Extraterritoriality in the Global Governance of Corruption: Legal and Political Perspectives

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<a> INTRODUCTION

International rules to combat corruption comprise a robust body of international law, both formal and informal. Of relatively recent origin, having developed just since the mid-1990s, these include a number of international treaties and agreements with varying degrees of legal obligation as well as political declarations adopted at high-level international summits, anti-corruption provisions in multilateral frameworks for development cooperation, and transnational initiatives involving non-state actors.[1] More than 180 states are party to at least one international anti-corruption treaty, at least 115 governments have ratified two or more treaties on corruption, and at least 17 have obligations under five different anticorruption treaties.[2] 'Anti-corruption' is a well-established area of multilateral regulation.

Non-state actors also mobilize in various ways to promote anti-corruption law and standards — in business, development, politics, and governance at all levels. Transparency International (TI), famous for its Corruption Perceptions Index, is the most prominent transnational non-governmental organization (TNGO) in this field, with chapters in over eighty countries. Other TNGOs including Global Witness, Global Financial Integrity, the Organized Crime and Corruption Reporting Project, the B-Team, and the World Economic Forum also include anti-corruption as a core component of their work. These non-state actors advocate, set standards, mobilize resources, monitor, and publicize anti-corruption policies and the compliance (or not) of states and businesses.

[1] Mathis Lohaus and Ellen Gutterman, 'International Efforts to Combat Corruption' in Andreas Bågenholm and others (eds), *Oxford Handbook of Quality of Government* (Oxford University Press 2021).
[2] Mathis Lohaus, *Towards a Global Consensus Against Corruption: International Agreements as Products of Diffusion and Signals of Commitment* (1 edition, Routledge 2019).

Taken together, this substantial set of norms, rules, principles, and processes around which international actors converge on efforts to control corrupt practices in international business and (to a lesser degree) politics constitutes the 'global governance of corruption.'[3] That is, the collection of governance-related activities, rules, and informal and formal processes operating at a variety of levels – national, transnational, and global – which (a) recognize corruption as a major problem whose causes and effects transcend the territorial bounds of states, and (b) seek to control it. While much can be said about the global governance of corruption across a range of theoretical and practical perspectives in international law and international relations, the focus of this chapter is on the legal and political practices of extraterritoriality which increasingly define this area of international law.

Extraterritoriality, simply put, means the application of a sovereign state's law outside the juridical bounds of its territory, or the 'unilateral projection of domestic rules into the international arena.'[4] As a concept grounded in the international law of jurisdiction, 'extraterritoriality' often is identified in provisions that establish whether and where national laws apply in a given case, and whether the courts of a given state have standing to decide a case with international reach.[5] Within the global governance of corruption, practices of extraterritoriality are a defining feature even in the absence of explicit legal provisions. The United States, for example, enforces its Foreign Corrupt Practices Act (FCPA) on an increasingly extraterritorial basis through deferred prosecution agreements (DPAs). Also known as negotiated settlements, these arrangements enable American enforcement agencies to sidestep tests of jurisdiction and extract fines and penalties in complex anti-bribery enforcement actions against non-US persons for conduct occurring outside United States. The 2021 National Defense Authorization Act, called 'the most important anti-corruption laww seen in a generation,'[6] also increases US extraterritorial enforcement capacity in new measures to control illicit finance.

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[3] Ellen Gutterman, 'Corruption in the Global Economy' in Greg Anderson and Christopher John Kukucha (eds), *International Political Economy* (Oxford University Press Canada 2016).

[4] Michael L Buenger, 'Regulatory Legality: Extraterritorial Rule across Domestic and International Arenas' in Nikolas M Rajkovic, Tanja Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and their Politics* (Cambridge University Press 2016) 268.

[5] Branislav Hock, 'Transnational Bribery: When Is Extraterritoriality Appropriate' (2017) 11 Charleston Law Review 305; Tonya L Putnam, 'Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere' (2009) 63 International Organization 459.

[6] Frank Vogl, 'Promoting the Most Important Anti-Corruption Action in a Generation: Kleptocrats and Oligarchs Beware!' (*The Globalist*, 1 January 2021) <https://www.theglobalist.com/united-states-donald-trump-kleptocracy-corruption-national-defense-authorization-act-us-congress/> accessed 19 May 2021.

Similar trends are evident in the UK, France, Canada, and elsewhere. Increasingly, states seek to control transnational bribery and illicit global finance on an extraterritorial basis.

