal they called the dove: how Britain grasped the biggest prize', *The Guardian*, 16 December 2006.

[621] Christopher David, 'Five years of the Bribery Act: is it really the toughest in the world?', *The Times*, 7 July 2017.

[622] The UK *Bribery Act* has since influenced several states' foreign bribery regimes, including reforms in Australia and Canada.

- commit private-to-private bribery;
- commit active bribery (giving) or passive bribery (taking); and,
- fail to prevent bribery.

Like the FCPA, the *Bribery Act* has broad extraterritorial jurisdictional reach. Firms can be prosecuted for foreign bribery offences if they carry on a business, or part of their business, in the UK, irrespective of where in the world the illicit conduct occurs.[623] Unlike the FCPA, the *Bribery Act* does not explicitly except so-called 'facilitation payments'.[624]

Individuals found guilty of committing an offence under the *Bribery Act* can be imprisoned for up to 10 years and/or be subject to an unlimited fine.[625] A company found guilty of committing an offence may also be subject to an unlimited fine.[626] These maximum penalties, however, are balanced against a forgiving regime for firms that can show they had 'adequate' procedures in place and designed to prevent bribery.[627] Companies can also benefit from a complete defence if they can show that they had a robust anti-corruption programme in place.[628]

Crime and Courts Act 2013

Soon after, through the *Crime and Courts Act 2013*, the Serious Fraud Office ('SFO') was empowered to negotiate US-style DPAs with companies that co-operate with SFO investigations involving bribery, fraud and other economic crimes.[629] The UK DPA regime offers companies the prospect of avoiding a conviction and costly, uncertain trials in favour of penalties and disgorgement of illicit gains. Since they were introduced in the

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[623] *Bribery Act*, s. 7(5).

[624] UK Ministry of Justice guidance, however, confirms that prosecutors will exercise discretion in determining whether to prosecute such offences.

[625] *Bribery Act*, s. 11.

[626] Section 7.

[627] SFO, 'Bribery Act: Guidance on adequate procedures facilitation payments and business expenditure' (2010).

[628] SFO, Operational Handbook, 'Evaluating a Compliance Program' (2020).

[629] *Crime and Courts Act 2013*, Schedule 17.

spring of 2014, the SFO has executed several DPAs with firms accused of engaging in or failing to prevent foreign bribery.

Notably, Rolls-Royce Plc agreed in January 2017 to disgorge profits and to pay financial penalties to UK, US, and Brazilian authorities amounting to £671 million in relation to foreign bribery and related offences.[630] These legislative reforms and recent enforcement measures have notionally enhanced the UK's otherwise poor reputation for prosecuting foreign bribery matters. But as we have seen with the dearth of US enforcement for the first twenty years of the FCPA, and France's arguable go-slow approach to prosecuting effectively foreign bribery cases, the measure of these reforms is in their professional implementation. Testing how well UK officials' rhetoric about foreign bribery fits with British authorities' implementation of laws against this conduct, we now turn to examine a case of major foreign bribery by a UK firm that tells us much about the quality of this state's commitment to the US campaign against foreign bribery and its fellow signatories of the Anti-Bribery Convention.

[630] SFO, Press Release, 'SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC DOJ' 17 January 2017; DOJ, Press Release, 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case', 17 January 2017.

I hate to use the words 'trade war', but something must be done ... British firms can bribe with impunity.
—Mark Pieth[631]

2. Case study

Like other major exporting nations of the world, UK firms have a long and deep history of involvement in major foreign bribery conduct. The case selected here for scrutiny, involving BAE Systems (BAE), is one prominent example. This case is particularly illuminating for our purposes because it is relatively recent and there is an abundance of relevant, high quality information available. It also brings to light important legal, economic, and political challenges that authorities may navigate when their firms are accused of engaging in major foreign bribery.

a) BAE Systems—national interests and the rule of law

The BAE al-Yamamah[632] corruption scandal is one of the most controversial, long-running, and colossal cases of foreign bribery ever made public.[633] This case revolves around the so-called al-Yamamah contract, initially negotiated in 1985 by UK Prime Minister Margaret Thatcher and King Fahd of Saudi Arabia.[634] The al-Yamamah contract was a £43 billion agreement between the UK and the Kingdom of Saudi Arabia for BAE (then called British Aerospace) to supply various military aircraft and weapons systems to Saudi Arabia.[635] This case study is one of several cases of alleged major foreign bribery involving BAE that emerged during this period across several jurisdictions.[636]

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[631] Quoted in Charlotte Denny, 'OECD targets UK corruption', *The Guardian*, 7 June 2001.

[632] Arabic for 'the dove'.

[633] NB: aspects of the BAE investigations began in the UK before the OECD Anti-Bribery Convention had entered into force.

[634] Luke Harding, 'Declassified papers reveal real reason for Thatcher's dash to Riyadh', *The Guardian*, 24 August 2016.

[635] Some reports indicate this contract, and successor contracts, pushed the value of these deals to £76 billion.

[636] UK investigations of alleged foreign bribery by BAE extended to South Africa, Tanzania, Chile, Romania, and Qatar.

BAE is the jewel in the UK's industrial crown and is this nation's largest manufacturing employer. At times, it has been Britain's single largest exporter, primarily of defence materiel. Today, BAE is one of the world's largest defence contractors, employing more than 80,000, and is a leading contractor for the US Department of Defense. The al-Yamamah deal was, by all accounts, 'Britain's biggest sale ever, of anything, to anyone'.[637] This single deal catapulted BAE and the UK into a top international arms exporter, providing roughly $2 billion per year for decades to come, paid for with approximately 400,000 barrels of Saudi Arabian crude oil per day.

Because the BAE al-Yamamah scandal was investigated in both the UK and the US, it is useful to examine both jurisdictions. The bulk of the analysis, however, is focused on the conduct and decision-making of UK government officials and the British judiciary. The US investigation is examined primarily in the context of considering how this case was disposed of there, as well as to consider US government conduct given the extensive evidence of foreign bribery by BAE and this firm's relative importance to vital elements of the US military industrial complex.

Allegations of corrupt payoffs by BAE to members of the Saudi royal family in connection with al-Yamamah surfaced as far back as 1985 when the deal was inked.[638] Responding to these rumours, a National Audit Office (NAO) investigation into the deal was completed in 1992. However, this report was suppressed on national interest grounds amid reported fears that its contents would offend the Saudi royal family and imperil the hoped for conclusion of the next tranche of weapons sales to the Saudis.[639] In a show of bipartisanship, Robert Sheldon, then Labour chairman of the Commons Public Accounts Committee who viewed the NAO reports, cited the risk to British jobs as the reason the

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[637] David White and Robert Mauthner, 'Britain's Arms Sale of the Century: The 10 Billion Pounds UK-Saudi Deal', *Financial Times*, 9 July 1988.

[638] Pallister (n. 620).

[639] Joe Watts, 'Margaret Thatcher's role in securing controversial £42bn arms deal with Saudi Arabia revealed', *The Independent*, 23 August 2016.

reports should be suppressed.[640] This was no small concern. At its peak, the al-Yamamah deal supported tens of thousands of jobs in the UK.[641]

Despite persistent allegations that unlawful commissions had been paid, and after a few years of delay by Saudi Arabia, in 1993 the deal was renewed under al-Yamamah II. Under this follow-up agreement, Saudi Arabia agreed to buy a further 48 Tornado aircraft from BAE for approximately £3 billion, securing a reported 19,000 jobs in the UK and marking a big export win for the John Major government.[642] Seeking to rebuff the enduring suspicions about secret payments made to the Saudis, Roger Freeman, then UK Minister for Defence Procurement, told the House of Commons in October 1994:

> The transaction between Her Majesty's government and Saudi Arabia was on a government-to-government basis in which no commissions were paid and no agents or any middlemen were involved.[643]

In that same year, however, it was reported that Prime Minister Margaret Thatcher's son, Mark Thatcher, received £12 million to act as a fixer for the Saudis during the al-Yamamah negotiations.[644] Despite repeated denials of any impropriety in the al-Yamamah deal by both Conservative and Labour governments, by 1997 it was reported that BAE had paid hundreds of millions of pounds in hidden commissions to various Saudi royal officials.

In 1998, a writ was issued in the High Court by some of the closest in-laws of Saudi Arabia's King Fahd. The in-laws' company, Panama-registered Aerospace Engineering Design Corporation (AEDC), alleged that Rolls-Royce, a major subcontractor on the al-Yamamah contract, had reneged on a deal to pay it a 15 per cent commission on aircraft

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[640] Ibid.

[641] *Evening Standard*, '50,000 British jobs at risk if vital defence deal is lost', 25 November 2006.

[642] *The Independent*, 'Saudis buy British warplanes worth pounds 3bn', 29 January 1993.

[643] Richard Norton-Taylor and David Pallister, 'Millions in secret commissions paid out for Saudi arms deal', *The Guardian*, 23 June 1997.

[644] *UPI*, 'Thatcher son paid in Saudi deal', 9 October 1994. In 2016, it was reported that documents pertaining to Mark Thatcher's business affairs with the Saudis and others would remain secret indefinitely; Valentine Low, 'Mark Thatcher files stay secret "to spare blushes on arms deal"', *The Times,* 21 July 2016.

engines delivered under al-Yamamah.[645] Expecting to receive £90 million on the £600 million deal, AEDC alleged it had only received commissions of £23 million.[646] This dispute, however, was soon settled confidentially and disappeared from the headlines.

By this time the UK government had reluctantly agreed to ratify the Anti-Bribery Convention. Despite continued denials by the UK government and BAE of any impropriety, in 2003 *The Guardian* reported explosive allegations that BAE Chairman, Sir Richard Evans, 'may have been personally complicit in the operation of a £20m "slush fund" designed to bribe Saudi officials', citing a leaked, confidential letter from the head of the SFO to the Ministry of Defence.[647] In 2004, the SFO commenced an official investigation into allegations of foreign bribery and illicit payments by BAE. Soon after, a credible whistle-blower emerged, providing overwhelming evidence of impropriety by BAE, along with detailed allegations of widespread bribery and other corrupt conduct.[648] The initial SFO investigation soon widened to include BAE's dealings globally, in which payments it had made to foreign officials in South Africa, Tanzania, Chile, Romania, and Qatar were scrutinised.

As the scandal unfolded publicly, US authorities also began to register their frustration at the slow pace of the UK to investigate BAE over these allegations. The Working Group on Bribery also expressed concerns about UK compliance with the Convention, repeatedly calling for a prompt and full investigation into the matter in accordance with this state's legal obligations under the Convention.[649] Britain responded aggressively to this criticism from the OECD, reportedly attempting to remove the Chair of the Working

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[645] David Pallister, Richard Norton-Taylor and Owen Bowcott, 'Rolls Royce in firing line on Saudi deal', *The Guardian*, 8 February 1998.

[646] Ibid.

[647] David Leigh and Rob Evans, 'BAE accused of arms deal slush fund', *The Guardian*, 11 September 2003.

[648] Ibid. Allegations included BAE provision of prostitutes, yachts, first-class plane tickets, luxury vehicles, unlimited restaurant meals, club memberships, gambling trips, and lurid reports of 'sex and bondage with Saudi princes'.

[649] Matthew Tempest, 'OECD to press Blair over BAE inquiry', *The Guardian*, 20 December 2006.

Group from his post after he made statements critical of the progress of UK investigations into this matter and this state's compliance with the Convention.[650]

Despite increasing international pressure on the UK, in 2006 Prime Minister Tony Blair moved to terminate the SFO investigation into the BAE al-Yamamah deal. In a redacted, personal minute to his Attorney General on 8 December 2006, Blair wrote:

> In the light of recent developments, I would be grateful if you would consider again the public interest issues raised by the Serious Fraud Office's ongoing investigation into the possibility of corrupt payments being made by BAE Systems in connection with the Al Yamamah defence relationship with the Kingdom of Saudi Arabia. It is my judgment on the basis of recent evidence and advice of colleagues that these developments have given rise to a real and immediate risk of a collapse in UK/Saudi security, intelligence and diplomatic cooperation. This is likely to have seriously negative consequences for the UK public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East.[651]

Blair's concerns about the risks of continuing this investigation were pitched at the highest level, invoking core UK foreign policy objectives, its foreign relations, diplomatic and intelligence cooperation with Saudi Arabia, and British national security. A week later, Blair publicly justified ceasing the SFO investigation, stating:

> Our relationship with Saudi Arabia is vitally important for our country in terms of counter-terrorism, in terms of the broader Middle East, in terms of helping in respect of Israel and Palestine. That strategic interest comes first.[652]

From where did these perceived grave threats to UK national security and strategic interests emerge? Saudi Arabian officials, reportedly perturbed by the quickening progress of the SFO investigation and its turn to foreign authorities for evidence,[653] decided it would be expedient to threaten the UK. The alleged threats, coming from senior Saudi officials, were not confined to the al-Yamamah or other commercial arms contracts.

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[650] David Leigh and Rob Evans, 'Organisation for Economic Cooperation and Development', *The Guardian*, 9 June 2007; Heimann and Pieth (n. 587).

[651] Personal minute by the UK Prime Minister to the Attorney General, 8 December 2006.

[652] *BBC News*, 'Blair defends Saudi probe ruling', 15 December 2006.

[653] Namely, Switzerland.

Instead, they were alleged to be far more sinister. Saudi Arabia's Prince Bandar—who was the son of the then Crown Prince and Secretary General of the Saudi Arabia National Security Council—was reported to have threatened the UK to 'make it easier for terrorists to attack London unless corruption investigations into their arms deals were halted'.[654]

Following these threats, on 14 December 2006 the Director of the SFO, Robert Wardle, issued a terse statement announcing the SFO was ending the investigation into alleged corruption in the BAE al-Yamamah case, citing national security concerns:

> The Director of the Serious Fraud Office has decided to discontinue the investigation into the affairs of BAE SYSTEMS Plc as far as they relate to the Al Yamamah defence contract with the government of Saudi Arabia.
>
> This decision has been taken following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security.
>
> It has been necessary to balance the need to maintain the rule of law against the wider public interest. No weight has been given to commercial interests or to the national economic interest.[655]

On that same day, the Attorney General, Lord Goldsmith, made a statement to Parliament noting the strong public interest in upholding and enforcing the criminal law against international corruption. Lord Goldsmith also referred to the views of the Prime Minister and the Foreign and Defence Secretaries as to the public interest considerations raised by the SFO investigation into corruption allegations involving BAE, UK government entities, and Saudi Arabia. These officials, Lord Goldsmith stated, had:

> expressed the clear view that continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle

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[654] David Leigh and Rob Evans, 'Saudis "threatened Blair with terror"', *The Guardian*, 16 February 2008.

[655] *R (On The Application of Corner House Research and Others) v Director of The Serious Fraud Office*, [2008] UKHL 60, at [29].

> East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment.[656]

The Attorney General also noted that Article 5 of the Anti-Bribery Convention precluded him and the SFO from taking into account considerations of the national economic interest or the potential effect upon relations with another state, adding 'we have not done so'.[657] Nonetheless, Prime Minister Tony Blair soon after acknowledged the 'thousands of jobs which would have been lost' if the £6 billion contract for the 72 Typhoon aircraft did not proceed, but wryly noted this fact was not a consideration in his decision to end the investigation into BAE.[658]

More candidly, on a trip to the US, alongside President George W Bush, Blair told journalists:

> This investigation, if it had gone ahead, would have involved the most serious allegations and investigation being made of the Saudi royal family and my job is to give advice as to whether that is a sensible thing in circumstances where I don't believe the investigation would have led anywhere except to the complete wreckage of a vital interest to our country.[659]

At a G8 conference in Germany in 2007, Blair again stated that the fight against terrorism would have been harmed if the BAE investigations had gone ahead, arguing that the UK 'would have lost thousands, thousands of British jobs'.[660]

Later, the reported Saudi threats were further detailed in a court case brought against the SFO by UK NGO The Corner House, alleging the SFO had wrongfully discontinued its

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[656] Statement of the Attorney General in the House of Lords of 14 December 2006.

[657] Article 5 of the Anti-Bribery Convention states: 'Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.'

[658] Bochetti (n. 436) 6.

[659] Mark Tran, 'Blair rejects calls for fresh BAE inquiry', *The Guardian*, 7 Jun 2007.

[660] *Reuters*, 'BAE denies any wrongdoing in UK-Saudi arms deals', 7 June 2007; Julia Werdigier, 'British Company to Investigate Its Own Deal With the Saudis', *New York Times*, 12 June 2007.

investigation into BAE.[661] In this case, it was described how SFO investigators were told they faced 'another 7/7' terrorist attack and the loss of 'British lives on British streets'[662] if they continued with their inquiries and the Saudis carried out their threats. It was alleged in court, and unchallenged by the government, that it was Saudi Prince Bandar who made these threats to cease providing the UK with counter-terrorism related intelligence. At the time, Bandar himself was facing accusations that he personally received over £1 billion in secret payments from BAE in connection with the al-Yamamah deal.[663] Lending credence to such claims are the words of the Prince himself. When asked in 2001 about allegations of widespread corruption in the House of Saud, Bandar replied forcefully:

> If you tell me that building this whole country, and spending $350 billion out of $400 billion, that we misused or got corrupted with $50 billion, I'll tell you, 'Yes.' But I'll take that any time.[664]

Prince Bandar is also alleged to have threatened the UK with the cancellation of the highly anticipated, multi-billion-pound Eurofighter Typhoon aircraft deal (the 'al-Salam' contract) that was planned to follow the Tornado fighter aircraft supplied under the al-Yamamah deal. Documents since released show that before the al-Yamamah deal was agreed, officials in Britain were concerned that BAE could lose out to France's Dassault Mirage 2000 fighter jets, which the Saudis reportedly preferred.[665]

Further evidence of this national interest focused, realist behaviour by the UK was on full display in 2010 in a leaked US diplomatic cable concerning HRH Prince Andrew, the Duke of York. In his capacity as the UK Special Representative for International Trade and Investment, Prince Andrew is reported to have 'railed at British anti-corruption

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[661] *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60.

[662] Ibid [21]. The 7 July 2005 London terrorist bombings (7/7) consisted of multiple suicide attacks targeting civilians travelling on public transport, killing 52 and wounding more than 700.

[663] *Reuters* (n. 660).

[664] PBS, Frontline, interview with Bandar bin Sultan: <https://www.pbs.org/wgbh/pages/frontline/shows/terrorism/interviews/bandar.html> (accessed 1 July 2021).

[665] Richard Norton-Taylor and Rob Evans, 'Margaret Thatcher's lobbying of Saudi royals over arms deal revealed', *The Guardian*, 16 July 2015; Watts (n. 639).

investigators, who had had the "idiocy" of almost scuttling the Al-Yamamah (sic) deal with Saudi Arabia.'[666] The cable, written by the US Ambassador to Kyrgyzstan, Tatiana Gfoeller, who was in attendance, quotes the Duke of York as saying:

> [T]hese (expletive) journalists, especially from the National [sic] Guardian, who poke their noses everywhere.[667]

It is revealing that these comments attributed to Prince Andrew were made openly, in the presence of a US ambassador no less, at a public hotel brunch during the period in which the DOJ was actively investigating BAE in relation to what is perhaps the largest ever foreign bribery scandal. Instead of discretion and circumspection from an experienced government official, what we see is open, mocking disdain for laws against foreign bribery, and similar scorn for those who would act to undermine the important interests of the UK its firms (such as *The Guardian* and its pesky journalists).

Final settlement: US and UK

In 2007, US authorities initiated their own investigation into this matter after it was revealed that BAE had been making regular payments to the Saudi Ambassador to the US, Prince Bandar, through Riggs Bank in Washington DC.[668] In 2010, after 20 years of denials, BAE agreed to pay almost $400 million to the US to resolve these allegations. However, BAE's deal with the DOJ was not for foreign bribery offences.

Instead, BAE pleaded guilty to making false statements and conspiracy to defraud the US government.[669] This was an important outcome for BAE, at the time the fifth largest US defence contractor and a major European Union supplier. If BAE had been convicted of foreign bribery offences, it would likely have been suspended or debarred for a period

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[666] *Financial Times*, 'Prince Andrew attacks fraud inquiry "idiocy"', 29 November 2010.

[667] *The Atlantic*, 'Cablegate Chronicles: Prince Andrew on "These (Expletive) Journalists"', 29 November 2010.

[668] David Leigh and Rob Evans, 'BAE accused of secretly paying £1bn to Saudi prince', *The Guardian*, 7 June 2007.

[669] DOJ, Press Release, 'BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine', 1 March 2010.

from participating in tenders for contracts in these jurisdictions.[670] One wonders whether the false statement charges were crafted by US authorities precisely to avoid such an outcome.

At the same time, in the UK the SFO settled with BAE after it agreed to plead guilty to a minor accounting offence, and to pay £30 million in relation to foreign bribery allegations in Tanzania. As part of this settlement, the SFO dropped charges against several BAE executives, and ended its investigations of alleged foreign bribery and related corrupt conduct by BAE in several other states.

The rule of law yields to claimed national interests

In this case we see clearly the limitations of the liberal justificatory rhetoric against foreign bribery. Here, realism arguably rules the day in explaining the motivations of the UK in determining this case. UK security, national interest, foreign policy, and foreign relations considerations each played prominent, decisive roles in the disposition of arguably the biggest ever foreign bribery scandal.

Any pretence of morals, liberal values, purported international norms against bribery and corruption, and other tenets of liberal explanations for state behaviour in the international system was discarded as this scandal unfolded. Instead of co-operating with its international partners at the OECD, the UK issued veiled threats against the Chair of the Working Group.[671] Instead of acting on its purported anti-corruption values, the most senior UK statesmen deemed the rule of law would yield to claimed national security interests. Instead of fulfilling its international legal obligations under the Anti-Bribery Convention, the UK clearly prioritised threatened economic and other impacts above its investigation of this case of major foreign bribery.

Examining the BAE case has furthered the task of distinguishing the UK's rhetorical commitment to the US campaign against foreign bribery from the record of this state's conduct (its leaders, authorities, and institutions) when confronted with allegations of major foreign bribery. The UK's actions, it is argued, demonstrate its commitment to

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[670] Sope Williams, 'BAE/Saudi Al-Yamamah Contracts: Implications in Law and Public Procurement' (2008) 57(1) *International and Comparative Law Quarterly* 200.

[671] Bochetti (n. 436) 6.

realist conceptions of the international system and state behaviour, against which liberal rationales for its commitment to the US campaign against foreign bribery simply evaporated in favour of protecting claimed UK national interests.

Despite extensive media coverage, a credible whistle-blower, overwhelming evidence of criminality, and an enormous, unprecedented level of alleged bribery, the BAE case stands for the willingness and ability of the UK government to bury a massive case of alleged foreign bribery where it countervailing national interests are claimed or perceived to be at risk. If nothing more, the BAE case demarcates the limits of UK rhetorical support for the US campaign against foreign bribery when confronted with alleged threats to superior interests. In the end, the rule of law, the UK's international legal obligations under the Anti-Bribery Convention, and the threat of reputational damage to its legal and business institutions were each overrun by these claimed threats to UK national, economic and security interests.

The BAE case analysis has continued the task of critically considering the gap between what states *say* relative to what states *do* when serious foreign bribery cases come up against countervailing national interests. In these circumstances, do states and their institutions demonstrate strong normative, political and legal commitments against foreign bribery? Or do they act self-interestedly to scuttle investigations, conceal incriminating conduct, and protect their national and economic interests? Where we find repeated instances of the latter conduct by powerful Parties to the Anti-Bribery Convention, it serves as further evidence that the US campaign against foreign bribery is bound to fail.

The BAE case dealt a major blow to the credibility of the Anti-Bribery Convention and the US campaign against foreign bribery, eroding the latter's normative patina and arguably quickening its demise. Justified publicly by purported liberal rationales, yet buried under claimed countervailing national interests, it became clear that major foreign bribery investigations may be forced to yield to states' economic, national security, and foreign policy interests. In other words, authorities will sometimes fail to prosecute major foreign bribery cases, political leaders will sometimes interfere in purportedly independent legal processes, and sometimes even the most shocking allegations of foreign bribery will be whitewashed by states' claims of countervailing interests at stake.

In the case of France, we have seen how inadequate laws and wending legal processes combined with weakly dissuasive penalty regimes to foster suspicion of state tolerance for foreign bribery in international business. In the UK, we observed claims of competing foreign policy interests prioritised above the rule of law as the highest authorities in the land terminated the investigation into the sprawling BAE foreign bribery case. In the next section, we consider the US prosecution of a major foreign bribery case. Considering these case studies in France and the UK, states which resisted the US campaign to ban foreign bribery in international business, it is useful now to look to the US record when an inconvenient foreign bribery case arises.

C. UNITED STATES: REALPOLITIK AND THE RULE OF LAW

This dissertation has examined the history and development of the US regime against foreign bribery, and the US strategy in advocating for a multilateral prohibition of foreign bribery at the OECD. It remains to examine a major US foreign bribery case to test the motivation and will of US authorities to prosecute FCPA offences. This case is streaked with political intrigue and great power politics, in which claimed matters of national interest stifle the prosecution of alleged foreign bribery. Like the BAE case in the UK, it is argued that the resolution of this case under a cloud of political and other motivations portends and hastens the failure of the US campaign against foreign bribery.

1. Case study

Like all case studies, there are limitations inherent in case selection. Many other US cases of major foreign bribery could have been selected, involving both US firms or non-US firms or persons. But because this dissertation is concerned with understanding the motivations of the selected states to ban foreign bribery, it is illuminating to examine how the US has dealt with US firms or persons accused of engaging in foreign bribery when countervailing American national interests are at stake. Does this state's claimed liberal values and moral leadership against foreign bribery hold fast, or do cross-cutting national interest claims emerge to take precedence over the rule of law?

a) Kazakhgate: US national interests and the rule of law

Touted as 'the biggest FCPA prosecution of all time', the 'Kazakhgate' case involved tens of millions of dollars in alleged bribes, vast oil reserves in Kazakhstan, major multinational petroleum firms, a New York merchant banker, and US security and economic interests as it scrambled to fill the vacuum of power in Central Asia after the collapse of the Soviet Union. In the spring of 2003, American oil consultant and merchant banker James H. Giffen was arrested as he attempted to board a flight at JFK airport from New York to Paris. US authorities accused Giffen of funnelling more than $84 million

from several major American and British petroleum firms to bank accounts benefitting Kazakhstan President Nursultan Nazarbayev, his associates and relatives.[672]

The case against Giffen began with a bang. He was indicted on 62 counts, including more than a dozen counts of violating the FCPA, eight counts of wire fraud, 36 counts of money laundering, three counts of filing false personal income tax returns, and a slew of related conspiracy charges.[673] With these charges, Giffen was facing bankruptcy and up to 88 years in prison. However, the case against Giffen would ultimately end with a whimper as economic, political and diplomatic headwinds emerged to tame the FCPA, challenge the professional independence of the federal prosecutors, and arguably taint the rule of law in the US.

In 2012, seven years after his indictment, Giffen would plead guilty to a misdemeanour tax charge of not disclosing a foreign bank account and pay a special assessment of twenty-five dollars.[674] It turns out that vital US foreign policy interests were at stake in this matter and the 'biggest FCPA prosecution ever' would yield to countervailing US national interests. How did this case collapse so spectacularly, from the threat of decades in prison and millions of dollars in penalties, only to end with a meagre sentence of time served (one day), no probation, and a fine equal to the price of a modest lunch? To answer this question, it helps first to understand who Giffen was, the nature of the work he did, and the interests that he served.

Beginning in the 1970s, Giffen worked at Armco Steel Corporation, which was headed by C. William Verity, Jr., a 'champion of increased trade with the Soviet Union who would later serve as commerce secretary in the Reagan administration.'[675] Rising through the ranks and gaining experience and networks in the Soviet Union with Armco, Giffen

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[672] Matthew Yeager, 'The CIA made me do it: understanding the political economy of corruption in Kazakhstan' (2012) 57(4) *Crime, Law and Social Change* 441, 442; Ron Stodghill, 'Oil, Cash and Corruption', *New York Times*, 5 November 2006, B1.

[673] Yeager (n. 672), 442.

[674] Separately, Mercator Corporation (Giffen's bank) pleaded guilty to an FCPA violation in relation to the supply of two snow machines to a senior Kazakh official. Mercator paid a $32,000 fine, reflecting the cost of the vehicles.

[675] Stodghill (n. 672).

established a small merchant bank in the mid-1980s, Mercator Corporation, with the support of his former boss, William Verity. During this period, Giffen worked with his connections to senior Soviet leaders to open the market in the USSR to US firms through various joint US-Soviet trade bodies.[676] After the breakup of the Soviet Union, Giffen reportedly became close friends with Nazarbayev, and a 'conduit for information involving US-Soviet affairs'[677] for various US government agencies.

Kazakhstan is a large nation that is endowed with significant deposits of mineral resources and vast petroleum reserves. As one of the former Soviet Republics in the Caspian Sea region, home to some of largest and oldest oil-producing regions in the world, Kazakhstan had the interest of every major oil company in the world battling to access its abundant oil and gas reserves. The crown jewel in Kazakhstan's natural resources is the prized oil field called the Tengiz, which is estimated to be the sixth largest oil field in the world.[678]

US oil giant Mobil wanted very much to get into Kazakhstan, and the Tengiz. To do so, Mobil needed to go through Giffen, who was by then an important adviser to the new president of the young, independent Republic of Kazakhstan, Nursultan Nazarbayev. As Counsellor to the President, Giffen had a Kazakhstan diplomatic passport and was known as 'Mr Kazakhstan', the go-to guy on all matters involving oil and gas contracts in this country.[679] Giffen's first big deal in Kazakhstan involved a $20 billion investment by Chevron, an American petroleum firm, for a 50 per cent stake in the Tengiz in 1991. According to the FBI, Giffen's merchant bank, Mercator, 'was paid commissions totalling at least $67 million from 1994-2000'.[680]

Soon after the Chevron deal, Mobil commenced negotiations for a stake in the Tengiz. Under Giffen's stewardship, and an investment of approximately $1 billion, Mobil

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[676] Ibid.

[677] Ibid.

[678] Seymour Hersh, 'The Price of Oil', *New Yorker*, 9 July 2001, 50.

[679] Michael Dobbs, David Ottaway and Sharon LaFraniere, 'American at Center of Kazakh Oil Probe—Insider Linked to Payments to Foreign Officials', *Washington Post*, 25 September 2000.

[680] Yeager (n. 672) 444.

obtained a 25 per cent share in the Tengiz consortium.[681] As Giffen's star rose in the petroleum business, he remained in close contact with US government authorities, including high-level officials working in the diplomatic, law enforcement and foreign intelligence agencies,[682] concerning his business dealings and interactions in the region. By most accounts, Giffen was a talented, reliable adviser to the under-experienced Kazakh government as it sought to develop its considerable oil and gas resources and negotiate sizeable deals with shrewd multinational firms. It would later emerge that Giffen was also an important source of information and a reliable intermediary for the US government as it sought to navigate its relations with the states of the Former Soviet Union (FSU) and the Russian Federation.[683]

The Giffen story, and his prosecution for foreign bribery and related corrupt practices, is shot through with matters involving the geopolitical interests of the US and other states in this region. During this period, the US dedicated significant diplomatic and economic resources to the states of the FSU, including Kazakhstan. Understandably important to the US was the issue of nuclear proliferation. After its independence in 1991, Kazakhstan inherited the fourth largest arsenal of nuclear weapons in the world.[684] While containing the nuclear threat was clearly at the forefront of US interests in Kazakhstan and the region, US economic and strategic interests were also implicated in the potential emplacement of petroleum pipelines. As the US pursued a policy of greater diversification of energy imports, the rich energy resources of Kazakhstan were front and centre. There were also powerful US geo-strategic interests at play in seeking to divert Kazakhstan's energy resources away from Russia and Iran. As it turned out, Giffen was well-placed to advance these US interests.

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[681] Hersh (n. 678) 53.

[682] Giffen's lawyers provided evidence that he was in contact with several senior US intelligence and diplomatic officials, including CIA Director Robert Gates, Deputy CIA Director John McGaffin, NSC official Brent Scowcroft, Special Assistant to the President Tobi Gati, Department of State Secretary James Baker, and Ambassadors William Courtney and John Wolf; see Yeager (n. 672) 447 and note 11.

[683] See the sentencing statement in this case.

[684] The new Kazakh government swiftly renounced nuclear weapons and returned its nuclear arsenal to Russia.

The first public evidence of potential corrupt dealings involving Giffen arose out of a failed business deal. In July 2001, investigative reporter Seymour Hersh published a detailed account of this matter.[685] At its core, the deal centred on a planned oil swap between Kazakhstan and Iran, involving Giffen and other middlemen associated with US oil majors. However, the US had implemented a strict sanctions regime against Iran that forbade US firms from trading with Iran.[686] As Hersh explains, these sanctions 'barred Americans from facilitating such a deal, even if they didn't own the oil.'[687] When US authorities got wind of the proposed swap the deal fell apart and the big business interests rushed for the exits. The middlemen who stood to gain millions, however, began to cast blame for the failure of the deal and brought legal claims in the US and UK. Soon after, a grand jury was convened to investigate allegations of US firms' involvement in the deal and returned an indictment against Giffen on dozens of counts of FCPA violations, money laundering, wire and mail fraud, and other charges.

When confronted with these serious criminal charges, Giffen's lawyers quickly signalled their intent to produce, and to seek, evidence demonstrating the US government's alleged knowledge and approval of their client's conduct during the relevant period. Giffen sought access to classified documents from several 'three-letter' US government agencies to support his assertion of the US government's full knowledge of the charged conduct. Pejoratively called 'graymail' in the US (as distinct from blackmail), Giffen asserted a 'public authority' defence, which was grounded in the claim that the actions he undertook for which he was charged were done in 'reasonable reliance on the instructions of an official who had the actual authority to give such instructions.'[688]

Giffen's lawyers further argued that he was an 'operative of the Central Intelligence Agency and had *de facto* approval at the highest levels of the US Government, including the Clinton Whitehouse.'[689] Giffen's requests to access classified documents were strongly resisted by DOJ prosecutors, and by the government agencies that had the

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[685] Hersh (n. 678).

[686] Ibid 55.

[687] Ibid.

[688] Yeager (n. 672) 446 and note 9.

[689] Ibid 442.

documents Giffen's lawyers requested. If the alleged documents existed, they could implicate the US government in the conduct for which Giffen was charged—i.e., foreign bribery and related criminal offences.

After several years of back-and-forth, during which several counts against Giffen were dismissed, the presiding judge viewed several classified documents *in camera*, after which he decided Giffen could proceed with his public authority defence (and therefore seek the requested information from the government relevant to his defence).[690] After several more years of document disclosure battles with the relevant agencies, the DOJ dismissed more charges against Giffen as the statute of limitations tolled.[691]

During this period, the government of Kazakhstan pressured senior US officials to drop the prosecution. US Vice President Dick Cheney was reportedly lobbied personally by President Nazarbayev to end the prosecution; Secretary of State Madeleine Albright was also urged to intervene to put an end to the matter. Soon after these high-level interventions, in 2010, the DOJ curiously brought a new charge against Giffen, a misdemeanour alleging his failure to disclose a foreign bank account on his 1996 tax return.[692] Giffen quickly cut a deal to plead guilty to this charge and the whole saga came crashing to an end.