This chapter reviews and analyses this trend. Part 2 provides a brief overview of extraterritoriality in US anti-corruption law and the diffusion of this approach to anti-corruption enforcement in other jurisdictions. The analysis in part 3 builds on recent research on extraterritoriality in anti-corruption law, and specifically the use of negotiated settlements to extend jurisdictional reach. From a legal perspective, there are two sets of insights. First, research suggests that extraterritoriality can provide a functional solution to the complex coordination challenges of multi-jurisdictional anti-bribery investigations and this can potentially alleviate many serious harms caused by corruption in the global economy. At the same time, a second set of research indicates that extraterritorial enforcement via negotiated settlement hampers effectiveness, reduces fairness, and diminishes legitimacy in this area of multilateral regulation. If international legal mechanisms are to fulfil their promise to eradicate corruption and the ills that attend it, this approach falls short. From a political perspective, the analysis addresses some additional implications of extraterritoriality: First, thinking of implications for anti-corruption governance, the US's extraterritorial focus on business bribery limits the potential of global enforcement to a narrow focus and fails to encompass a broader range of business practices in which the licit and the illicit intertwine, to the detriment of a range of outcomes in the global political economy. Second, taking extraterritoriality as an analytic lens for the study of global governance, the discussion underscores the centrality of politics and power in international law.[7] From this perspective, extraterritoriality in the global governance of corruption is a strategic resource used by powerful states to promote particularistic objectives under the guise of world public interest. The ostensibly multilateral regime of anticorruption governance, in this view, is embedded in the particular national politics and policies of the United States and extraterritorial enforcement indicates a practical *use* of law by this powerful state 'to get things done' in global politics.[8] As David Kennedy might note, this use of law is also a way to rearrange deck chairs – to avoid 'remaking the world' for more truly effective anti-

[7] Ellen Gutterman, 'Extraterritoriality as an Analytic Lens: Examining the Global Governance of Transnational Bribery and Corruption' in Daniel S Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (1 edition, Routledge 2019).
[8] Ian Hurd, *How to Do Things with International Law* (Princeton University Press 2017).

corruption governance, and for greater global justice.[9] The chapter concludes with some further thoughts on extraterritoriality as an analytic lens for the interdisciplinary study of international law and international relations, and questions for further research on the global governance of corruption.

<a> EXTRATERRITORIALITY IN US ANTI-CORRUPTION LAW, AND ELSEWHERE

Extraterritoriality is the dominant feature of US anti-corruption enforcement and this is a key influence on anti-corruption enforcement patterns in other jurisdictions. The US Foreign Corrupt Practices Act is the most vigorously enforced anti-corruption law in the world. Over the past fifteen years, FCPA enforcements against individuals and corporations have yielded billions in fines, driven splashy headlines, and prompted the burgeoning of a global 'compliance industry' of legal specialists and consultants devoted to helping multinational corporations navigate international business in this 'treacherous' global regulatory environment. In statutory terms the FCPA bans transnational business bribery by US persons and non-US persons with US registered securities. In practice, however, the Securities Exchange Commission (SEC) and the Department of Justice (DOJ) routinely enforce against non-US persons with unproven links to the territorial jurisdiction of the United States, outside the purview of US courts, via negotiated settlement agreements. Also called diversion agreements or deferred prosecution agreements (DPAs), negotiated settlements enable corporations implicated in FCPA violations to avoid criminal prosecution in exchange for admission of wrongdoing and various other stipulations for anti-corruption reform. Diversion agreements have become an essential component of FCPA enforcement.

In just two recent years (2019 and 2020), the DOJ and SEC have brought enforcement actions via DPA against 26 companies and imposed financial penalties totaling $9.3 billion. Since 2015 average corporate penalties have ranged from $97.5 million (in 2016) to $534.7 million (in 2020).[10] Not all enforcement actions are that big, but the big ones have gotten dramatically bigger. Five FCPA settlements have now reached a billion dollars, and 'it takes at least $585

[9] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016) 15.
[10] Harry Cassin, 'Five Numbers That Show Just How Big the FCPA Industry Has Become | The FCPA Blog' (12 January 2021) <https://fcpablog.com/2021/01/12/five-numbers-that-show-just-how-big-the-fcpa-industry-has-become/> accessed 5 May 2021.

million to even appear in the current top ten.'[11] Data presented by Brandon Garrett and other sources document the trend of increasingly global 'blockbuster penalties' in FCPA enforcement cases.[12] Harry Cassin offers the following list of the ten biggest FCPA cases of all time based on penalties and disgorgements assessed in the U.S. enforcement documents[13]: Goldman Sachs Group Inc. ($3.3 billion in 2020); Airbus SE ($2.09 billion in 2020); Petróleo Brasileiro S.A. – Petrobras ($1.78 billion in 2018); Telefonaktiebolaget LM Ericsson ($1.06 billion in 2019); Telia Company AB: ($1.01 billion in 2017); MTS ($850 million in 2019); Siemens ($800 million in 2008); VimpelCom ($795 million in 2016); Alstom ($772 million in 2014); and Société Générale S.A. ($585 million in 2018). Nine out of these 'top ten' are non-US corporations accused of bribery outside the territory of the United States, and the jurisdictional basis of the enforcement actions against them have not been tested in court. If not clearly de jure, extraterritoriality in US FCPA enforcement is a pattern, de facto.[14]