Sentencing Giffen to time served (one day) and fining him $25, Judge Pauley stated:

> Suffice it to say, Mr Giffen was a significant source of information to the US Government and a conduit for secret communications with the Soviet Union and its leadership during the Cold War. He undertook that effort as a volunteer and was one of the only Americans with sustained and reliable access to the highest levels of Soviet officialdom. … He became a trusted advisor to Kazakhstan's President Nazarbayev. In that capacity, he helped Kazakhstan invest foreign investment and provide advice on economic development. … In doing so, he advanced the strategic interests of the US and American

[690] Ibid 451 (see [37] of Order).

[691] Ibid 452.

[692] Separately, the DOJ charged Giffen's private bank, Mercator Corporation, for providing two snow-mobiles to a senior Kazakhstan official.

> businesses in Central Asia. Throughout this time, he continued to act as a conduit for communications on issues vital to America's national interest in the region.[693]

Clearly, Judge Pauley was of the view that Giffen had been working to further important US interests in Kazakhstan and this contested part of the world, citing Giffen's work to advance the strategic interests of 'American businesses in Central Asia.'[694] We may surmise from these comments that Judge Pauley understood the US had knowledge of Giffen's actions to advance these important state and corporate interests. But Judge Pauley went further, refashioning Giffen from an allegedly corrupt businessman who would likely die in prison into a real American Cold War hero, noting:

> These relationships, built up over a lifetime, were lost the day of his arrest. This ordeal must end. How does Mr Giffen reclaim his reputation? This court begins by acknowledging his service.[695]

Curiously, and in contrast to several other politicised foreign bribery cases,[696] the Working Group on Bribery issued no condemning statement or public peer pressure campaign against the US to conduct this investigation and prosecution in accord with its international legal obligations under the Anti-Bribery Convention. This apparent lack of scrutiny by the Working Group is concerning given that it was conducting its Phase 3 country monitoring of the Convention in the US while this case was on foot,[697] and later conducted a follow-up Phase 3 report that focused on US enforcement efforts to implement the Convention.[698] Alas, the Working Group did not revisit this case in its 2020 Phase 4 review of the US implementation of the Convention.

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[693] *United States v James H. Giffen, U.S. District Court, Southern District of New York*. No. 3:03-CR-00404-WHP-1 (2003).

[694] Ibid.

[695] Ibid.

[696] Such as the Working Group's response to the discontinuation of the UK BAE case.

[697] OECD, 'Phase 3 Report on the United States by the OECD Working Group on Bribery', October 2010, commenting, at p. 9: 'The evaluators commend the United States Government's visible and high level of support for the fight against the bribery of foreign public officials, including as demonstrated by engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the Government.'

[698] OECD, United States, 'Follow up to Phase 3 Report and Recommendations', December 2012.

Like the BAE case, the Kazakhgate case also provides a clear demarcation of the limits of the US campaign against foreign bribery. Spahn argues, for example, 'the Giffen debacle may be an isolated failure, but real harm nevertheless is done to the idea of the rule of law: a neutral, professional, and independent legal system in the United States.'[699] While the rule of law in the US can surely survive this 'isolated failure', the credibility of this nation's campaign against foreign bribery was arguably dealt the most serious blow. Coming off the back of the BAE scandal and the open political interference to shut down the most sprawling case of foreign bribery ever, Parties to the Convention would understand that the US's purported shared values against foreign bribery are limited to cases that do not cut across countervailing national interests and foreign policy priorities. In other words, interest-based considerations dominate this space of international policy in such circumstances, not liberal claims that emphasise international norms, multilateralism, and institutions like the 'liberal international order'.

There is precedent in the US for foreign bribery cases coming up against claimed national interest considerations. In fact, the first FCPA case ever brought was resolved in deference to US national interests. In *SEC v Page Airways, Inc., et al*,[700] the SEC alleged the defendants, an executive jet distributor, made payments of more than $2.5 million to foreign officials in several states in connection with a $60 million of business deal.[701] However, Page Airways settled, without admitting the allegations, and consented to a permanent injunction prohibiting the firm from further violations of the *Securities Exchange Act 1934* and agreeing to retain an independent monitor. The SEC dismissed all charges against the individual defendants, noting:

> In reaching settlement of this action, the Commission and Page considered concerns raised by another agency of the United States Government regarding matters of national interest.[702]

In these cases, much like in the UK BAE case, we see that when foreign bribery cases come up against competing national interest claims, the rule of law may come off second

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[699] Spahn (n. 34) 19.

[700] 464 F. Supp. 461 (D.D.C. 1978).

[701] Ibid.

[702] Ibid.

best. These cases are also notable for their omission of the liberal narrative for enacting the FCPA or justifying the US campaign against foreign bribery, which arguably exposes further the hollowness of these claims. Instead, realism and interest-based concerns, rightly or wrongly, dominate the disposition of both of these cases.

D. CHAPTER III CONCLUSION

This chapter examined the development and implementation of regimes against foreign bribery in France and the UK. It also scrutinised several case studies of major foreign bribery from these two states and the US. Demonstrating both France and the UK's reticence to enact, and later to enforce, domestic laws against foreign bribery, this chapter advanced the central claim that the US campaign against foreign bribery is bound to fail.

As we have seen, the French experience with the US campaign against foreign bribery is imbued with a certain siege mentality, in which the US is perceived to be engaged in an 'economic war' against France and its national champions under the guise of its anti-bribery campaign. Since the negotiation of the Anti-Bribery Convention, there is a growing distrust and cynicism in France of US motivations in foreign bribery matters, which often manifest in the commentary of business executives, politicians and officials, as well as in the legal, journalistic and academic communities. French perspectives on the US campaign against foreign bribery are also punctuated by perceptions of unjust targeting of French firms by US authorities, with some claiming US agencies work in concert with opportunistic American businesses to pillage strategic, internationally competitive French firms that may have engaged in foreign bribery.

Given the scale of alleged bribery in the French cases examined, and their potential to impact on French foreign affairs and national interests, it is instructive that they appear not to have provoked overt political interference from the government.[703] In their own way, these cases arguably demonstrate a certain resolve of the French judicial system to enforce their laws against foreign bribery on their own terms, at their own pace, and without outside pressure or influence from state or non-state actors, foreign or domestic.

The UK experience with the US campaign against foreign bribery has been quite different from that of France, arguably demonstrating this state's ability both to resist US pressure effectively and to adapt its laws and policies against foreign bribery to serve its economic and national interests. Although both France and the UK resisted US policy prescriptions in its campaign against foreign bribery, we have seen that the consequences to each for

[703] Unlike the UK BAE or US Kazakhgate cases, these French cases did not raise similar tensions between the rule of law and French national security or foreign policy concerns.

that resistance was markedly different. Whereas the US threatened France publicly with severe economic sanctions for its resistance at the OECD, the American response to British recalcitrance in these matters was confined to discrete jawboning and encouragement to 'do the right thing'. In other words, the UK experience is arguably a story of successful adaptation to the US campaign against foreign bribery, despite sharing with the French a resistance to US hegemony in these matters and a comparable history of their firms engaging in major foreign bribery.

After ratifying the Anti-Bribery Convention, France relatively quickly enacted an arguably fit-for-purpose regime against foreign bribery. On the other hand, the UK failed to enact a modern law against foreign bribery for many years, delaying until 2010 the reform of its antiquated statutes. Whereas both states failed to ramp up enforcement of their laws against foreign bribery since ratifying the Convention, we saw that French firms have borne the brunt of US prosecutions for alleged foreign bribery offences.[704] France, more than any other Party to the Anti-Bribery Convention, has paid the highest price in the US campaign against foreign bribery. Throughout the US campaign against foreign bribery, French firms have been repeatedly targeted by US authorities and given exemplary penalties, whereas the UK and several of its firms appear to have been let off lightly despite evidence of major foreign bribery.[705] The UK is also not known to be subject to the intrusive US espionage that we see aimed against France and its large firms.[706]

In the BAE and Kazakhgate cases, we saw what happens when anti-bribery laws in the UK and US come into conflict with countervailing national, security and economic interests in these states. These cases demonstrate the power of these realist interests as they were arguably prioritised over the rule of law and liberal claims for prohibiting foreign bribery. In both cases, the rhetoric of liberal values against foreign bribery was

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[704] To date, French firms have paid US authorities more than three times the penalties for alleged foreign bribery and related offences when compared to UK firms.

[705] See, e.g., the BAE case.

[706] Jean-Marc Leclerc, 'Comment les États-Unis espionnent nos entreprises', *Le Figaro*, 13 November 2018: citing a memorandum from the Direction générale de la sécurité intérieure (DGSI) to French firms advising: [American actors deploy a strategy of conquering the export markets which results, with regard to France in particular, in an offensive policy in favour of their economic interests].

subdued, the rule of law arguably smothered by purported public interest considerations, and serious criminal conduct simply whitewashed by claimed national security concerns. The moral condemnation against foreign bribery seemingly evaporated as the façade of liberal values against this conduct was overrun by paramount matters of state. In other words, political realism ruled the day as the liberal narrative for the US campaign against foreign bribery arguably collapsed under the weight of its own pretence.

The outcomes in these cases, it was argued, hasten the failure of the US campaign against foreign bribery as they show that powerful, wealthy states are willing and able to place their national and economic interests above their anti-bribery laws. The unmistakable message these cases send to other states and Parties to the Anti-Bribery Convention is 'what's good for the goose is good for the gander'. Why should one Party prosecute its firms for alleged foreign bribery while its powerful economic rivals find crude and creative ways to bury these inconvenient affairs when it suits them? The answer is, they likely will not.

Like any case analysis, there are inherent limitations in attempting to derive general understandings about complex and inter-related matters from examining a few cases. Nonetheless, these cases provided instructive examples of how prominent foreign bribery cases are prosecuted in these states. Whether it is the flagrant direction by senior UK officials to shut down the SFO investigation into BAE, or the calculated conduct of US agencies not to provide essential information to prosecute Mr Giffen, the liberal rhetorical claims to justify the US campaign against foreign bribery ring hollow. Similarly, the prosecutorial appeal against the first conviction of a company in France, Safran, for foreign bribery offences, or the protracted prosecutions and negligible penalties in the other cases, show the limits of France's rhetorical commitment to the US campaign against foreign bribery.

Pour ce qui est de l'avenir, il ne s'agit pas de le prévoir, mais de le rendre possible
—Antoine de Saint Exupéry, *Citadelle*

IV. Conclusion

This dissertation set out to tell a story about the US campaign against foreign bribery in international business. Its central argument was that this campaign is bound to fail due to the fundamentally weak rationales and motivations that underpin many states' foreign bribery laws. Part I began at the source of this campaign with a critique of the origins of, and motivations for, the US prohibition of foreign bribery. This Part included a close reading and critical assessment of the legislative history of the FCPA, and the events that provoked this Act. This task, relying on evidence of lawmakers' deliberations about the impacts of widespread foreign bribery by US firms, was essential to discard the popular myth that the FCPA was enacted in a brilliant stroke of American moral leadership.

Instead, it was argued that the US enacted the FCPA to restrain its firms from wrong-footing US foreign policy and international relations through reckless foreign bribery. This basis for the FCPA was contrasted with the near consensus rationale offered by US government officials and the academy, who routinely assert a values-driven justification for the Act. If this dissertation accomplished nothing else, it is hoped that the reader appreciates the fundamental foreign policy motivations for the FCPA, and with this insight permanently dismisses the values claims justifying the FCPA as nothing more than self-serving historical revisionism and pretence. Without this extensive analysis of the origins and fundamental rationales for the FCPA, it would not have been possible to analyse and explain cogently US motivations for the subsequent formation of its campaign against foreign bribery.

Part II told the story of the birth and the evolution of the US campaign against foreign bribery. Using insights from realist and liberal theories of international relations, it considered critically US measures to export its policies against foreign bribery in international business. In launching its campaign against foreign bribery, it was argued that the US employed a strategy of values-driven rhetoric and liberal economic arguments, combined with self-interested realist tactics, to compel hesitant OECD member states to agree to prohibit foreign bribery in international business.

Chapter II examined the history, precipitating events and negotiations leading to the ratification of the Anti-Bribery Convention, arguing that the mobilisation of US power to persuade OECD member states to ban foreign bribery tells us much about why the US campaign against foreign bribery is bound to fail. The central argument presented in this chapter was that the US push for a multilateral agreement with OECD member states to ban foreign bribery was justified publicly via claimed liberal principles and values but was executed to achieve self-interested US economic and foreign policy priorities. In other words, American liberal rhetoric to ban foreign bribery provided cover for this state's interest-based concerns about the impacts of this conduct.

This explanation for US motivations and tactics for its campaign against foreign bribery and its advocacy for a multilateral ban on this conduct at the OECD contrasts sharply with the dominant narrative that Parties were motivated to ratify the Convention by reference to shared Western values and adherence to the tenets of economic liberalism. Instead, it was argued that it was hard-nosed, realist tactics by the US that persuaded states such as France to agree to the Anti-Bribery Convention. This analysis also told us much about the willingness of France and the UK to ban foreign bribery and to enforce these laws, arguably serving as a harbinger of the success or failure of the US campaign against foreign bribery. In the case of France and the UK, it was argued that these states agreed to ratify the Anti-Bribery Convention and to ban foreign bribery only after a concerted pressure campaign from the US, which included interference in their domestic affairs, outright coercive measures, and threats of economic sanctions.

Chapter III considered the development of regimes against foreign bribery in France and the UK following the ratification of the Anti-Bribery Convention. It argued that these states implemented and enforced their laws against this conduct in a manner that is consistent with their weak commitment to the US campaign against foreign bribery. This chapter also revealed the limits of states' commitments to investigating and prosecuting foreign bribery offences through an examination of several case studies of major alleged foreign bribery in France, the UK and the US.

In the US and UK case studies considered in this chapter, we saw the rule of law yield to national interest claims as authorities in these states prioritised their national and economic interests above their international legal obligations in these cases of unparalleled alleged foreign bribery. In the French cases, we observed both a reticence to

adopt the zeal of the US on foreign bribery matters combined with arguably inadequate laws and penalties against this conduct.

In the end, there may be a risk that, like Hegel's Owl of Minerva, we understand too late the folly of the US campaign against foreign bribery. What we observe today is widespread foreign bribery, poor or manipulated enforcement of anti-bribery laws, and states' repeated trampling of the rule of law to privilege their claimed national security, economic, or other political interests. With the present trend of increasing economic protectionism, broadening scepticism of the benefits of globalisation, and the rise and rise of populism and nationalist policies, we may well have squandered the opportunity to address effectively the problem of foreign bribery in international business.

The Parties to the Anti-Bribery Convention assert that the fight against foreign bribery is a 'core shared value' that unites them all. In the competitive arena of international trade, however, we see that this shared value repeatedly fails to translate into policies and actions that robustly deter and respond to foreign bribery offences. As the UK BAE and US Kazakhgate cases demonstrate, powerful states will act to privilege their national interests over international agreements, the rule of law, and their claimed values in matters of major foreign bribery. In other words, hard-nosed realism continues to trounce liberal aspirations that fail to accommodate states' national interests.

If this observation is correct, we may profitably consider how to leverage this characteristic of states' behaviour and motivations to reduce the incidence of foreign bribery. What mechanisms could address, for example, the simmering suspicions of French officials and titans of industry who see the US campaign against foreign bribery as a tool of 'economic war' deployed by the US to administer the global economy and to advance US national interests? How may we deter scandals like BAE and Kazakhgate, in which massive illicit payments are made to seal multi-billion-dollar deals, all with the apparent connivance of the relevant governments? How can we hold accountable governments that bury the rule of law and evade their international legal obligations under the guise of warped claims of safeguarding the public interest?

Perhaps more challenging, how can we assuage suspicions by some governments and their national champions that the US replaced its firms' unparalleled foreign bribery after the enactment of the FCPA with government-led standover tactics to fend off

international competition? Harder still, how can we foster policies to reduce foreign bribery that both developed *and* developing economies may embrace? For example, and absent outright coercion, how can China, now the world's second largest economy, be convinced it is in its interests to enforce professionally its laws against foreign bribery? How can the fast-growing economy of India be persuaded that it is in its interests to enact and enforce laws against foreign bribery in international business? Indeed, can willing states supersede the US campaign against foreign bribery and replace it with anti-bribery measures that they also perceive to be in their national interests?

This conclusion is not the place to venture answers to these questions. Rather, they are posed to provoke discussion about the next steps for efforts to reduce and to minimise foreign bribery. If the developed states from which most foreign bribery radiates today are truly committed to minimising this conduct, they ought first to recognise and to learn from the arguable failure of the US campaign against foreign bribery. In doing so, it is essential to anticipate the sometimes-overwhelming presence of great powers and their national interests in these matters. As the history and rationales for the US campaign against foreign bribery demonstrates, this subject remains squarely in the realm of international politics and trade, of global contest and strategic competition between states and their powerful multinational firms.

Effectively controlling foreign bribery will surely take a multitude of approaches and techniques; there is likely no 'silver bullet' to this problem. Beyond state-based domestic and international efforts to minimise foreign bribery, other entities, organisations, and even individuals can contribute to changing the underlying game to break out of the wicked problem of foreign bribery in international business. There is an increasing role for non-state actors in anti-corruption advocacy, including civil society organisations, trade unions, corporations, international institutions, citizens and employees, and the media and investigative journalists.[707] Each may have a role to play to incentivise firms not to engage in foreign bribery, and work to hold to account firms that engage in, and officials who connive in, this conduct.

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[707] See OECD, Working Group on Bribery, 'United States Phase 4 Monitoring Report', 16 October 2020, noting 'the DOJ states that approximately 15% of the DOJ FCPA cases come from media reports', 30.

Anti-corruption focused NGOs often argue that radical corporate and government transparency is crucial to reducing foreign bribery and other corrupt conduct. Given the customary secret nature of this conduct, systematic transparency in these matters has some natural appeal. Firms, however, are concerned about issues of commercial competition and confidential activities, rarely voicing support for increased transactional transparency. While some governments, particularly the Scandinavian states, have supported moves for greater transparency,[708] others have resisted and even reversed foreign payment disclosure requirements.[709]

Some anti-corruption activists and scholars have gone in another direction, contending that a 'world court' against corruption is needed,[710] arguing that widespread corruption should be characterised as a serious human rights violation.[711] In this vein, it has been argued that the International Criminal Court should be empowered with jurisdiction to investigate cases of serious corruption.[712] More practically, and perhaps more promisingly, some anti-corruption experts have advocated for strengthening corporate criminal liability laws.[713] Measures calculated to increase the likelihood that corporate offenders may suffer greater personal liability or risk serving a custodial sentence for engaging in foreign bribery may focus the minds of those who may be so tempted. Of

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[708] See *Corporate Transparency Act 2021* (US) and *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (France).

[709] For example, the 2017 repeal of US regulations under the *Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010* that required natural resources firms to disclose their payments to foreign governments.

[710] See Wolf (n. 21). In 2019, Colombia and Peru called upon the UN to create an 'International Anti-Corruption Court'.

[711] Anne Peters, 'Corruption as a Violation of International Human Rights' (2018) 29(4) *European Journal of International Law* 1251.

[712] See Ilias Bantekas, 'Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies' (2006) 4 *Journal of International Criminal Justice* 466; Brian Harms, 'Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption' (2000) 33 *Cornell International Law Journal* 159.

[713] See Mark Pieth and Radha Ivory (eds.), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer Media, 2011).

course, such reforms would rely on states' strong implementation and enforcement efforts to achieve results.

Surely, many of these ideas and proposed reforms have some capacity to impede, if not eliminate, foreign bribery in international business. Indeed, some of these reforms are already underway with select governments showing a greater willingness to introduce or to harden their corporate criminal liability laws, perhaps signalling to corporates that the days of expecting only to pay a fine when their firm is caught engaging in foreign bribery may be nigh.[714]

[714] In Spain, for example, Organic Law 5/2010, 22 June 2010, introduced into the Spanish Criminal Code (Article 31bis) for the first time, corporate criminal liability. In France, corporate criminal prosecutions have increased significantly since reforms in 1992 introduced, and expanded in 2004, corporate criminal liability.

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VI. Appendix A – Summary of dissertation in French

La campagne mondiale menée par les États-Unis contre la corruption transnationale : une ambition vouée à l'échec

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Résumé

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Introduction

Si la corruption était légale, elle serait l'un des secteurs les plus rentable de l'économie internationale. Avec des recettes estimées à près de 2600 milliards de dollars par an[1], la corruption est une donnée significative au sein des économies modernes et elle affecte de nombreuses vies[2]. Elle existe dans toutes les sociétés, sous différents aspects, formes ou importance, qui changent à travers le temps[3].

Notre recherche se concentre sur la corruption internationale. Celle-ci implique le plus souvent la corruption de représentants d'un État par des investisseurs étrangers. Ce type de corruption est important et global. L'Organisation pour la Coopération et le Développement Économique (OCDE) estime que 5 à 25 % du total de la valeur des transactions internationales d'affaires sont des commissions occultes[4]. Ces dernières représenteraient près de 100 milliards de dollars par an.

La plupart de cet argent vient de multinationales d'États développés qui s'engagent dans la corruption de représentants officiels d'États en développement. La corruption internationale dans le domaine commercial est le plus souvent le fait de grandes multinationales qui cherchent à développer leurs activités à l'étranger et qui sont majoritairement présentes dans des États occidentaux, industrialisés et aux économies développées[5]. En d'autres mots, la corruption commerciale provient traditionnellement des pays développés vers les pays en développement, du Nord vers le Sud.

Malgré l'illégalité de ce type de pratiques, les entreprises corruptrices et leurs agents ne font que rarement l'objet de poursuites. Par un examen critique de la campagne

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[1] Sauf indication contraire, les montants en dollars indiqués se réfèrent au dollar américain.

[2] UN Secretary-General António Guterres, 8346th réunion, SC/13493, 10 septembre 2018 : « The World Economic Forum estimates the global cost of corruption is at least $2.6 trillion, or 5 per cent of the global GDP. According to the World Bank, meanwhile, businesses and individuals pay more than $1 trillion in bribes every year. »

[3] John T. Noonan, *Bribes* (Macmillan, 1984).

[4] Anna E. D'Souza et Daniel Kaufmann, « Who Bribes in Public Contracting and Why: Worldwide Evidence from Firms », (2013) *Economics of Governance* 2.

[5] En 2017, neuf États membres de l'OCDE abritaient 316 entreprises du classement Fortune Global 500.

américaine contre la corruption transnationale, cette étude vise à expliquer et à démontrer les raisons de cette impunité et voudrait établir que cette campagne est vouée à l'échec.

L'argument principal mis en avant dans cette recherche est que la campagne des États-Unis contre la corruption transnationale était, dès le départ, vouée à l'échec[6] du fait de la faiblesse des motifs et incitations qui sous-tendent les législations anti-corruption transnationale adoptées par de nombreux États. On soutient ici que cette faiblesse des incitations et motifs trouve ses origines dans la campagne américaine d'« exportation » de sa loi anti-corruption des années 1990.

Nous commencerons par une analyse historique des origines et motivations au cœur du *US Foreign Corrupt Practices Act 1977* (FCPA ou *le Act*). À la lumière des expériences des États-Unis, de la France et du Royaume-Uni, nous examinerons ensuite les négociations et la mise en œuvre de la *Convention de l'OCDE sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales* de 1997 (« Convention anticorruption »)[7].

En conclusion, nous verrons le développement des législations contre la corruption transnationale en France et au Royaume-Uni à travers l'étude de cas de corruption transnationale dans ces pays ainsi qu'aux États-Unis. Dans certains de ces cas, le réalisme politique et économique joue un rôle significatif voire décisif d'influence sur les enquêtes et les instructions d'affaires relatives à des soupçons de corruption transnationale. Il en résulte que ces affaires sont en porte-à-faux à l'endroit de la rhétorique libérale dominante qui justifie l'adoption de lois contre la corruption transnationale.

1. Plan de la recherche et méthodologie

La méthodologie de cette recherche combine une approche critique des origines et du développement de la campagne américaine de lutte contre la corruption transnationale avec plusieurs cas d'étude en France, aux États-Unis et au Royaume-Uni.

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[6] La terme « vouée à l'échec » (en anglais « bound to fail ») est inspiré par John Mearsheimer, « Bound to Fail: The Rise and Fall of the Liberal International Order » (2019) 43(4) *International Security* 7.

[7] La Convention a été signée le 17 décembre 1997 et est entrée en vigueur le 15 février 1999.

Théorie politique internationale et corruption

Utiliser les instruments théoriques de politique internationale pour expliquer la corruption transnationale peut apparaître peu orthodoxe. Le plus souvent, la théorie politique internationale s'intéresse aux comportements des États et pas à ceux des acteurs privés. Or, l'objet d'analyse de cette recherche – la campagne des États-Unis de lutte contre la corruption transnationale – étant en l'occurrence conduite et mise en œuvre par un État, les théories de politiques internationales se révèlent pertinentes.

Cette recherche se focalise sur les motivations et les stratégies des États-Unis dans leur campagne contre la corruption transnationale. Cette campagne implique inévitablement des interactions entre des États, des responsables gouvernementaux et des entreprises. Les théories des relations internationales permettent d'expliquer les motivations de chacun de ces acteurs dans leurs interactions avec le système international.

Les théories des relations internationales employées dans cette recherche se limitent au réalisme et au libéralisme. Ces théories apparaissant comme les plus à même de fournir des explications efficaces pour rendre compte des motivations des États-Unis dans la mise en œuvre de leur campagne de lutte contre la corruption transnationale et des raisons pour lesquelles cette campagne est vouée à l'échec.

Le réalisme politique est une approche théorique pour la compréhension du pourquoi et du comment, les États se comportant comme ils le font en politique internationale. En tant que théorie des relations internationales, le réalisme se concentre sur les questions de puissance, de sécurité et d'intérêts dans ses hypothèses sur le comportement des États. Cette théorie est souvent critiquée en raison de l'image sombre qu'elle dessine de la politique internationale et de sa perspective sur des politiques étrangères des États, perçue comme amorale.[8] Les différentes branches du réalisme concentrent leurs analyses sur la compétition et les conflits entre États.

[8] John Mearsheimer, « The False Promise of International Institutions » (1994/5) 19 *International Security* 3.

Le réalisme est contrebalancé par le libéralisme, théorie dominante de politique internationale en Occident [9]. Dans ses explications du fonctionnement du système international, le libéralisme se concentre sur les modes de coopérations, les normes, l'interdépendance économique et sur le rôle des institutions [10]. Le libéralisme est également orienté sur les possibilités de coopérations entre les États qui auraient préalablement des réticences à la coopération[11].

Études de cas

Les études de cas dans cette recherche s'appuient sur une approche analytique des justifications avancées par les États pour interdire la corruption transnationale. Les principaux cas examinés couvrent plusieurs affaires qui ont défrayé la chronique en France, au Royaume-Uni et aux États-Unis. Dans plusieurs de ces cas, les discours de l'orthodoxie libérale contre la corruption ont cédé face à la considération d'intérêts étatiques. Ces affaires ont été perçues comme le signe avant-coureur de l'échec de la campagne des États-Unis contre la corruption transnationale.

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[9] Au sens large, les institutions sont les règles de base, les traditions et l'organisation de la société. Voir notamment Robert Keohane, *International Institutions and State Power* (1989) 164.

[10] Andrew Moravcsik, « A Liberal Theory of International Politics » (1997) 51 *International Organisation* 513.

[11] Mearsheimer (*supra* n. 8).

Partie 1 : La genèse d'un crime

Cette partie examine l'interdiction de la corruption transnationale par les États-Unis dans le but de renverser la sagesse conventionnelle, selon laquelle ce pays a interdit cette conduite pour des raisons fondées sur les valeurs, et affirmer que le FCPA a été adopté afin d'éviter que les entreprises américaines affectent la politique étrangère américaine et ses relations internationales.

II. Les origines de l'interdiction de la corruption transnationale par les États-Unis

L'argument central est ici que la motivation principale pour mettre en place le FCPA en 1977 était de protéger les intérêts de politique étrangère des États-Unis lésés par des entreprises américaines engagées dans des pratiques corruptrices avec des représentants étrangers. Cet argument contraste avec le discours orthodoxe qui met en avant une justification éthique pour la mise en œuvre de cette disposition.

A. HISTOIRE ET RÉCITS

Pour arriver à l'argument central de cette recherche – qui cherche à démontrer que la campagne anticorruption des États-Unis est vouée à l'échec – il est nécessaire de comprendre le contexte historique et politique qui a conduit à la situation présente. Cela implique de comprendre les motivations premières qui ont poussé les États-Unis à interdire la corruption transnationale.

Les origines du FCPA se trouvent dans l'administration Nixon et le scandale du Watergate qui a ébranlé la nation et conduit à la démission du président. L'histoire du Watergate débute avec l'arrestation de « plombiers » alors qu'ils cambriolaient le quartier général du comité national démocrate au *Watergate Hotel* à Washington, D.C. en 1972[12].

Le Washington Post a alors rapporté que $25 000 de chèques servant à financer la campagne de Nixon avaient été déposés sur le compte en banque d'un des cambrioleurs

[12] Peter Schroth, « The United States and the International Bribery Conventions » (2002) 50 *American Journal of Comparative Law* 593.

du *Watergate Hotel*[13]. Deux mois plus tard, une « caisse noire » comptant des centaines de milliers de dollars en liquide était découverte. Le département de la justice a alors ouvert des enquêtes pour des soupçons de violation des lois fédérales sur le financement électoral[14]. Un « grand jury » a, par la suite, mis en examen les cambrioleurs, un conseiller de la Maison Blanche et un avocat associé à la campagne de réélection de Nixon[15].

La progression des enquêtes a fait apparaître des preuves de comportements délictuels présumés, notamment le détournement de fonds de campagne pour la corruption de représentants officiels étrangers. La commission des opérations de bourse des États-Unis (SEC) a alors commencé à enquêter sur ces paiements à l'étranger[16]. Le nombre d'enquêtes qui incriminaient Nixon arriva à un seuil critique et contraignit le président américain à démissionner le 8 août 1974.

Après cette démission, les auditions et les enquêtes se poursuivirent avec cependant une nouvelle cible : la corruption de représentants officiels étrangers. En 1976, la SEC publie un *Report on Questionable and Illegal Corporate Payments and Practices*[17], qui établit un programme de déclaration volontaire dans lequel les entreprises acceptent de s'auditer elles-mêmes et de fournir les résultats de leurs enquêtes à la SEC ainsi qu'aux juridictions[18]. Des centaines d'entreprises américaines ont alors admis qu'elles avaient corrompu des représentants officiels ainsi que des partis politiques étrangers pour un

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[13] *Ibid.*

[14] *Ibid*, 594. Voir également, « The Watergate, the Republicans and the GAO », *America Magazine*, 9 septembre 1972.

[15] Voir Schroth (*supra* n. 12).

[16] US Securities and Exchange Commission, *Report on Questionable and Illegal Corporate Payments and Practices*, 94e Congrès, 2e Session (1976).

[17] *Ibid*.

[18] Voir David Boulton, *The Lockheed Papers* (J. Cape, 1978), 257 ; Ellen Gutterman, « Easier Done Than Said : Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act » (2015) 11 *Foreign Policy Analysis* 109, 120.

montant de 300 millions de dollars[19]. Ces révélations ont par la suite été le sujet de plusieurs enquêtes du Congrès américain.

1. Enquêtes du Congrès américain

Présidé par le sénateur Church, le sous-comité du Sénat sur les entreprises multinationales[20] a recueilli les témoignages de dirigeants d'importantes entreprises américaines détaillant la corruption de représentants officiels étrangers. Les éléments présentés devant le comité Church incluaient des paiements effectués au Président de Corée du Sud, à des généraux saoudiens, à des partis politiques italiens, à un Premier ministre japonais, et à un important criminel de guerre japonais.

Les Présidents du Honduras, d'Italie, du Gabon, un Prince hollandais, un ministre de la Défense d'Allemagne de l'Ouest, un général français et un grand nombre d'autres représentants et d'hommes d'État étaient impliqués dans ces pratiques corruptrices généralisées des entreprises américaines. Ces révélations ont été source d'une grande préoccupation. Le sénateur Church déclare à ce sujet :

> [W]hat we are concerned with is not a question of private or public morality. What concerns us here is a major issue of foreign policy for the United States[21].

Les scandales liés à la corruption de la multinationale de l'armement Lockheed qui éclatent au Japon, en Italie et aux Pays-Bas démontrent que les États-Unis ont criminalisé la corruption transnationale pour des raisons de politique étrangère.

Les scandales de Lockheed : l'émergence d'un modèle de corruption global

La corruption transnationale de Lockheed s'est largement étendue jusqu'à inclure des alliés des États-Unis en Europe de l'Ouest, en Asie et au Moyen-Orient. La tempête politique que les diplomates et les juristes avaient prédite s'est propagée à l'internationale

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[19] W. Cragg et W. Woof, « The US Foreign Corrupt Practices Act : A Study of Its Effectiveness » (2002) 107 :1 *Business and Society Review* 98 ; Schroth (*supra* n. 12) 593.

[20] « Multinational Corporations and United States Foreign Policy : Hearings Before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations », United States Senate, 94th Cong. 1 (mars 1973-septembre 1976) (le « Church Committee »).

[21] *Ibid.*

et ses répercussions ont commencé à impacter fortement les intérêts des États-Unis dans de nombreuses nations.

Au Japon, le Premier ministre Kakuei Tanaka et des membres de son gouvernement ont été contraints de démissionner après qu'il fut révélé qu'ils avaient touché des commissions de la part de Lockheed. En 1976, Tanaka fut arrêté et accusé d'avoir accepté 2 millions de dollars de Lockheed pour influencer favorablement l'achat d'avions de chasse. Tanaka fut reconnu coupable et condamné à 4 ans de prison. Dans une lettre adressée au Président Ford, le Premier ministre Takeo Miki fit part de la gravité de ce scandale et de ses inquiétudes pour la démocratie au Japon[22].

En Italie, le gouvernement démocrate-chrétien implosa lorsque le Président Giovanni Leone fut contraint à la démission en juin 1978 après des soupçons regardant le versement, entre autres, de commissions par Lockheed[23]. Plusieurs condamnations pour corruption en résultèrent, notamment de deux anciens ministres de la Défense impliqués dans l'achat d'avions de Lockheed[24]. Le parti communiste italien remporta les élections locales devant le parti démocrate-chrétien soutenu par les États-Unis[25].

Aux Pays-Bas, le Prince consort Bernhard alors inspecteur général des forces armées néerlandaises fut accusé de comportement « inacceptable » après avoir reçu une somme de 1,1 million de dollars de la part de Lockheed[26]. Le Prince démissionna et perdit son uniforme. Pour la Maison d'Orange, ce fut une crise. Pour le gouvernement néerlandais,

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[22] Gerald R. Ford Presidential Library, Box 2, NSA Presidential Correspondence with Foreign Leaders Collection (24 février, 1976) : « The Japanese political circle has been profoundly shaken by the reported allegation made at the public hearings of the Senate Sub-Committee on Multinational Corporations that Japanese government officials received payments from Lockheed. A grave concern is spread throughout Japan at present that, if the whole issue is kept unsolved with the names of the officials involved remaining in doubt, democracy in Japan may suffer a fatal blow. »

[23] Henry Tanner, « President of Italy resigns in scandal », *New York Times*, 16 June 1978, A1.

[24] Noonan (*supra* n. 3) 668.

[25] NB : Lockheed / Northhrop a également versé $58 000 au Parti communiste italien.

[26] Noonan (*supra* n. 3) 667.

ce fut une honte. Pour les États-Unis un embarras diplomatique de plus à l'étranger causé par les pratiques corruptrices d'entreprises américaines.