Enforcement against companies accused of paying bribes abroad often involves large-scale, multijurisdictional prosecutions involving complex illicit financial transactions that are exceedingly difficult to investigate. For example, the largest FCPA settlement to date – a $3.3 billion DPA with Goldman Sachs, in 2020 – included a complex resolution of bribery and fraud charges coordinated with criminal and civil authorities in the United Kingdom and Singapore. In this case, Goldman Sachs admitted to an intricate international bribery scheme in which the firm defrauded the Malaysian economic development fund 1MDB of more than $1 billion, and paid

[11] Harry Cassin, 'Country Count for the Top Ten List (April 2021)' (*FCPA Blog*, 21 April 2021) <https://fcpablog.com/2021/04/21/country-count-for-the-top-ten-list-april-2021/> accessed 5 May 2021.
[12] Brandon L Garrett, 'The Path of FCPA Settlements' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases* (Edward Elgar Publishing 2020) <http://www.elgaronline.com/view/edcoll/9781788970402/9781788970402.00010.xml> accessed 4 August 2021; See also Stanford Law School, 'FCPAC | Foreign Corrupt Practices Act Clearinghouse' (*FCPAC*) <http://fcpa.stanford.edu/index.html> accessed 22 June 2018; Shearman & Sterling LLP, 'FCPA Digest' (2021) <https://fcpa.shearman.com/> accessed 13 September 2021; Philip Urofsky, 'Anti-Corruption Report: Second Edition of the DOJ/SEC FCPA Resource Guide Spotlights U.S. Enforcers' Controversial Legal Interpretations' (*Shearman & Sterling*, 8 July 2020) <https://www.shearman.com/perspectives/2020/07/urofsky-discusses-fcpa-resource-guide-updates> accessed 13 September 2021; US DOJ, 'FCPA Enforcement Actions' (23 February 2021) <https://www.justice.gov/criminal-fraud/enforcement-actions> accessed 13 September 2021; U.S. Securities and Exchange Commission, 'SEC Enforcement Actions: FCPA Cases' (*SEC.gov*) <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases> accessed 14 September 2021.
[13] Cassin (n 11).
[14] Daniel Patrick Ashe, 'The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U. S. Foreign Corrupt Practices Act' (2005) 73 Fordham Law Review 2897.

bribes to high-ranking officials in Malaysia, Abu Dhabi, and elsewhere in exchange for business related to the sale of $6.5 billion in 1MDB bond transactions.[15]

This case also exemplifies the close connection between bribery in international business transactions – the object of the FCPA and the multilateral OECD anti-bribery convention – and other aspects of illicit finance, including money laundering, kleptocracy, and related transnational criminal activities which produce more general patterns of illicit globalization.[16] Such complex, multi-jurisdictional enforcement actions bring into view a wider scope of illicit financial activity in the global economy, supported by legitimate international banking and financing institutions.[17] Not just transnational bribery, but illicit finance more generally is imbricated within, across, and throughout the licit economic sphere and its control is a real challenge. Sophisticated corporate structures and anonymous companies set up across multiple secrecy jurisdictions such as the British Virgin Islands, Panama, Seychelles, and Delaware in the United States are key prongs in the toolkit of "kleptocrats, oligarchs and gangsters,"[18] of bribe-

[15] The details are of some interest, as this case also exemplifies the intimate interconnections of the licit and the illicit in global finance. Goldman Sachs participated in at least $1.6 billion of corrupt payments to secure business. The firm's executives also embezzled funds for themselves and various accomplices, to be spent on luxuries and the financing of Hollywood films. Former Southeast Asia Chairman and participating managing director Timothy Leissner pleaded guilty to conspiring to launder money and to violate the FCPA, for which he agreed to forfeit $43.7 million. Roger Ng, former managing director of Goldman and head of investment banking for GS Malaysia, was charged with conspiring to launder money and to violate the FCPA. Notorious financier and Hollywood producer Jho Low was indicted in the United States on money laundering and FCPA violation charges in this case and is an international fugitive. For additional (and colourful) detail, see: Jonathan Stempel, 'U.S. Withheld Evidence in Ex-Goldman Banker's 1MDB Malaysia Corruption Case, Lawyer Claims' *Reuters* (10 December 2020) <https://www.reuters.com/article/goldman-sachs-1mdb-ng-idUKKBN28K2K8> accessed 10 July 2021; Kori Hale, 'Goldman Sachs Takes A $1 Billion Hit Due To Ex-Hip Hop Banker' (*Forbes*, 21 January 2020) <https://www.forbes.com/sites/korihale/2020/01/21/goldman-sachs-takes-a-1-billion-hit-due-to-ex-hip-hop-banker/> accessed 10 July 2021; Elizabeth Dilts Marshall, 'Ex-Goldman Sachs Banker in 1MDB Corruption Case Gets Smaller Ankle Bracelet' *Reuters* (20 July 2021) <https://www.reuters.com/business/finance/ex-goldman-sachs-banker-1mdb-corruption-case-gets-smaller-ankle-bracelet-2021-07-20/> accessed 14 September 2021; Dan Friedman, '"He Was Throwing off Cash": How an International Fugitive Tried to Influence Trump's Swamp' (*Mother Jones*, 21 October 2020) <https://www.motherjones.com/politics/2020/10/jho-low-broidy-trump/> accessed 10 July 2021; Tom Wright and Bradley Hope, *Billion Dollar Whale: The Man Who Fooled Wall Street, Hollywood, and the World* (Illustrated edition, Hachette Books 2018).