Dans les auditions menées par le *« Nix Committee »*[27] et le *« Murphy Committee »*[28] les discussions se sont focalisées sur les impacts de la corruption transnationale sur la politique étrangère des États-Unis. À titre d'exemple, le député Nix affirmait :

> There has been a negative impact on our foreign policy already because of these revelations. […] [I]n Italy the Communist party is using the fact of multinational bribery in Italy against the political friends of the United States[29].

De même que pour le député Solarz qui poursuit :

> We simply cannot permit activity which so damages US foreign policy[30].

Ainsi que le député Moss :

> Surely the public expects more than to have foreign policy made in the board rooms of United Brands or Lockheed[31].

Ou encore le député Murphy :

> The foreign policy implications for the United States are staggering and in some cases, perhaps irreversible[32].

Une indignation généralisée vis-à-vis des pratiques corruptrices des entreprises américaines s'empara du Congrès. Cette indignation ne portait pas en elle des considérations morales, elle faisait ressortir la grande inquiétude des législateurs concernant l'impact de ces pratiques sur les intérêts de politique étrangère des États-Unis.

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[27] US House of Representatives Hearings Before the Subcommittee on International Economic Policy of the House Committee on International Relations (1975) (« le Nix Committee »).

[28] US House of Representatives Hearings Before the Subcommittee on Consumer Protection and Finances, Committee on Interstate and Foreign Commerce (1976) (« le Murphy Committee »).

[29] Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014) 6-7.

[30] *Ibid*, 7.

[31] *Ibid*.

[32] *Ibid*, 2.

Ne pouvant pas empêcher les représentants officiels étrangers de demander ou d'accepter des commissions de la part des entreprises, les États-Unis ont choisi d'interdire à leurs entreprises de payer ces commissions.

La logique orthodoxe derrière le FCPA

La logique de politique étrangère derrière le FCPA est étonnamment ignorée par la plupart des commentateurs. C'est la justification traditionnelle d'un leadership moral américain qui lui est préférée. Certains avancent que cette « norme anti-corruption » a été mise en avant du fait du Watergate et des révélations de corruption transnationale généralisée par les entreprises américaines[33]. De nombreux chercheurs soutiennent simplement que la logique derrière le FCPA tire ses origines de considérations morales et éthiques[34].

Cependant, certains chercheurs ont présenté de brèves justifications pour cette norme qui transparaissent dans les archives du Congrès. Dan Danielsen et David Kennedy notent :

> This reflects the intention of Congress when it enacted the FCPA to focus on the harm done to our economy and to our foreign policy interests by the practice of bribing foreign governments[35].

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[33] Voir Elisabeth Spahn, « Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption » (2012) 23 *Indiana International & Comparative Law Review* 1.

[34] Voir, e.g., D.A., Gantz, « Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus » (1997-98) 18 *Northwestern Journal of International Law & Business* 457, 459 ; K. Isaacson, « Minimizing the menace of the FCPA » (2014) *University of Illinois Law Review* 597 ; A. Posadas, « Combating Corruption Under International Law » (2000) 10 *Duke Journal of Comparative and International Law* 345, 352 ; A.P. Jakobi, « The changing global norm of anti-corruption: from bad business to bad government » (2013) (7) *Zeitschrift für Politikwissenschaft* 243, 246 ; Kevin Abbott et Duncan Snidal, « Values and Interests: International Legalization in the Fight Against Corruption » (2001) 31 *Journal of Legal Studies* S161 ; K.E. Davis, « Self-Interest and Altruism in the Deterrence of Transnational Bribery » (2002) 4(2) *American Law & Economics Review* 328.

[35] David Kennedy et Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Open Society Foundations, 2011) 47.

Wesley Cragg et William Woof avancent que « l'importance cruciale du FCPA réside dans le domaine de la politique des États-Unis », affirmant que « le lien avec les objectifs de politique étrangère était alors un élément central pour la genèse du FCPA »[36].

Daniel Tarullo, ancien sénateur américain impliqué dans l'élaboration de la campagne américaine contre la corruption transnationale a déclaré :

> Congress concluded that the bribery scandals had adversely affected US foreign policy, 'tarnished' the 'image of American democracy abroad,' and impaired confidence in the 'financial integrity of our corporations'[37].

Le plus grand rejet de cet impératif moral au cœur du FCPA vient certainement d'une des personnes les plus impliquées dans sa conception. Dans un article intitulé « *Again, Why Congress Barred Bribery Abroad »* paru en 1981 dans le *New York Times*, Karin M. Lissakers rejette la thèse des valeurs à l'origine du FCPA :

> Congress acted because it had become convinced … that the damage to the United States' foreign-policy interests from permitting these corrupt practices to continue far outweighed any short-term gains in exports and overseas-investment opportunities[38].

Lissakers ajoute :

> [Senator] Church also noted: Morality in the business community is not our responsibility, nor is enforcing the law in other lands[39].

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[36] Voir Cragg et Woof (*supra* n. 19) 9-10.

[37] Daniel K. Tarullo, « The Limits of Institutional Design : Implementing the OECD Anti-Bribery Convention », (2003-04) 44 *Virginia Journal of International Law* 665, 673. De 1993 à 1996, Tarullo a été secrétaire d'État adjoint aux affaires économiques et commerciales des États-Unis, puis a été adjoint du président (Clinton) pour la politique économique internationale.

[38] Karin Lissakers, « Again, Why Congress Barred Bribery Abroad », *New York Times*, 18 juin 1981, A31. Lissakers était directeur du personnel du sous-comité de politique économique étrangère du sous-comité sénatorial des relations extérieures sur la politique économique étrangère lors des audiences du comité de Church.

[39] *Ibid*.

En d'autres mots, ce sont des impératifs réalistes qui ont conduit les États-Unis à adopter le FCPA, et non pas leur engagement en faveur de valeurs libérales ou d'un leadership moral.

Cette analyse introduit les arguments qui seront développés dans la 2e partie de cette recherche dans laquelle nous observerons les stratégies adoptées par les États-Unis afin de promouvoir le FCPA à l'international et débuter sa campagne contre la corruption transnationale. En déconstruisant le mythe libéral à l'origine du FCPA, nous examinerons les motivations des États-Unis dans leur campagne anticorruption.

Partie 2 : Une campagne est née : le FCPA s'exporte

Notre deuxième partie rapporte l'histoire de la campagne américaine de lutte contre la corruption transnationale. Cette histoire débute dans les années 1990 par les mesures prises par les États-Unis afin d'exporter la criminalisation de la corruption transnationale vers les États membres de l'OCDE. Nous relaterons ici la réception en France et au Royaume-Uni de cette campagne. Nous analyserons également d'importantes affaires de corruption transnationale en France, au Royaume-Uni ainsi qu'aux États-Unis.

III. La négociation de la Convention sur la lutte contre la corruption : la stratégie américaine des valeurs, des intérêts et de la coercition

Ce chapitre aborde de façon critique les efforts américains pour constituer un accord multilatéral avec les États membres de l'OCDE pour interdire la corruption transnationale dans le domaine des affaires internationales. L'hypothèse centrale avancée dans ce chapitre est que, bien que les arguments déployés publiquement par les États-Unis à l'OCDE aient été tournés vers la défense de principes libéraux, leurs efforts étaient dirigés vers leurs propres intérêts économiques et leurs priorités en termes de politique étrangère.

Les arguments avancés ici contrastent avec le discours officiel de la campagne américaine à l'OCDE qui prônait un leadership moral et des valeurs libérales pour interdire la corruption[40]. Une analyse plus nuancée nous démontre que les motivations des États-Unis dans cette quête ont favorisé leurs propres intérêts, comme ils l'avaient calculé. En résumé, les motivations centrales de cette campagne étaient basées sur la protection et l'avancement des intérêts économiques et de politique étrangère des États-Unis.

A. UN TRAITÉ IMPOSÉ : RHÉTORIQUE LIBÉRALE ET TACTIQUE RÉALISTE

Les efforts précédents auprès des Nations unies et de l'OCDE n'ont pas abouti à un accord significatif pour l'interdiction de la corruption transnationale et, au début des

[40] R. Michael Gadbaw et Timothy J. Richards, « Anticorruption as an International Policy Issue », in Geza Feketekuty (ed.), *Trade Strategies for a New Era : Ensuring US Leadership in a Global Economy* (Council on Foreign Relations, 1998) 223, 228.

années 1990, les États-Unis ont débuté une nouvelle diplomatie pour convaincre les États membres de l'OCDE de criminaliser cette pratique. En agissant avec le soutien du Congrès, l'exécutif a réengagé les négociations pour l'adoption d'un accord multilatéral anticorruption à l'OCDE. L'administration Clinton s'est grandement impliquée dans ces efforts renouvelés[41].

L'Administration Clinton s'est « engagée plus que les précédentes [administrations] pour l'augmentation des exportations américaines »[42], et les États-Unis ont vu l'obstacle que représentait la corruption transnationale mis en place par leurs rivaux internationaux dans la réalisation de cet objectif. Daniel Tarullo, alors assistant au secrétaire d'État pour les affaires économiques et commerciales, note que la définition renouvelée des « intérêts américains » par l'Administration Clinton a participé à considérer la problématique de la corruption transnationale comme nécessitant une gestion quotidienne. Il en a résulté la nomination d'un sous-cabinet officiel et l'implication régulière des représentants du cabinet principal[43].

Avec ce changement dans les priorités et dans la définition des intérêts nationaux, les États-Unis se sont préparés à « exercer une pression substantielle dans les négociations à l'OCDE[44]. Comme le mentionne Tarullo :

> Because of shifts in the preferences of domestic interest groups and the government in power, the United States became more committed to an international agreement and then used its power, assisted by domestic political forces in some of the states, to press an agreement upon the rest of the OECD member states[45].

Dans sa campagne d'interdiction de la corruption transnationale dans les États membres de l'OCDE, l'administration Clinton a suivi la voie libérale des valeurs partagées, du

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[41] Tarullo (*supra* n. 37) 676.

[42] *Ibid* ; voir également, David Metcalfe, « The OECD Agreement to Criminalize Bribery: A Negotiation Analytic Perspective » (2000) (5(1) *International Negotiation* 129, 407.

[43] Tarullo (*supra* n. 37) 677.

[44] *Ibid*.

[45] *Ibid*, 668.

libre-échange, de la confiance dans les institutions internationales et, en dernier ressort, fit usage de la puissance coercitive américaine.

1. Acte 1 : La stratégie des valeurs libérales

À l'image du FCPA, le discours dominant de la campagne américaine de lutte contre la corruption est imprégné des notions libérales de valeurs, de normes et de morale partagées. Ces principes libéraux étaient également invoqués par les États-Unis auprès des États membres de l'OCDE lors des négociations comme base « universelle » pour bannir la corruption transnationale.

La logique stratégique des États-Unis était de présenter leur campagne comme une initiative morale, comme « the right thing to do ». Abbott et Snidal analysent à ce sujet les dires du Sherpa américain Daniel Tarullo, lors de la réunion ministérielle de l'OCDE en octobre 1993 :

> [P]resented a broad rationale for multilateral action against transnational bribery. He argued not only US economic interests (which were not at all persuasive) and economic efficiency (which had failed in the past) but also the unethical nature of bribery and corruption and their harmful effects on democracy, governance, and development[46].

Présenter publiquement la corruption transnationale comme une affaire morale avait l'avantage de mettre en lien cette pratique avec la corruption en général, celle-ci étant largement abhorrée par les citoyens[47]. Un représentant d'un gouvernement élu démocratiquement ne pouvait ainsi pas être vu comme « en faveur de » la corruption.

Au cours des négociations, les médias américains ainsi que des agences de presse européennes ont largement publicisé les justifications pour l'adoption d'un accord international pour l'interdiction de la corruption transnationale défendu par le « leadership moral américain »[48]. Abbott et Snidal notent que le *Financial Times* fait de

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[46] Abbott et Snidal (*supra* n. 34) S163-S164.

[47] *Ibid*, S163.

[48] *Ibid*. Lorsque le Conseil de l'OCDE a adopté sa recommandation de 1994, par exemple, Abbott et Snidal notent « it was the result of US success in bringing domestic political pressure, motivated by value considerations, to bear on European governments ».

l'année 1994 « l'année de la corruption »[49], ce qui a « fondamentalement changé la physionomie des négociations »[50], en rendant le public européen « fortement sensible aux problématiques de la corruption »[51].

Le département d'État américain a joué sur la peur de la presse et des critiques chez les « représentants européens »[52], à travers une campagne publique de « name and shame » que relaye les États membres de l'OCDE qui, selon eux, entravaient les négociations[53]. Elisabeth Spahn rapporte à ce sujet :

> The Europeans moved to negotiate only when, during a notorious corruption scandal inside Germany and in the European Union, the Clinton administration deployed domestic political pressure[54].

La stratégie des valeurs a établi une forte pression sur les gouvernements européens pour que ces derniers soutiennent la campagne. Comme l'écrivent Abbott et Snidal :

> Attempts to block agreement were overcome by sophisticated entrepreneurial leadership, including the selective admission of value perspectives into the proceedings. In this 'soft law' forum, the incorporation of values implicitly limited the arguments that could be made, until Europe's interest-based resistance was boxed in[55].

En mettant en avant une justification basée sur les valeurs pour interdire la corruption transnationale, les États-Unis ont cherché à dépasser les considérations liées aux intérêts de certains États dont l'économie aurait souffert avec l'application de cet accord[56].

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[49] *Financial Times*, 30 décembre 1994, 13 (cité en Abbott et Snidal, *supra* n. 34, S164).

[50] Abbott et Snidal (*supra* n. 34) S164.

[51] *Ibid*.

[52] Ibid, S164. Voir également, Gail Edmondson, « Europe's New Morality », *Bloomberg Business Week*, 18 December 1995, 26-30.

[53] Abbott et Snidal (*supra* n. 34) S164 : affirmant que le département d'État américain « relied heavily on value tactics such as shaming and normative persuasion ».

[54] Spahn (*supra* n. 33) 11.

[55] Abbott et Snidal (*supra* n. 34) S163.

[56] Ellen Gutterman, « On corruption and compliance : explaining state compliance with the 1997 OECD Anti-Bribery Convention », (Doctorat, Université de Toronto, 2005), a noté « prior to the

Présentés dans un langage libéral, les efforts américains pour l'internationalisation du FCPA comme « *the right thing to do* » ont rencontré la résistance de gouvernements sceptiques quant aux objectifs des États-Unis. Le Japon, la France, l'Allemagne et le Royaume-Uni n'étaient pas enclins à soutenir les justifications morales et économiques avancées par les États-Unis dans leur croisade contre la corruption transnationale. Certains représentants européens accueillaient avec dérision ce qu'ils ressentaient comme un agissement des Américains sur leurs « propres valeurs morales », dans une recherche d'internationalisation du FCPA[57].

Pour certains, les Américains semblaient engagés dans une campagne peu appropriée d'exporter leur « moralisme naïf » et leurs prétendues « valeurs puritaines »[58]. Pour d'autres, cette campagne était une mesure économique astucieuse pour conforter les entreprises américaines dans leur médiocres performances dans le commerce international.

La stratégie des valeurs libérales ne s'est cependant pas avérée suffisante pour contrer les argumentaires de certains États cherchant à défendre leurs propres intérêts. Engagés dans la mission de rehausser la morale des autres États, les États-Unis ne sont pas parvenus à convaincre certains de la sagesse de leurs propositions.

Au-delà de la continuation de la sous-application stratégique du FCPA, les États-Unis n'avaient d'autre choix que de recourir à d'autres justifications et tactiques. Pour ce faire, ils ajoutèrent une justification économique libérale à leur stratégie.

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conclusion of the OECD Convention, the German government took no steps to implement the earlier OECD recommendations on bribery, and German business also opposed such efforts », p. 74.

[57] Paul Lewis, « Straining Toward an Agreement on Global Bribery Curb », *New York Times*, 20 mai 1997.

[58] Voir Steven Salbu, « The Foreign Corrupt Practices Act as a Threat to Global Harmony » (1999) 20(3) *Michigan Journal of International Law* 419 ; Kevin Davis, *Between Impunity and Imperialism : The Regulation of Transnational Bribery* (OUP, 2019) ; Andy Spalding, « Unwitting Sanctions : Understanding Antibribery Legislation As Economic Sanctions Against Emerging Markets » (2010) 62 *Florida Law Review* 351.

2. Acte 2 : La stratégie économique libérale

La signature de l'amendement à certaines dispositions du FCPA en 1998 par le Président Clinton est en partie la raison pour laquelle le gouvernement américain a fait campagne pour la Convention anticorruption[59]. Selon Clinton, la logique derrière cette convention était de remédier aux pertes que les entreprises américaines subissaient face à leurs rivaux internationaux membres de l'OCDE s'adonnant à des pratiques corruptrices.

Dans cette optique, les États-Unis ont soutenu que leur proposition d'interdiction de la corruption transnationale était nécessaire pour « mettre tout le monde sur un pied d'égalité » dans le domaine du commerce international. Faussement simpliste mais largement acceptée, cette justification est rarement critiquée. À titre d'exemple, Nicola Bonucci, alors Directeur des affaires juridiques et conseiller de l'OCDE écrit :

> [T]he main reason for the multilateralization of the FCPA through the Anti-Bribery Convention and similar foreign bribery provisions in other treaties was not an ethical or moral one—it was because US companies felt, and rightly so, that they were in a competitive disadvantage vis-à-vis their main competitors[60]!

Les représentants américains accusaient les entreprises d'États membres de l'OCDE d'exploiter cet avantage « injuste » au détriment des intérêts commerciaux américains[61] et de porter ainsi un coup à l'économie des États-Unis[62]. Les représentants américains

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[59] William J. Clinton, Statement by the President (10 novembre 1998) : « US companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at $30 billion per year. The OECD Convention—which represents the culmination of many years of sustained diplomatic effort—is designed to change all that ».

[60] Nicola Bonucci, « The fight against foreign bribery and international law: an exception or a way forward? » (2013) *American Society of International Law, Proceedings – Anti-Corruption Initiatives in a Multipolar World* 250.

[61] Mark Pieth, Lucinda Low, and Nicola Bonucci (eds.), *The OECD Convention on bribery: a commentary* (2nd ed.) (Cambridge University Press, 2014), 12, n. 18.

[62] US General Accounting Office, *Report to Congress: Impact of Foreign Corrupt Practices Act On US Business,* 4 mars 1981.

avançaient qu'à ce sujet, entre 1994 et 1998, 239 contrats comptabilisant 108 milliards de dollars avaient été influencés par le paiement de « pots-de-vin »[63].

Nonobstant la valeur persuasive des arguments économiques avancés par les Américains, ces arguments ne constituaient pas une justification suffisante pour certains États, dont la France. Les représentants de l'Allemagne, du Japon et du Royaume-Uni ont également résisté aux propositions des États-Unis pour interdire la corruption transnationale[64]. Comme la France, ils s'inquiétaient de l'impact économique des propositions américaines sur leurs parts de marché à l'exportation.

Ces États avaient compris qu'en suivant l'objectif économique visant à « mettre tout le monde sur un pied d'égalité », leurs entreprises risquaient de perdre un outil important, celui de la corruption transnationale dans le commerce international. Le Royaume-Uni a soutenu l'idée d'une période d'évaluation interne sur ce sujet. En d'autres mots, les affaires reprenaient[65].

Comprenant que cette stratégie ne pourrait pas aboutir, les États-Unis ont adopté de nouvelles tactiques. Ils se sont appuyés, cette fois, sur des principes réalistes pour rallier les États comme la France à sa campagne contre la corruption transnationale.

3. Acte 3 : La stratégie de realpolitik

Alors que le discours officiel des États-Unis portait sur les avantages d'une prohibition multilatérale de la corruption transnationale (*i.e.*, renforcer les valeurs occidentales et

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[63] Barbara C. George, *et al,* « The 1998 OECD Convention : An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions » (2000) 37(3) *American Business Law Journal* 485, 493 ; Paul Blustein, « Kantor Weighs Sanctions to Fight Overseas Bribery », *Washington Post*, 7 mars 1996 ; US Department of State, « Fighting Global Corruption : Business Risk Management », Bureau for International Narcotics and Law Enforcement Affairs, mai 2001, « Corruption : Why It Matters ».

[64] Rob Evans et David Hencke, « Parliament 'Misled' over UK Efforts to End Bribery », *The Guardian*, 24 avril 2000 (notant que les responsables américains ont fait valoir que « there had been no sign of strong, active UK support for the convention »).

[65] Rosie Waterhouse, « Britain Spurns US Over Bribes », *The Independent*, 3 avril 1994, notant : « An appeal by a senior United States official for Britain to adopt measures to prevent companies paying bribes to obtain contracts overseas has failed to change the Government's stance ».

« mettre tout le monde sur un pied d'égalité »), la somme nulle des intérêts économiques et la logique des conséquences ont motivé les États-Unis de ne pas abandonner cette ambition de politique économique étrangère[66]. Ils ont revêtu cette campagne des habits du libéralisme tout en se fixant avec détermination et réalisme sur leurs intérêts nationaux.

Pourquoi les États-Unis ont-ils utilisé un argument fondé sur leurs propres intérêts[67] en réponse aux réticences de certains États membres de l'OCDE ? La stratégie des valeurs n'était qu'un moyen tiré des considérations propres aux États-Unis (i.e., leurs intérêts économiques). Le FCPA a été adopté pour des raisons de politique étrangère et non pour des considérations morales, la campagne américaine contre la corruption transnationale n'est donc pas fondée sur l'engagement en faveur des valeurs anticorruption ou sur des idéaux d'économie libérale. Les États-Unis s'attachèrent plutôt à renforcer leurs intérêts économiques et leur politique étrangère[68].

Déterminés à faire adopter la Convention internationale contre la corruption par les membres de l'OCDE, alors réticents, les États-Unis adoptèrent une tactique coercitive[69]. Un exemple qui illustre cette approche est rapporté par Elisabeth Spahn qui décrit les agissements de Daniel Tarullo, le négociateur en chef de la délégation américaine à l'OCDE :

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[66] Under the logic of consequences, actors behave strategically to achieve certain objectives, whereas under the logic of appropriateness, actors' behavior is biased toward social norms deemed « right ». Foreign economic policy is integral to any successful foreign policy, and involves the mediation and management of international economic flows. Voir Alfred Eckes et Thomas Zeiler, *Globalization and the American Century* (Cambridge University Press, 2003).

[67] Abbott et Snidal (*supra* n. 34) S162.

[68] Ellen Gutterman, « Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act and its impact on the global governance of corruption », (2018) 18(2) *European Political Science* 205, 360 : notant que les mesures américaines contre la corruption transnationale « reflects US interests and not those of the millions of people around the world who are in desperate need of credible and effective strategies to curb the damage of complex corruption problems ».

[69] Abbott et Snidal (*supra* n. 34) S164.

> [He] carried a list of the ten largest bribe-paying companies in the world in his jacket pocket; when European negotiators resisted, he would tap his jacket pocket, threatening to release the list to the press[70].

Abbott et Snidal commentent la tactique musclée qu'aurait eue Tarullo lors de ces négociations et remarquent que « la plupart des Européens ont considéré ces tactiques comme inappropriées et menaçantes »[71]. Étant donné le nombre important d'entreprises sous l'égide de l'État en France à cette époque, ces menaces ont été considérées comme dirigées de façon coercitive à l'endroit de la France et de ses champions nationaux.

Pour comprendre l'importance de ces menaces, il faut également apprécier le contexte européen où plusieurs scandales de corruption et de financement occultes de campagnes émergeaient. En France, le scandale de corruption Elf-Aquitaine[72] avait touché les plus hauts niveaux du gouvernement et avait traversé le Rhin pour impliquer le Chancelier Helmut Kohl[73]. Ce dernier était également lié à la plus grande affaire de corruption de l'Allemagne d'après-guerre en rapport avec un accord de défense avec l'Arabie

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[70] Spahn (*supra* n. 33) 11 ; Abbott et Snidal (*supra* n. 34) S164.

[71] Abbott et Snidal (*supra* n. 34) S164.

[72] Eva Joly, *Justice Under Siege : One Woman's Battle Against a European Oil Company* (Arcadia, 2006).

[73] Karl Laske, « Un été 98. À suivre : l'affaire Elf (10) », *Liberation*, 23 juillet 1998 ; Craig R. Whitney, « A Seamy French Tale of Sex, Politics and an Oil Company's Lost Millions », *New York Times*, 11 février 1999 ; John R. Heilbrunn, « Oil and Water ? Elite Politicians and Corruption in France » (2005) (37(3) *Comparative Politics* 277.

saoudite[74]. D'autres affaires de corruption étaient en cours en Italie[75], au Royaume-Uni[76], et en Belgique[77].

L'utilisation par les États-Unis des scandales politiques domestiques pour faire avancer leurs propositions s'est avérée payante[78]. Tarullo confirme l'utilisation de ces événements de la vie politique européenne pour faire pression sur ces États :

> Thus, in a turn of events that seems very far from today's world, efforts of the United States to exercise its power in pursuit of an international arrangement elicited a favorable reaction from European publics and, in accordance with liberal explanations for international behavior, helped shift the positions taken by European governments which, until that point, had been recalcitrant[79].

Relatant ces éléments, Abbott et Snidal affirment que Tarullo et ses successeurs au département d'État ont continué leur tactique basée sur les valeurs « en façade » jusqu'à

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[74] Roger Cohen, « Kohl Resigns German Party Post After He Is Rebuked for Scandal », *New York Times*, 19 janvier 2000.

[75] Mattia Feltri, *Novantatré. L'anno del terrore di Mani pulite* (Marsilio, 2016) ; Melinda Henneberger, « 10 Years After Bribery Scandal, Italy Still Counts the Cost », *New York Times*, 24 février 2002.

[76] David Hencke, « Tory MPs were paid to plant questions says Harrods chief », *The Guardian*, 20 octobre 1994.

[77] Craig R. Whitney, « Belgium Convicts 12 for Corruption on Military Contracts », *New York Times*, 24 décembre 1998.

[78] Tarullo (*supra* n. 37) 678-679 : « Although there does not seem to have been much direct public pressure on European governments with respect to overseas bribery as such, European officials reacted in anticipation of such pressures developing. Attention to overseas bribery might further have complicated efforts to contain the harm from domestic bribery scandals that were at that time commanding such media and public attention. US officials thus learned that they were, unwittingly at first, affecting the domestic political situation in France, Germany, Britain, and other countries that had resisted international obligations to limit overseas bribery. Having learned of this effect, they added a new move to their tactical repertoire. The European press showed great interest in the US initiative, resulting in numerous newspaper articles and even a lengthy segment on a British television program. US officials engaged in more 'public diplomacy' by granting interviews and giving speeches on the topic. »

[79] *Ibid*, 679.

ce que la Convention soit adoptée, alors qu'en « off » ils négociaient âprement les mécanismes de criminalisation de la corruption transnationale[80].

Traitant des catalyseurs pour une réforme anticorruption à cette période, Mark Pieth rappelle que cette « âpre pression politique des États-Unis » a rendu possible l'adoption des recommandations et de la Convention anticorruption de 1997[81]. La rhétorique des valeurs libérales et la force des tactiques basées sur leurs intérêts propres ont été associées pour servir cette initiative de politique étrangère à visée économique[82].

Au-delà de la diplomatie coercitive pour contrer les États réticents à l'OCDE, les représentants américains ont également formulé des menaces de sanctions contre certains États. Lors d'un des tournants des négociations, les représentants américains ont menacé d'imposer des tarifs douaniers unilatéraux à la France si elle continuait à défier les propositions américaines d'anticorruption[83]. Ces menaces ont constitué un message puissant aux États membres de l'OCDE encore hésitant face à l'adoption des politiques américains contre la corruption transnationale[84].

Beaucoup en France accueillaient la campagne américaine avec suspicion, la percevant comme une ingérence malvenue des États-Unis dans les affaires internationales d'États

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[80] Abbott et Snidal (*supra* n. 34) S165.

[81] Mark Pieth, « International Efforts to Combat Corruption », *Conférence internationale anticorruption*, 10 octobre 1999, Sud Afrique (affirmant que les principaux partenaires commerciaux ont compris qu'une action collective contre la corruption était dans leur intérêt commun).

[82] Mark Pieth fait allusion à ces tactiques lors des négociations en « Taking Stock : Making the OECD Initiative Against Corruption Work », 13 octobre 2000, Groupe de travail sur la probité et l'éthique publique de la Commission des questions juridiques et politiques, Conseil permanent de l'Organisation des États américains : « Of course there is power play involved and sometimes things can get rough, especially when countries use the media to support their point in a crucial negotiation phase ».

[83] Mickey Kantor, US Secretary of Commerce, remarks before the Detroit Economic Club, 13 September 1996, disponible sur: https://web-archive-2017.ait.org.tw/en/officialtext-bg9632.html (5 janvier 2021).

[84] *Ibid*, M. Kantor : « [W]e have not hesitated to rely on American trade laws to head off unfair practices ; on bribery and corruption we will put into use the available tools that will strengthen our hand. »

souverains[85], et une politique mercantiliste cherchant à relancer les exportations américaines[86]. Dans un discours plus travaillé, les représentants français ne souhaitaient pas soutenir la proposition américaine contre la corruption transnationale après qu'une entreprise française influente ait avancé que la corruption de représentants étrangers agissait en « contrepoids d'une pression politique émanant de hauts responsables américains dans les passations de marchés publics »[87].

Frank Vogl rapporte une discussion avec un haut responsable français qui indiquait que dans le secteur de la défense :

> the French were forced to use bribes to compete with the major American companies, which received huge subsidies from the Pentagon and the US Export-Import Bank and enjoyed the unique advantage of—in the case of major deals—having the US president pick up the telephone to major foreign leaders and encourage them to buy American[88].

Si cela était vrai, on peut concevoir que les compétiteurs des États-Unis ne percevaient pas l'interdiction de la corruption transnationale comme une mise à égalité des puissances mais comme une avancée en faveur des intérêts américains et de leurs entreprises[89].

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[85] Jean Guisnel, « Corruption, entre pratiques et condamnation » *Géoéconomie* 2010/1 (no. 52), 23-31 : « [L]es pays européens, dont la France, n'ont pas eu leur mot à dire dans la rédaction de ce texte qu'ils se sont fait imposer par la puissance américaine ».

[86] Ellen Gutterman, « The legitimacy of transnational NGOs: lessons from the experience of Transparency International in Germany and France » (2014) 40 *Review of International Studies* 391, 417 (notant que la France et l'Allemagne se sont opposées à une approche multilatérale pour lutter contre la corruption transnationale).

[87] Voir, « Trade Policy : US, Europe at Loggerheads Over Talks To End Bribery in International Transactions », (1997) 14 *International Trade Reporter* 1985.

[88] Frank Vogl, *Waging war on corruption* (Rowman & Littlefield, 2016), 181 : notant les discussions avec des diplomates et des dirigeants faisant valoir que la corruption était nécessaire pour concurrencer les entreprises américaines bénéficiant de « huge power of the White House and US embassies around the world to twist the arms of host governments to buy American products ».

[89] Jean Guisnel, *Les pires amis du monde. Les relations franco-américaines à la fin du XXe siècle* (Stock, 1999) 275 ; voir également, *Intelligence Online*, « Le Monde du renseignement », 11 novembre 1999 : « Firmes américaine ont développé au cours des vingt dernières années un

Alors que certains peuvent estimer que les actions des États-Unis manquent de diplomatie, d'autres peuvent considérer qu'elles sont justifiées par les circonstances. Nous nous appuierons ici sur l'histoire des négociations de la Convention anticorruption pour démontrer que cet accord a été conclu par la force et non par consensus. Cela aura des conséquences pour la mise en œuvre de cette convention et pour l'avenir de la campagne américaine de lutte contre la corruption transnationale.

La ratification de la Convention a été largement perçue comme un triomphe de politique étrangère économique aux États-Unis. Cependant, les intimidations, la coercition et la pression ont peut-être mis en péril la réussite de cette campagne. Comme le reconnaît Tarullo « la pression exercée par les États-Unis a seulement servi à obtenir les signatures des autres États, elle n'a pas permis de changer le jeu sous-jacent des autres États »[90].

véritable savoir-faire pour extraire du cash et rémunérer les intermédiaires plus discrètement que dans les autres pays ».

[90] Tarullo (*supra* n. 37) 680.

IV. Régime applicable au développement de la corruption transnationale et études de cas : La France, le Royaume-Uni et les États-Unis

Ce chapitre passe en revue plusieurs études de cas de corruption transnationale majeurs supposés avoir été ourdis par des entreprises françaises, britanniques et américaines. Nous examinerons ces cas non pas tant au prisme des discours des États sur les actions qu'ils comptent entreprendre mais en analysant leurs actions réelles.

A. FRANCE : *LA GUERRE ÉCONOMIQUE*

Contrairement au FCPA, la législation française contre la corruption transnationale n'est pas le résultat d'inquiétudes liées aux comportements d'entreprises pouvant nuire à des objectifs de politique étrangère. Cette législation n'est pas non plus fondée sur des principes éthiques ou moraux. La France n'a accepté de ratifier la Convention anticorruption qu'à la suite de la pression diplomatique américaine et de menaces économiques.

Une grande partie du monde des affaires et du gouvernement en France voit le FCPA et la campagne américaine de lutte contre la corruption transnationale comme une ruse visant à avantager les entreprises américaines vis-à-vis de leurs rivales françaises[91]. Beaucoup d'entreprises françaises importantes ont exprimé ce point de vue lors des négociations de la Convention anticorruption[92].

Les spécialistes français les plus directs n'hésitent pas à déclarer que la campagne américaine était une « guerre économique » menée par les États-Unis contre ses ennemis, ses alliés et ses amis[93]. Certains affirment que les entreprises françaises sont

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[91] Virginie Robert, « Quand le droit devient une arme de guerre économique », *Les Echos*, 10 octobre 2016 ; Éric Denécé et Claude Revel, *L'autre guerre des Etats-Unis* (R. Laffont, 2005) ; Xavier Leonetti, *La France est-elle armée pour la guerre économique ?* (Armand Colin, 2011) (NB : M. Leonetti a dirigé la division intelligence économique de la gendarmerie nationale).

[92] Pieth (*supra* n. 81) notant : « The other industrialised states questioned the rationale of the unilateral move by the US. It was either perceived as an act of expansive moralism or they suspected a hidden hegemonial trade-agenda. » Voir également, Anja Jakobi (*supra* n. 34) 244.

[93] Voir Ali Laïdi, *Le droit, nouvelle arme de guerre économique : Comment les Etats-Unis déstabilisent les entreprises européennes* (2019) et *Aux sources de la guerre économique* (2012);

désavantagées par la campagne américaine de lutte contre la corruption transnationale[94] et lésées par la surveillance et l'espionnage industriel menés par les États-Unis et ses entreprises.

En 2015, *Libération* [95] et *Mediapart* [96] ont divulgué une demande de collecte d'information émanant du Directeur du renseignement national américain chargeant la NSA d'une campagne d'espionnage économique contre les entreprises françaises. Cette demande comprenait l'interception de toutes « les propositions de contrats, études de faisabilité, négociations de ventes ou d'investissements dans des projets majeurs ou des systèmes d'intérêt significatif pour les pays concernés ou comptabilisant 200 millions de dollars et plus en vente et services »[97].