[16] Peter Andreas, 'Illicit Globalization: Myths, Misconceptions, and Historical Lessons' (2011) 126 Political Science Quarterly 403.

[17] Frank Vogl, *The Enablers: How the West Supports Kleptocrats and Corruption - Endangering Our Democracy* (Rowman & Littlefield 2021).

[18] Vogl (n 6).

payers, sanctions-busters, tax evaders, terrorist financiers, and transnational criminals of all stripes. And, these are major obstacles to the investigation of corruption cases.[19]

In part to help overcome such challenges, the 2021 US *National Defense Authorization Act* introduced important changes to improve anti-money laundering (AML) enforcement capability in the US.[20] As noted above, proponents hailed it as 'the most dramatic series of potential changes to the AML infrastructure'[21] since passage of the US Patriot Act in October 2001 as well as 'the most important anti-corruption law seen in a generation.'[22] Among the changes, the Act establishes a mandatory registry of beneficial ownership for all US corporations and strengthens the government's ability to subpoena foreign bank records in FCPA and other criminal investigations and civil forfeiture actions. This subpoena power applies to records outside the territorial jurisdiction of the United States, and regardless of potential conflict with foreign laws. Foreign banks that do not comply may face monetary penalties and potential restrictions from doing business with U.S. banks.[23] In effect, the new Act both bans anonymous shell corporations and dramatically increases US extraterritorial enforcement capacity.

The US approach to anti-corruption enforcement is spreading to other jurisdictions. In the UK, the 2010 Bribery Act first introduced the possibility of deferred prosecutions in criminal enforcement actions. The first ever DPA under the Act was an agreement with Standard Bank in 2015 that included a $33 million financial sanction. Since then, the Serious Fraud Office (SFO) has entered into nine DPAs. The most significant of these involved coordination and shared investigation with France and the US, and huge fines against Airbus SE – the giant multinational aerospace corporation headquartered in Leiden, Netherlands. In France, the recent anti-corruption law known as Sapin II also introduced a DPA mechanism, used for the first time in

[19] Lucas Amin and José María Marín, 'Recommendations on Beneficial Ownership for OGP Action Plans' <https://images.transparencycdn.org/images/Rec-on-Beneficial-Ownership-Transparency-for-OGP-action-plans-FINAL.pdf> accessed 19 May 2021.
[20] Jay Adkisson, 'Congress Passes Corporate Transparency Act To Require Beneficial Ownership Filings For LLCs And Corporations' (*Forbes*, 26 January 2021) <https://www.forbes.com/sites/jayadkisson/2021/01/26/congress-passes-corporate-transparency-act-to-require-beneficial-ownership-filings-for-llcs-and-corporations/> accessed 19 May 2021.
[21] Cited in Brett Wolf, 'US Senate Passes Defense Bill with New Anti-Money Laundering Measures' (*Thomson Reuters Institute*, 15 December 2020) <https://www.thomsonreuters.com/en-us/posts/corporates/defense-bill-anti-money-laundering/> accessed 19 May 2021.
[22] Vogl (n 6).
[23] Lawrence E Ritchie, Malcolm Aboud and Chelsea Rubin, 'Impact on Canadian Companies: U.S. Anti-Money Laundering Reform Establishes Beneficial Ownership Registry and Strengthens Subpoenas' (*Risk Management and Crisis Response Blog*, 25 January 2021) <http://www.osler.com/en/blogs/risk/january-2021/impact-on-canadian-companies-u-s-anti-money-laundering-reform-establishes-beneficial-ownership-reg> accessed 19 May 2021.