Pour beaucoup en France, cette preuve d'espionnage économique contre les entreprises privées françaises confirmait les craintes d'un espionnage débridé des États-Unis à des fins commerciales. Ces craintes avaient déjà été mentionnées dans le *Campbell report*[98]. Ainsi la campagne américaine de lutte contre la corruption était vue en France comme

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Jean-Michel Quatrepoint, « Au nom de la loi… américaine », *Le Monde Diplomatique,* janvier 2017*,* 1, 22-23; Hervé Juvin, « Sanctions américaines: la guerre du droit », *Le Débat*, 194, 2017/2; Luc Lenoir, « Guerre économique: la France et l'UE "complètement désemparées" », *Le Figaro*, 22 février 2019 ; Jean-Pierre Neu, « Les industriels de l'armement montent au créneau contre la future loi anticorruption », *Les Echos*, 10 février 1999 (« Selon les industriels français, les Américains, promoteurs de cette convention OCDE, ont ainsi conçu une véritable machine de guerre commerciale »).

[94] Robert (*supra* n. 91); Stéphane Lauer, « Sous couvert de lutte contre le terrorisme, l'extraterritorialité du droit américain est une arme de guerre économique », *Le Monde*, 30 décembre 2019.

[95] Emmanuel Fansten, « NSA : espionnage économique, le sale jeu américain », *Libération*, 29 juin 2015.

[96] Fabrice Arfi, et al., « Moscovici et Baroin écoutés sur fond d'espionnage économique », *Mediapart*, 29 juin 2015.

[97] *Ibid*.

[98] Duncan Campbell, « Report to the Director General for Research of the European Parliament (Scientific and Technical Options Assessment programme office) on the development of surveillance technology and risk of abuse of economic information » (2000).

servant la stratégie plus large des États-Unis pour asseoir encore davantage leur puissance économique et leur domination stratégique. Hervé Juvin relève que :

> Les sanctions américaines contre les entreprises françaises et européennes méritent l'attention. Elles révèlent une stratégie de mobilisation du droit dans la guerre économique, qui se traduit par un changement de nature de droit, placé sous la dépendance de l'économie et de la géopolitique[99].

Plus critique, Jean-Michel Quatrepoint suggère qu'il existe une stratégie de guerre économique menée par les États-Unis contre le secteur industriel français.[100] Les récentes réformes anticorruption introduites par la loi Sapin II ont également été décrites comme une forme d'impérialisme juridique américain par Pierre Lellouche, ancien secrétaire d'État au commerce extérieur :

> Au fil de mon travail à la commission des Affaires étrangères, j'ai découvert la puissance du rouleau compresseur normatif américain qui revêt la forme d'un véritable impérialisme juridique et économique[101].

Au point que les lois françaises relatives à la corruption transnationale peuvent être considérées comme des importations, des produits de coercition et de pression politique étrangère. La volonté politique pour les appliquer sera certainement limitée.

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[99] Hervé Juvin, « Sanctions américaines : la guerre du droit », *Le Débat*, n. 194, 2017/2.

[100] Jean-Michel Quatrepoint, « La souveraineté industrielle de la France est-elle en danger ? », *Areionews24*, 11 septembre 2018.

[101] Raphaël Legendre, « Au nom de la lutte contre la corruption, les États-Unis imposent leurs lois aux entreprises étrangères », *L'Opinion*, 5 juin 2016 : « C'est évident. La menace, ce sont les Américains, car ils sont dans une stratégie identique à celle des Chinois, mais avec un temps d'avance grâce à leur statut de superpuissance. La réforme fiscale de Donald Trump est une machine de guerre économique redoutable, fort habile, que les Européens ont découvert trop tardivement. C'était pourtant dans le programme du parti républicain depuis de nombreuses années. Si l'on ajoute à cela l'extraterritorialité du droit américain et tout ce qui concerne les normes, cela traduit bien une réalité nous sommes en guerre économique. Trop longtemps, les Français n'ont pas voulu le croire. Dans le cas de l'extraterritorialité du droit américain, si l'Europe n'a rien à redire à cela, c'est parce que les Européens, et en particulier les Allemands, ont accepté de facto depuis des décennies la tutelle américaine. »

1. Cas d'études — Total, Vitol, et Alstom

Le premier cas étudié est l'affaire de corruption transnationale la plus importante qui, en France, a trouvé un aboutissement devant les tribunaux. Nous verrons également une affaire relative à une entreprise française qui a été poursuivie à l'étranger pour des soupçons de corruption mais qui n'a pas encore été poursuivie en France.

a) Le scandale pétrole contre nourriture *: Total et Vitol*

En 1996, le programme des Nations unies *pétrole contre nourriture* (OFFP) fut établi alors qu'il y avait une inquiétude grandissante concernant les sanctions des Nations unies sur l'Irak et leur impact sur la population ainsi que sur le soutien international au maintien de ces sanctions[102]. Avec l'OFFP, il était permis à l'Irak de vendre des produits pétroliers pour financer l'achat de biens humanitaires.

Ce programme a pris fin lors de l'intervention des États-Unis en 2003. À ce moment, des dizaines de milliards de dollars de biens et d'équipements humanitaires avaient été livrés. Cependant, une enquête indépendante révéla plus tard que ce programme avait été manipulé par le gouvernement irakien avec la complicité de centaines d'entreprises internationales. Nous étudierons ici deux de ces entreprises : Total et Vitol. Les affaires qui émergèrent furent les premières condamnations d'ampleur d'entreprises en France pour corruption transnationale.

2013 Poursuites (Total et Vitol)

Cette fameuse affaire impliquait vingt accusés – dont le dirigeant de Total, un ancien ministre de l'Intérieur français et plusieurs anciens diplomates – soupçonnés de s'être livrés à des pratiques de corruption transnationale en lien avec l'OFFP. Mais le 8 juillet 2013, le tribunal de première instance décida d'acquitter tous les accusés, dont l'entreprise française Total et le distributeur d'énergie suisse Vitol[103].

La Cour jugea qu'aucun des chefs d'accusation (corruption transnationale, trafic d'influence ou détournement de fonds privé) n'était avéré. La cour estimait que la

[102] En août 1990, le Conseil de sécurité de l'ONU a adopté la résolution 661 et imposé des sanctions globales à l'Irak après son invasion du Koweït.

[103] Tribunal de grande instance de Paris, (11e chambre correctionnelle), 8 juillet 2013.

corruption transnationale ne pouvait être prouvée du fait que le récipiendaire des paiements était l'État irakien. En ce qui concerne Vitol, cette entreprise avait déjà été impliquée en 2007 pour les mêmes faits par les autorités américaines et la cour appliqua le principe du *ne bis in idem* qui arrêta les poursuites en France sur la base de l'autorité de la chose jugée[104].

En seconde instance cependant, la Cour d'appel de Paris cassait cette décision et déclarait Total coupable de faits de corruption transnationale le 26 février 2016[105]. Il en fut de même pour Vitol. Un des accusés fut acquitté et les onze autres durent payer une amende[106]. Cependant, Total et Vitol, ainsi que plusieurs accusés portèrent l'affaire en cassation.

Deux décennies après que le comportement supposé ait eu lieu, la Cour de cassation confirma la décision de la Cour d'appel le 14 mars 2018[107]. C'est ainsi que la France eut sa première et seconde inculpation d'entreprises s'étant livrées à des faits de corruption transnationale. Dans cette décision historique, la Cour examina plusieurs éléments de l'appel, incluant les objections de juridiction relatives au principe du *ne bis in idem*, à la caractérisation de délit de corruption de représentants étrangers, et à l'application extraterritoriale de lois interdisant la corruption transnationale et les pratiques qui y sont liées.

Plus important, la Cour a soutenu que la résolution d'une affaire de corruption transnationale à l'étranger même sous le coup d'un accord différé d'engagement de ne pas poursuivre (comme pour Vitol) n'interdirait pas aux autorités françaises d'engager des poursuites sur les mêmes faits dans le cas où certains de ces faits auraient lieu en

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[104] Voir Juliette Lelieur, « Créativité judiciaire en faveur des entreprises françaises dans l'affaire Pétrole contre nourriture II », *Dailloz – AJ pénal* (2015) 540.

[105] Christophe de Margerie, PDG de Total SA, est décédé tragiquement en 2014 ; l'ancien ministre de l'Intérieur Charles Pasqua est décédé en 2016.

[106] *Le Parisien*, « Pétrole contre nourriture : amende de 750.000 euros en appel pour Total », 16 février 2016.

[107] Cour de cassation, 14 mars 2018, No. 16-82.117.

France[108]. La Cour a donc maintenu que même si le principe de double préjudice s'appliquait, il ne s'appliquait pas aux États souverains.

b) Alstom

En 2014, le département de la justice des États-Unis (DOJ) intitula le procès de l'entreprise française Alstom « la résolution la plus importante relative à une affaire de corruption transnationale ». Dans cette affaire, le DOJ ne reçut pas de coopération de la part de l'entreprise et des autorités françaises et fut entravé dans ses enquêtes par ces dernières[109]. C'était un cas typique de corruption transnationale d'un géant industriel avec des soupçons de commissions occultes de près de 75 millions de dollars versés à des représentants officiels étrangers à travers le monde, incluant l'Indonésie, l'Arabie saoudite et l'Égypte, pour s'assurer la passation de contrats d'énergie majeurs.

Cependant, Alstom a été en partie acquis par son rival américain General Electric (GE) dans des circonstances troubles et était poursuivi par les autorités américaines pour violation du FCPA. Alors que les deux firmes, ainsi que prétendument le DOJ, s'accordèrent pour que GE règle toutes les pénalités afférentes aux violations du FCPA, le juge américain interdit GE de le faire. L'amende s'éleva à 772 millions de dollars ce qui mit en difficulté Alstom, déjà dans une position financière précaire à un moment stratégique de son histoire[110].

Cette affaire, qui intervenait au moment de l'acquisition d'Alstom par GE, reste très controversée en France et sujette à plusieurs investigations et enquêtes parlementaires sur le comportement des dirigeants d'Alstom ainsi que de certains responsables français, dont

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[108] Bien qu'il n'ait pas été allégué que Vitol ait commis des actes de corruption sur le territoire français, Vitol a été condamné pour avoir utilisé un diplomate français comme complice, qui a passé des appels depuis la France et qui a reçu un paiement sur un compte bancaire français.

[109] Frédéric Pierucci et Matthieu Aron, *Le piège américain* (JC Lattès, 2019) ; Jean-Michel Quatrepoint, *Alstom, scandale d'État* (Fayard, 2015) ; Anne Michel, « L'enquête sur l'affaire Alstom-General Electric passe entre les mains du Parquet national financier », *Le Monde*, 18 juillet 2019.

[110] *BBC News*, « Alstom to pay $772m fine to settle bribery charges in US », 22 décembre 2014, note : « When GE agreed the €12.4bn takeover deal, both sides said the US firm would take on all of its liabilities, including possible official penalties. »

l'actuel Président Emmanuel Macron qui, alors ministre de l'Économie, avait approuvé l'acquisition d'Alstom par GE[111]. Les commentateurs estiment qu'il y aurait eu collusion entre le DOJ, GE, le juge américain, les dirigeants d'Alstom et les responsables français. Alors que l'entreprise a plaidé coupable face aux accusations retenues aux États-Unis, aucune procédure de corruption transnationale n'a été engagée contre Alstom en France.

Étant donné l'importance des allégations de corruption dans les affaires françaises étudiées et leurs impacts potentiels sur les intérêts nationaux français, il est intéressant de constater qu'il ne semble pas y avoir eu d'interférence politique de la part du gouvernement[112]. D'une certaine façon ces affaires démontrent la volonté du système judiciaire français de faire appliquer les lois nationales contre la corruption transnationale à leur propre rythme, sans influence excessive de l'État.

B. LE ROYAUME-UNI : COMMISSIONS SPÉCIALES ET RELATIONS SPÉCIALES

Tout comme en France, les dispositions législatives relatives à la prohibition et la lutte contre la corruption transnationale en vigueur au Royaume-Uni émanent de la campagne menée par les États-Unis. Ces lois britanniques ne résultent pas de problèmes de politiques étrangères causées par des entreprises anglaises ni d'une prise de position morale contre ces pratiques.

En réalité, le paiement de commissions a été une politique officielle du Royaume-Uni durant des décennies. Après la ratification de la Convention anticorruption, peu de choses ont changé. Le discours officiel contre la corruption transnationale devint plus courant mais les pratiques corruptrices engagées par les entreprises parmi les plus importantes du Royaume-Uni restèrent une problématique vivace. L'affaire qui retiendra notre attention

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[111] Assemblée nationale, 31 octobre 2017, « Commission d'enquête sur les décisions de l'État en matière de politique industrielle, notamment dans les cas d'Alstom, d'Alcatel et de STX » (Rapporteur, M Guillaume Kasbarian) ; *Challenges*, « L'affaire Alstom-General Electric transmise au parquet national financier », 19 juillet 2019.

[112] Contrairement aux affaires du BAE au Royaume-Uni ou du Kazakhgate aux États-Unis, ces trois affaires françaises ne semblent pas avoir soulevé de tensions similaires entre l'État de droit et la sécurité nationale ou la politique étrangère de la France.

impliquait un géant de l'industrie de l'armement BAE et le Royaume de l'Arabie saoudite dans ce qui fut appelé « the deal of the century »[113].

1. Cas d'étude — BAE al-Yamamah

L'affaire BAE al-Yamamah[114] fait partie des scandales de corruption transnationale les plus controversés et importants jamais vus. Il s'articule autour d'un contrat dénommé al-Yamamah, négocié à l'origine en 1985 par Margaret Thatcher alors Premier ministre et le Roi saoudien Fahd[115]. Ce contrat comprenait un accord de 43 milliards de livres sterling pour que BAE fournisse des avions de chasse et des systèmes d'armement à l'Arabie saoudite[116].

Joyau de la couronne industrielle britannique, BAE est un des plus gros employeurs du Royaume-Uni et l'un de ses plus grands exportateurs. BAE est une des plus importantes entreprises d'armement du monde avec plus de 80 000 employés. L'accord al-Yamamah était à tous les niveaux la plus grande vente de tous les temps : « *Britain's biggest sale ever, of anything, to anyone* »[117].

Des soupçons de paiement de commissions occultes par la BAE à des membres de la famille royale saoudienne en lien avec l'accord al-Yamamah surgissent en 1985 au moment de la signature de cet accord[118]. En réponse à ces rumeurs, une enquête de la

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[113] David Pallister, « The arms deal they called the dove: how Britain grasped the biggest prize », *The Guardian*, 16 décembre 2006.

[114] Signifie « la colombe » en arabe.

[115] Luke Harding, « Declassified papers reveal real reason for Thatcher's dash to Riyadh », *The Guardian*, 24 août 2016.

[116] Certains rapports indiquent que ce contrat et les contrats successeurs ont porté la valeur de ces accords à 76 milliards de livres sterling.

[117] David White et Robert Mauthner, « Britain's Arms Sale of the Century : The 10 Billion Pounds UK-Saudi Deal », *Financial Times*, 9 juillet 1988. Fournissant environ 2 milliards de dollars par an à BAE pour les décennies à venir, il a été payé avec environ 400000 barils de pétrole brut saoudien par jour.

[118] David Pallister (*supra* n. 113).

commission nationale d'évaluation fut menée jusqu'en 1992. Cependant le rapport qui en découla fut supprimé pour des raisons liées aux intérêts nationaux[119].

Malgré des dénégations répétées vis-à-vis de malversations autant du côté des conservateurs que des travaillistes, il fut rapporté en 1997 que la BAE avait payé des centaines de millions de livres de commissions à de hauts dignitaires saoudiens. Peu après, le Royaume-Uni ratifia à contrecœur la Convention anticorruption. Les dénégations des responsables britanniques et de la BAE continuèrent six années encore.

En 2003, *The Guardian* rapporta que le président de la BAE Sir Richard Evans aurait été personnellement complice de l'établissement d'un « slush fund » de 20 millions de livres destiné aux représentants saoudiens[120]. En 2004, le Serious Fraud Office (SFO) débuta une enquête sur la base de ces soupçons. Un lanceur d'alerte crédible fit alors son apparition et fournit des preuves indéniables d'une corruption généralisée et d'autres pratiques corruptrices de la BAE[121].

Alors que le scandale se développa sur la place publique, le groupe de travail de l'OCDE exprima ses inquiétudes sur le respect par le Royaume-Uni de la Convention anticorruption et appela à plusieurs reprises à une enquête rapide en accord avec les obligations légales stipulées dans la Convention[122]. Le Royaume-Uni eut une réponse abrupte face à ces critiques et chercha à destituer le président du groupe de travail de ses fonctions[123].

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[119] *Ibid*. Voir également, Joe Watts, « Margaret Thatcher's role in securing controversial £42bn arms deal with Saudi Arabia revealed », *The Independent*, 23 août 2016.

[120] David Leigh et Rob Evans, « BAE accused of arms deal slush fund », *The Guardian*, 11 septembre 2003.

[121] *Ibid*. Les allégations comprenaient la fourniture par BAE de prostituées, de yachts, de billets d'avion de première classe, de véhicules de luxe, de repas illimités au restaurant, d'adhésions à des clubs, de voyages de jeu et de rapports choquant sur « sex and bondage with Saudi princes ».

[122] Matthew Tempest, « OECD to press Blair over BAE inquiry », *The Guardian*, 20 décembre 2006.

[123] David Leigh et Rob Evans, « Organisation for Economic Cooperation and Development », *The Guardian*, 9 juin 2007; Fritz Heimann et Mark Pieth, *Confronting Corruption: past concerns, present challenges, and future strategies* (Oxford University Press, 2018).

La pression internationale s'intensifia et en décembre 2006, le Premier ministre Tony Blair cessa les enquêtes visant la BAE. Dans une note personnelle adressée au procureur général, Blair évoqua les inquiétudes soulevées par la poursuite de ces enquêtes en mentionnant les objectifs fondamentaux de la politique étrangère britannique, ses relations avec l'étranger, sa coopération diplomatique et de renseignement avec l'Arabie saoudite ainsi que la sécurité nationale[124].

La semaine suivante, Blair justifia publiquement l'arrêt de l'enquête du SFO en déclarant :

> Our relationship with Saudi Arabia is vitally important for our country in terms of counter-terrorism, in terms of the broader Middle East, […]. That strategic interest comes first[125].

D'où venait ces graves menaces à l'encontre de la sécurité nationale britannique ? Les responsables saoudiens, inquiets des progrès de l'enquête du SFO avaient finalement décidé de menacer le Royaume-Uni. Le Prince saoudien Bandar, fils du prince héritier, aurait menacé les Britanniques en affirmant « qu'il rendrait plus facile pour les terroristes d'attaquer Londres à moins que les enquêtes pour corruption concernant leurs accords de vente d'armes ne soient stoppées »[126].

Le 14 décembre 2006, le directeur du SFO publia une note mettant un terme à l'enquête sur les soupçons de corruption de la BAE dans le cadre de l'affaire al-Yamamah, invoquant des motifs liés à la sécurité nationale[127]. Le même jour, le procureur général

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[124] Compte rendu personnel du Premier ministre britannique au procureur général, 8 Décembre 2006.

[125] *BBC News*, « Blair defends Saudi probe ruling », 15 décembre 2006.

[126] David Leigh et Rob Evans, « Saudis "threatened Blair with terror », *The Guardian*, 16 février 2008.

[127] *R (On The Application of Corner House Research and Others) v Director of The Serious Fraud Office*, [2008] UKHL 60 [29] : « The Director of the Serious Fraud Office has decided to discontinue the investigation into the affairs of BAE SYSTEMS Plc as far as they relate to the Al Yamamah defence contract with the government of Saudi Arabia. This decision has been taken following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security. It has been

Lord Goldsmith fit une déclaration au Parlement relatant les vues du Premier ministre, des ministères de la Défense et des Affaires étrangères ainsi que des considérations d'intérêt public soulevées par l'enquête du SFO sur la BAE, les autorités britanniques et l'Arabie saoudite[128].

Le Procureur général nota également que l'article 5 de la Convention anticorruption excluait lui aussi que le SFO prenne en considération les intérêts économiques nationaux ou les retombées éventuelles sur des relations avec un autre État en ajoutant, « nous ne l'avons pas fait »[129]. Cependant, peu après, Tony Blair reconnut que « des milliers d'emplois auraient été perdus », si le contrat de 6 milliards de livres pour la livraison de 72 avions Typhoon n'avait pas été honoré[130].

En 2010, après 20 ans de dénégations, le SFO avait convenu avec la BAE, après que celle-ci ait plaidé coupable d'un délit comptable mineur, du paiement d'une amende de 30 millions de livres en lien avec des accusations de corruption transnationale en Tanzanie. En contrepartie, le SFO abandonna les charges retenues contre plusieurs individus et termina ses enquêtes sur des soupçons de corruption transnationale par la BAE dans plusieurs autres États. Dans le même temps, la BAE accepta de payer près de

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necessary to balance the need to maintain the rule of law against the wider public interest. No weight has been given to commercial interests or to the national economic interest. »

[128] Déclaration du procureur général à la Chambre des lords du 14 décembre 2006 : Ces responsables, a déclaré Lord Goldsmith, avaient « expressed the clear view that continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment. »

[129] L'article 5 de la Convention anticorruption stipule : « Les enquêtes et poursuites en cas de corruption d'un agent public étranger sont soumises aux règles et principes applicables de chaque Partie. Elles ne seront pas influencées par des considérations d'intérêt économique national, les effets possibles sur les relations avec un autre État ou l'identité des personnes physiques ou morales en cause. »

[130] Mark Bochetti, « Mark Pieth : a profile », *MLex* (Special Edition), 1 mars 2016, 6.

400 millions de dollars aux autorités américaines pour résoudre les allégations de corruption et d'actions connexes dans l'affaire BAE al-Yamamah[131].

Dans cette affaire, nous voyons les limites du discours justificatif libéral contre la corruption transnationale. Nous voyons en échange que le réalisme et les considérations basées sur les intérêts ont eu préséance. Les intérêts nationaux et les considérations de politiques étrangères britanniques ont joué un rôle fondamental dans ce scandale de corruption transnationale hors normes. Les prétentions morales, les valeurs libérales, les prétendues normes universelles contre la corruption et les autres préceptes libéraux visant à expliquer le comportement de l'État sont absents de cette affaire.

L'affaire BAE démontre la capacité et la propension du Royaume-Uni à enterrer un cas majeur de corruption transnationale alléguée lorsqu'il y a dans la balance des intérêts nationaux perçus comme menacés. L'expérience britannique montre également la capacité de cet État à résister efficacement aux pressions américaines et à appliquer ses lois contre la corruption transnationale pour servir ses intérêts économiques et nationaux.

Nous verrons à présent comment les États-Unis, architectes de la campagne contre la corruption transnationale, poursuivent une importante affaire de corruption transnationale. Les valeurs libérales défendues face à cette pratique tiennent-elles lorsqu'un scandale éclot ? Ou des intérêts nationaux viennent-ils remettre en cause les principes d'État de droit ?

C. LES ÉTATS-UNIS : *REALPOLITIK* ET L'ÉTAT DE DROIT

Nous examinerons maintenant une affaire de corruption transnationale parsemée d'intrigue et de politiques de puissance où l'intérêt national prend le pas sur les poursuites d'un cas de corruption majeur. Ce sera la victoire de la *realpolitik* sur les valeurs libérales au détriment de l'État de droit et de la campagne américaine de lutte contre la corruption transnationale.

[131] DOJ, Press Release, « BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine », 1 mars 2010.

1. Cas d'étude — Kazakhgate

Considéré comme le procès FCPA le plus important de tous les temps, le « Kazakhgate » comprenait : des dizaines de millions de dollars de pots-de-vin supposés, de vastes réserves de pétrole au Kazakhstan, des entreprises pétrolières américaines de premier plan, un banquier d'affaires new-yorkais et des intérêts économiques et sécuritaires américains, ces derniers cherchant à remplir le vide du pouvoir laissé par l'URSS en Asie centrale.

En 2003, James H. Giffen, banquier d'affaires américain et consultant dans l'industrie pétrolière, fut arrêté alors qu'il montait dans un avion à l'aéroport JFK. Les autorités américaines accusèrent Giffen d'avoir détourné plus de 84 millions de dollars provenant de plusieurs entreprises pétrolières américaines et britanniques en direction des comptes bancaires du Président kazakh Nursultan Nazarbayev, ses collaborateurs et ses proches[132].

Le procès Giffen démarra en fanfare avec 62 chefs d'inculpations comprenant douze violations du FCPA[133]. Giffen encourait 88 ans de prison ferme. Mais cette affaire allait finir de manière dérisoire alors que des vents contraires économiques, politiques et diplomatiques allaient prendre le dessus sur le FCPA, défier l'indépendance des procureurs fédéraux américains et entacher l'État de droit.

En 2012, Giffen plaidait coupable pour un simple délit fiscal lié à un compte en banque à l'étranger non déclaré dont la peine s'élevait à 25 dollars[134]. Les intérêts vitaux de politique étrangère des États-Unis étaient en jeu et ce qui aurait dû être « le plus grand procès FCPA de tous les temps » aboutit à desservir les intérêts nationaux américains. Comment cette affaire a-t-elle pu s'effondrer de manière si spectaculaire ? Pour répondre

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[132] Matthew Yeager, « The CIA made me do it : understanding the political economy of corruption in Kazakhstan » (2012) 57(4) *Crime, Law and Social Change* 441, 442 ; Ron Stodghill, « Oil, Cash and Corruption », *New York Times*, 5 novembre 2006, B1.

[133] Yeager (*supra* n. 132) 442.

[134] Par ailleurs, Mercator Corporation (la banque de Giffen) a plaidé coupable d'une infraction au FCPA en relation avec la fourniture de deux motoneiges à un haut responsable kazakh. Mercator a payé une amende de $32 000, reflétant le coût des véhicules.

à cette interrogation, il faut comprendre qui était Giffen, la nature de son travail et les intérêts qu'il servait.

Au début des années 1970, Giffen travaillait à Armco Steel Corporation, présidée par C. William Verity, Jr., « qui deviendra plus tard secrétaire d'État au commerce de l'administration Reagan »[135]. Gravissant les échelons, gagnant de l'expérience et développant ses réseaux en URSS avec l'Armco, Giffen se servit de ses relations avec de hauts responsables soviétiques pour ouvrir le marché de l'URSS aux entreprises américaines, notamment celles de l'industrie pétrolière[136]. À la chute de l'Union soviétique, Giffen se rapprocha de Nazarbayev et devint le rapporteur d'informations pour les affaires américano-soviétiques pour plusieurs agences gouvernementales américaines[137].

Giffen poursuivait son ascension dans le milieu pétrolier et resta en lien avec les autorités américaines au sein desquels il côtoyait de hauts responsables de la diplomatie, du judiciaire et du renseignement[138]. Giffen devint une importante source d'informations et un intermédiaire fiable pour le gouvernement américain dans ses relations avec les États anciennement rattachés au bloc soviétique ainsi qu'avec la Russie.

La première occurrence de potentielles malversations impliquant Giffen intervint lors d'un accord commercial manqué. Cet accord visait à un échange de pétrole planifié entre l'Iran et le Kazakhstan associant Giffen, des intermédiaires et de grands groupes pétroliers américains. Cependant, les États-Unis avaient mis en œuvre des sanctions strictes contre l'Iran qui interdisaient à toute entreprise américaine de commercer avec l'Iran. L'accord fut annulé lorsque les autorités américaines en eurent connaissance. Peu

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[135] Stodghill (*supra* n. 132).

[136] *Ibid*.

[137] *Ibid*.

[138] Les avocats de Giffen ont prouvé qu'il était en contact avec plusieurs hauts responsables du renseignement et des diplomates américains, notamment le directeur de la CIA Robert Gates, le directeur adjoint de la CIA John McGaffin, le responsable du NSC Brent Scowcroft, l'assistant spécial du président Tobi Gati, le secrétaire du département d'État James Baker, et les ambassadeurs William Courtney et John Wolf ; voir Yeager (*supra* n. 132) 447.

après, un grand jury fut formé pour enquêter sur l'implication des entreprises américaines dans cet accord manqué.

Au début de cette mise en examen, les avocats de Giffen signalèrent promptement leur intention de rechercher et de produire les preuves qui démontreraient que le gouvernement américain avait connaissance et approuvait les agissements de leur client durant la période en question. Giffen requit l'accès à des documents classifiés de plusieurs agences américaines pour soutenir son affirmation de la connaissance par le gouvernement des faits qui lui étaient reprochés.

Giffen mit en place une défense appuyée sur « l'autorité publique » dont le fondement reposait sur le fait que les actions qui lui étaient reprochées avaient été accomplies « en toute bonne foi sur les instructions d'un responsable qui avait l'autorité nécessaire à les donner »[139]. Les avocats de Giffen ajoutèrent qu'il était « un agent de la CIA et qu'il avait ainsi de facto l'approbation des plus hauts responsables du gouvernement américain, dont la Maison Blanche de Clinton »[140].

Les procureurs du DOJ et les agences gouvernementales ne produisirent pas les documents demandés par Giffen. Après plusieurs années de va et vient, le président de la formation de jugement prit connaissance de plusieurs documents classifiés *in camera*, et autorisa Giffen à poursuivre sa *public authority defence*[141].

Quelques années plus tard, le DOJ retira plusieurs chefs d'inculpation contre Giffen[142]. À cette période, le gouvernement kazakh exerça une pression sur de hauts responsables américains pour l'abandon des charges. Le lobbying du Vice-Président américain Dick Cheney fut assuré en personne par le Président Nazarbayev.

Après ces interventions, en 2010, le DOJ réintroduisit un chef d'inculpation visant Giffen, un délit de manquement à la déclaration d'un compte en banque à l'étranger sur sa déclaration d'impôts de 1996. Giffen accepta de plaider coupable et le procès fut clos.

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[139] Yeager (*supra* n. 132) 446 et n. 9.

[140] *Ibid*, 442.

[141] *Ibid*, 451 (voir [37] de le Ordre).

[142] *Ibid*, 452.

Giffen fut condamné à un jour de prison et une amende de 25 dollars. Le Juge William Pauley déclara :

> Suffice it to say, Mr Giffen was a significant source of information to the US Government and a conduit for secret communications with the Soviet Union and its leadership during the Cold War. He undertook that effort as a volunteer and was one of the only Americans with sustained and reliable access to the highest levels of Soviet officialdom. … In doing so, he advanced the strategic interests of the US and American businesses in Central Asia. Throughout this time, he continued to act as a conduit for communications on issues vital to America's national interest in the region[143].

Le Juge Pauley présentait la vision que Giffen avait développé à la poursuite en faveur des intérêts américains au Kazakhstan et dans cette partie du monde mentionnant les actions de Giffen pour faire avancer les intérêts stratégiques « des entreprises américaines en Asie centrale »[144]. Mais le Juge Pauley est allé plus loin encore en faisant passer Giffen du statut d'homme affaires corrompu à celui de héros américain de la Guerre froide en déclarant :

> These relationships, built up over a lifetime, were lost the day of his arrest. This ordeal must end. How does Mr Giffen reclaim his reputation? This court begins by acknowledging his service[145].

Les limites de la campagne contre la corruption transnationale menée par les États-Unis apparaissent clairement dans cette affaire. Spahn écrit que la débâcle Giffen était peut-être un cas isolé mais qu'elle a causé des dégâts bien réels envers l'idée d'un État de droit, celle d'un système judiciaire neutre, professionnel et indépendant aux États-Unis[146].

En miroir du scandale BAE, il semble que les parties à la Convention anticorruption ont compris certainement que les « valeurs partagées » contre la corruption transnationale ne s'étendent pas aux affaires touchant à des intérêts nationaux. Il résulte de ces deux affaires

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[143] *United States v. James H. Giffen*, U.S. District Court, Southern District of New York. No. 3:03-CR-00404-WHP-1.

[144] *Ibid*.

[145] *Ibid*.

[146] Spahn (*supra* n. 33) 19.

un échec cuisant de la campagne américaine. Celles-ci démontrent en effet que des États puissants sont en capacité s'ils le veulent de placer leurs intérêts nationaux au-dessus des principes de l'État de droit. Le message transmis ici aux autres États consiste à dire que ce qui est acceptable pour l'un est acceptable pour les autres.

V. Conclusion

Il pourrait y avoir un risque comme la chouette de Minerve chez Hegel de comprendre trop tard la folie de la campagne américaine de lutte contre la corruption transnationale. Nous avons aujourd'hui une corruption généralisée, peu de moyens de poursuites au niveau des dispositions législatives et des États qui bafouent l'État de droit de façon répétée en faveur de leurs intérêts nationaux sécuritaires, économiques et politiques.

Si ce constat s'avérait correct, nous devrions considérer comment utiliser ces caractéristiques du comportement des États et leurs motivations pour réduire l'incidence de la corruption transnationale. Quels mécanismes pourraient, par exemple, être instaurés pour traiter des soupçons entourant des responsables français et des chefs d'industrie qui voient la campagne des États-Unis comme l'instrument privilégié d'une « guerre économique » menée par les Américains pour favoriser leurs intérêts nationaux ?

Comment contrer les scandales comme ceux de la BAE et du Kazakhgate, dans lesquels des paiements massifs de commissions occultes sont effectués pour conclure des contrats de plusieurs milliards de dollars et ceci avec la connivence des gouvernements concernés ? Comment établir la responsabilité des gouvernements qui enterrent l'État de droit et manquent à leurs obligations internationales sous prétexte de sauvegarder l'intérêt public ?

De façon encore plus complexe, quelles politiques pour réduire la corruption transnationale pourraient-elles être adoptées aussi bien dans les pays développés que dans ceux en voie de développement ? Comment des économies en forte croissance telles que l'Inde et la Chine pourraient-elles être convaincues que l'adoption de normes contre la corruption transnationale va dans le sens de leurs intérêts nationaux ? Comme la campagne américaine le démontre, le sujet reste profondément inscrit dans le milieu de la politique internationale et des affaires, de la compétition mondiale et dans le domaine stratégique.

Pour contrôler la corruption transnationale de façon efficace, plusieurs approches sont envisageables. Il y a un rôle croissant des acteurs non étatiques dans la promotion de la lutte contre la corruption. C'est le cas des organisations de la société civile, des sociétés multinationales, des institutions internationales et des journalistes d'investigation.

Certains vont vers une autre direction en estimant que ce qu'il faut c'est une « Cour internationale contre la corruption »[147]. D'autres estiment que la corruption endémique devrait être qualifiée de grave violation des droits de l'homme[148]. Dans cet esprit il a été suggéré que la Cour pénale internationale soit dotée d'un pouvoir juridictionnel pour connaître des affaires de corruption les plus sérieuses[149].

De façon plus pratique et peut-être plus prometteuse, certains experts défendent le renforcement des lois impliquant la responsabilité pénale des entreprises[150]. Ces mesures sont calculées pour que les entreprises délictuelles soient plus touchées par des responsabilités personnelles ou qu'elles soient plus sujettes à des mesures de privation de libertés individuelles si elles sont impliquées dans des pratiques de corruption transnationale. Ces éléments devraient faire réfléchir à deux fois les personnes tentées par de telles actions.

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[147] Voir Mark Wolf, « The World Needs an International Anti-Corruption Court » (2018) 47(3) *Dædalus* 144. La Colombie et le Pérou, en 2019, ont appelé l'ONU à créer une « Cour internationale de lutte contre la corruption ».

[148] Anne Peters, « Corruption as a Violation of International Human Rights » (2018) 29(4) *European Journal of International Law* 1251.

[149] Voir, *e.g.*, Ilias Bantekas, « Corruption as an International Crime and Crime Against Humanity : An Outline of Supplementary Criminal Justice Policies » (2006) 4 *Journal of International Criminal Justice* 466; Brian Harms, « Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption » (2000) 33 *Cornell International Law Journal* 159.

[150] Mark Pieth et Radha Ivory (eds.), *Corporate Criminal Liability : Emergence, Convergence, and Risk* (Springer Media, 2011).