2017.[24] In 2020 in Canada, efforts to apply a US-style DPA to a bribery case involving the global construction and engineering firm SNC-Lavalin – a national champion relied upon for national economic benefits and electoral outcomes – prompted new legislation to create what in Canada are called 'remediation agreements' and triggered a major scandal for the Prime Minister and his cabinet.[25]

The extraterritorial enforcement of anti-corruption rules encompassing money laundering and sanctions busting – that is, illicit finance more generally, above and beyond bribery transactions in international business – is also apparent in the UK's 2017-2022 Anti-Corruption Strategy, which 'recognises the damage that corruption causes to countries outside the UK, especially to governance, economic growth and development, as well as to the UK's national security and business interests.'[26] A key aspect of the strategy introduced in 2021, the Global Anti-Corruption Sanctions Regime,[27] enables the Foreign Secretary to impose asset freezes and travel bans on 'designated individuals' and entities linked to certain corrupt activities abroad. It also criminalises the breach of any such sanctions by any UK individual or company, within or outside the UK territory, including foreign subsidiaries. Broadly similar to and intended to function in concordance with the provisions of the Global Magnitsky Human Rights Accountability Act of the US, the new sanctions regime is implemented under the UK's Sanctions and Anti-Money Laundering Act 2018 with the purpose to prevent and combat serious international corruption by stopping those involved from entering and channelling money through the UK.

The focus of these new regulations is on corruption occurring outside of the UK and they allow the government to target individuals around the world – a significant shift in the UK's previously longstanding, somewhat resistant approach to anti-corruption enforcement.[28] The new

[24] Jennifer Arlen, 'The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.' [2020] Negotiated Settlements in Bribery Cases 156.
[25] Elizabeth Acorn, 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' [2021] Canadian Journal of Political Science/Revue canadienne de science politique 1.
[26] quote in UK Foreign, Commonwealth, and Development Office, 'Global Anti-Corruption Sanctions: Consideration of Designations' (*GOV.UK*, 26 April 2021) <https://www.gov.uk/government/publications/global-anti-corruption-sanctions-factors-in-designating-people-involved-in-serious-corruption/global-anti-corruption-sanctions-consideration-of-designations> accessed 21 May 2021.
[27] UK Government, 'The Global Anti-Corruption Sanctions Regulations 2021' (*UK Statutory Instruments 2021 No. 488*, 26 April 2021) <https://www.legislation.gov.uk/uksi/2021/488/contents/made> accessed 21 May 2021.
[28] Ellen Gutterman, 'Poverty, Corruption, Trade, or Terrorism? Strategic Framing in the Politics of UK Anti-Bribery Compliance' (2017) 19 British Journal of Politics and International Relations 152.

policy is intended to pay particular attention to cases where the relevant jurisdiction's law enforcement authorities have been unable or unwilling to hold to account those persons involved in acts of serious corruption.[29] These new regulations also tie efforts to combat corruption with those to fight illicit finance more generally, including money laundering. And, in line with the US approach, they further indicate extraterritorial enforcement in those efforts.

<a> WHAT IS THE UPSHOT? LEGAL AND POLITICAL PERSPECTIVES ON EXTRATERRITORIALITY IN INTERNATIONAL ANTI-CORRUPTION LAW

From a legal perspective, recent scholarship on this trend suggests two sets of insights. To begin with, some research suggests that extraterritoriality in international anti-corruption enforcement can be an efficient and practical solution to a difficult transnational problem – one that is exceedingly urgent to address. In its global dimensions, corruption is complex, pervasive, and extraordinarily harmful. Corrupt transactions and illicit financial flows transgress national borders and evade state control. Bribery and money laundering drive kleptocratic rule and propel transnational organized crime. These generate destructive patterns of illicit globalization and produce human immiseration on a grand scale: the entrenchment of poverty, hunger, and disease; human trafficking and the abuse of human rights; environmental destruction; and the erosion of democracy. On a business-oriented note, transnational bribery distorts markets, disrupts international flows of goods and capital, reduces economic growth, impedes fair market competition, obstructs liberal international trade, and impedes sustainable development.

Yet legal definitions of corruption vary from jurisdiction to jurisdiction and there are no global institutions to control the transnational elements of corruption and its impacts. The implementation of international anti-corruption measures relies on state harmonisation, cooperation, and national enforcement – a tough challenge on any issue.[30] Moreover, as Elizabeth Acorn notes, the prosecution of a corporation for a complex crime like foreign bribery is especially difficult and potentially politically costly, 'requiring time and resources by police

[29] Skadden, Arps, Slate, Meagher, and Flom LLP, 'UK Steps Up Enforcement Efforts With New Global Anti-Corruption Sanctions Regime' (*JD Supra*, 13 May 2021) <https://www.jdsupra.com/legalnews/uk-steps-up-enforcement-efforts-with-8932000/> accessed 21 May 2021; UK Foreign, Commonwealth, and Development Office (n 26).

[30] Lorenzo Pasculli and Nicholas Ryder (eds), *Corruption in the Global Era: Causes, Sources and Forms of Manifestation* (Routledge 2019); Nicholas Ryder and Lorenzo Pasculli (eds), *Corruption, Integrity and the Law: Global Regulatory Challenges* (1st edition, Routledge 2020).

and prosecutors to marshal evidence of wrongdoing that involves public officials in another country.'[31] In this fragmented regulatory context and to mitigate these global problems, extraterritorial enforcement can fill an important compliance gap. As Branislav Hock argues, extraterritorial enforcement can alleviate competitive disadvantages in trade, solve dilemmas of collective action in complex, multijurisdictional fora, and promote open transnational markets as a public good.[32] In addition, extraterritoriality in FCPA enforcement has been shown to prompt other jurisdictions to enforce their own anti-foreign bribery laws.[33] In this way, U.S. enforcement of the FCPA can be read as a laudable effort by a powerful state to contribute to the global prohibition regime against transnational bribery and corruption. As Susan Rose-Ackerman puts it, 'there is a need for U.S. leadership in this area of global concern.'[34]

For Hock, furthermore, extraterritoriality in anti-bribery enforcement is a form of 'intergovernmental communication,' and a useful transnational legal strategy with which to solve the collective action dilemma that is created by bribery in the international business context.[35] In this analysis, extraterritorial enforcement provides the crucial 'technico-legal function' and the 'politico-economic function' required to support the goal of 'competitive neutrality' in international business competition against the backdrop of regulatory variation across national jurisdictions. As Hock puts it, 'the counterfactual to extraterritoriality is non-enforcement.'[36] In sum, therefore, extraterritorial enforcement of international law is to be valued and encouraged, to the extent that this approach can provide an efficient solution to the collective action problems that arise within the fragmented and decentralized environment of international business competition.

On a less sanguine note, legal scholars training their analyses on the diffusion of negotiated settlements to control transnational bribery on an extraterritorial basis note a second set of insights: that these practices in fact hamper effectiveness, reduce fairness, and diminish legitimacy in this area of multilateral regulation. Tina Søreide and Abiola Makinwa's volume on

[31] Elizabeth Acorn, 'Law and Politics in FCPA Prosecutions of Foreign Corporations' (2021) 17 Revista Direito GV e2124, 7.
[32] Branislav Hock, *Extraterritoriality and International Bribery: A Collective Action Perspective* (Routledge 2019); Hock (n 5).
[33] Sarah C Kaczmarek and Abraham L Newman, 'The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation' (2011) 65 International Organization 745.
[34] Susan Rose-Ackerman, 'International Anti-Corruption Policies and the U.S. National Interest' (2013) 107 American Society of International Law Proceedings 254.
[35] Hock (n 5) 305.
[36] Hock (n 32) 218.

negotiated settlements in bribery cases provides an overall picture of ineffective anti-corruption policy in a global regime troubled by an incoherent framework of different rules across jurisdictions, political conflicts of interest shaping approaches to enforcement, and an absence of globally accepted standards for due process in criminal legal enforcement. Across this fragmented regulatory landscape, DPAs fail to ensure the high standard of fairness and legitimacy normally expected of criminal law rules.[37] To the extent that criminal justice systems operate to deter crime, secure fair processes, and maximise results given limited resources,[38] extraterritorial enforcement of anti-corruption law falls short.

Jennifer Arlen, furthermore, describes how enforcement via DPAs is a practice tailored to the distinctive features of the US corporate compliance system – the absence of which in other jurisdictions cause DPAs in those countries to fail as effective deterrents of transnational bribery and corruption.[39] Prosecutors in the United States have been able to extract large fines and prompt corporations to produce stringent anti-bribery compliance systems in part because corporate defendants face broad liability for crimes their employees commit. In addition, a corporation can face 'enormous sanctions' if found guilty at trial. Given highly motivated, skilled, and well-resourced prosecutors aided by the FBI and other elite law enforcement agencies, a corporation accused in the US of foreign bribery is likely to calculate the chances of conviction without a DPA are high. Yet these conditions – restrictive rules on corporate criminal liability, material incentives to self-report, and adequately funded enforcement capacity – do not necessarily obtain in other jurisdictions. In the absence of these supportive features, 'improperly designed' DPA statutes in Germany, France, UK, Canada, and elsewhere ultimately serve primarily to reduce sanctions on foreign bribery; DPAs and associated penalties become 'the cost of doing business,' deterrence is undermined, and anti-corruption enforcement is ineffective. Settlement agreements will not induce self-reporting and companies will continue to profit from corporate crimes.[40] In sum, while it does seem that in the United States DPAs have been particularly functional for extraterritorial enforcement of the FCPA, it is doubtful that DPAs

[37] Tina Søreide and Abiola Makinwa, *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar Publishing 2020) 16.
[38] Kasper Vagle, 'The Public Prosecutor's Discretion in the Enforcement of Corporate Bribery Cases' <https://www.oecd.org/corruption/integrity-forum/academic-papers/Vagle.pdf> accessed 2 December 2021.
[39] (n 24).
[40] ibid.

constitute an appropriate legal response to corporate criminality in other jurisdictions.[41] If international legal mechanisms reliant on national compliance and enforcement are to fulfil their promise to eradicate corruption and the ills that attend it, extraterritorial enforcement via negotiated settlement is not enough.

In addition to the ineffective enforcement of anti-corruption law, current practices of extraterritoriality in the global governance of corruption also drive important political impacts. US enforcement practices limit the scope of global anti-corruption enforcement to a narrow focus on business bribery that largely fails to encompass a broader range of business practices in which the licit and the illicit intertwine – to the detriment of a range of outcomes at home and abroad. Other patterns of illicit finance and corrupt practices in the US and elsewhere remain largely unaddressed. For example, as vigorous extraterritorial enforcement of the FCPA proceeded throughout the 2016-2020 Trump Presidency, unprecedented levels of personal profiteering at the highest levels, including thousands of documented conflicts of interests, clear patterns of influence-peddling, and historic levels of democratic erosion enabled by flagrant violations of established norms, produced a legacy of corruption within the domestic US polity whose impacts are likely to unfold there and internationally for years to come.[42] From the use of the office of the President to promote and market President Trump's personal holdings and private business interests, to the patronage of Trump businesses and properties by foreign diplomats and government officials in exchange for access and influence, as a way to curry favour with the President,[43] the overt mingling of personal interest and political power for the express purpose of self-enrichment mirrored authoritarian and kleptocratic practices usually more typical of 'corrupt' foreign countries and public officials labeled as such by transnational anti-corruption advocacy organizations.[44] For all of the DOJ's and the SEC's close attention

[41] Susan Hawley, Colin King and Nicholas Lord, 'Justice for Whom? The Need for a Principled Approach to Deferred Prosecution Agreements in England and Wales' [2020] Negotiated Settlements in Bribery Cases 309.
[42] CREW, 'President Trump's Legacy of Corruption, Four Years and 3,700 Conflicts of Interest Later' (*CREW | Citizens for Responsibility and Ethics in Washington*) <https://www.citizensforethics.org/reports-investigations/crew-reports/president-trump-legacy-corruption-3700-conflicts-interest/> accessed 30 March 2022.
[43] Jonathan O'Connell and Mary Jordan, 'For Foreign Diplomats, Trump Hotel Is Place to Be' *Washington Post* (18 November 2016) <https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html> accessed 30 March 2022.
[44] David Leonhardt and Ian Prasad Philbrick, 'Trump's Corruption: The Definitive List' *The New York Times* (28 October 2018) <https://www.nytimes.com/2018/10/28/opinion/trump-administration-corruption-conflicts.html>

during this period to serious instances of foreign bribery, alleged corrupt practices within the United States remained outside the attention of law enforcement.

The extraterritorial focus on bribery in international business transactions also excludes enforcement against other forms of corruption and crucial linkages between the licit and illicit global economies, including such practices as illicit capital flight, money laundering, and tax evasion. Although the new 2021 regulations in the US and the UK mentioned above indicate a nascent shift towards a more comprehensive view of illicit finance and corruption, secrecy jurisdictions – including Delaware and Nevada in the US and the Isle of Man in the UK – continue to enable kleptocrats and corrupt elites to live in luxury on stolen assets. As the 2016 Panama Papers and the 2017 Paradise Papers revealed, the financial proceeds of political corruption, transnational crime, and tax evasion are intrinsically implicated within and throughout the licit global economy, mainly via offshore facilities.[45] It is not just drug dealers and criminals making use of secret offshore financial arrangements. Alongside illicit political campaign finance and the hiding of stolen assets and other proceeds of crime, offshore jurisdictions enable significant tax avoidance by otherwise legitimate political and economic actors, including multinational corporations such as Nike, members of the US cabinet, and even the Queen of England.[46] Money lost in this way results in fewer public services for those who need them and diminishes the quality of government and governance in the developed and developing world alike.[47] Tax havens are a significant threat to the global market economy.[48] They remain largely outside the ambit of extraterritorial enforcement of international anti-corruption law.

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accessed 30 March 2022; Transparency International, 'CPI 2021: Trouble at the Top' (*Transparency.org*) <https://www.transparency.org/en/news/cpi-2021-trouble-at-the-top> accessed 31 January 2022.

[45] ICIJ, 'The Panama Papers: Exposing the Rogue Offshore Finance Industry' (3 April 2016) <https://www.icij.org/investigations/panama-papers/> accessed 30 March 2022; Juliette Garside, 'Paradise Papers Leak Reveals Secrets of the World Elite's Hidden Wealth' *The Guardian* (5 November 2017) <https://www.theguardian.com/news/2017/nov/05/paradise-papers-leak-reveals-secrets-of-world-elites-hidden-wealth> accessed 30 March 2022.

[46] Nick Hopkins and Helena Bengtsson, 'What Are the Paradise Papers and What Do They Tell Us?' *The Guardian* (5 November 2017) <https://www.theguardian.com/news/2017/nov/05/what-are-the-paradise-papers-and-what-do-they-tell-us> accessed 30 March 2022.

[47] Bo Rothstein, *The Quality of Government: Corruption, Social Trust, and Inequality in International Perspective* (University of Chicago Press 2011).

[48] Gabriel Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens* (The University of Chicago Press 2015).

These political implications suggest, furthermore, a theoretical payoff for considering extraterritoriality as a lens on international law and global governance more generally. Thinking of extraterritoriality as an *analytic lens* through which to consider the impact of current anti-corruption enforcement trends can potentially highlight new insights on the nature of international law itself.[49] As US enforcement of the FCPA illustrates, extraterritoriality in the global governance of corruption signifies the 'use' of law – by a states with the power to do so – as a strategic resource to 'get things done' in world politics.[50] The capacity to enforce national laws within an international legal framework of extraterritoriality is a source of power in which the US invests. It does so in a manner that underscores the inextricable fusion of international law and international power.[51] As Ian Hurd puts it, state power and patterns of law and legality *mutually constitute* international law as a system of governance, in which 'legal explanation furnishes political justification.'[52] And, the impact of this fusion of law and power on global governance is both empowering and constraining. By couching the exertion of power in legal mechanisms such as extraterritoriality, legalism diffuses the interests of the strong through a system of apparently dispassionate rules.'[53] In this way leading powers determine (and limit) 'the terms of possibility for everyone else.'[54]

An analytic focus on extraterritoriality especially highlights the impact domestic politics – including domestic regulative and social norms, values, identities, interests, and practices – on the processes and outcomes of global governance. In the case of US FCPA enforcement and the diffusion of extraterritoriality and DPAs to other jurisdictions, this extension of national law and regulation into the international sphere produces a certain form of global governance, and a certain kind of world order, which promotes US interests alongside a particular view of what is needed for fair and open global markets. Both directly through the application of national laws outside the boundaries of the sovereign state and indirectly through the emanation of legal norms and practices from one sovereign jurisdiction to others, patterns and practices of extraterritoriality extend domestic political norms and practices into the global sphere. What at

[49] Gutterman, 'Extraterritoriality as an Analytic Lens: Examining the Global Governance of Transnational Bribery and Corruption' (n 7).
[50] Hurd (n 8).
[51] ibid; Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 European Journal of International Law 369.
[52] Hurd (n 8) 56.
[53] ibid 138.
[54] ibid.

first appears a scene of international cooperation or multilateral consensus is actually a story of hierarchy and political power, with a distinctly US tilt. In important respects, therefore, the global governance of corruption is shaped – and constrained – by the national and particular interests of the United States. If we want an international legal system with legitimacy, in which states search for rule-based solutions to common problems and comply with their legal obligations out of a sense of appropriateness,[55] evidence from the global governance of corruption would suggest this target is far off.

Further, in the vein of David Kennedy's deeply critical analysis, the analytic focus on extraterritoriality in the global governance of corruption highlights both the distributive significance of law, and the usefulness of this conceptual lens to 'map the cartography of power' in global governance arrangements.[56] As the preceding discussion has illustrated, the enforcement of anti-corruption rules is distributed unevenly, across space and fields of regulation. While in some respects extraterritoriality may be an alternative to impunity,[57] it also epitomizes the problem of selective prosecution.[58] The focus on extraterritoriality within this ostensibly multilateral regime offers the possibility to reframe the analysis, to focus on points of struggle, trade-offs, and inequalities more than on consensus and problem-solving. Extraterritoriality, in this view, spotlights points of struggle in global governance over the basic arrangements by which economic and political life are constituted: the meanings and appropriate relationships between capital, credit, society, state, bureaucracy, and markets. Extraterritoriality in international law is thus an arrangement by which powerful actors mobilize resources to create a perceived sense of harmony between their own perspective and world public interest. It is a way to 'rearrange deck chairs' and avoid 'remaking the world.'[59]

<a> CONCLUSION

[55] Samantha Besson, 'The Authority of the Law: Lifting the State Veil' (2009) 31 Sydney Law Review 343; Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010).
[56] Kennedy (n 9) 19.
[57] Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019).
[58] Thomas Christiano, 'The Problem of Selective Prosecution and the Legitimacy of the International Criminal Court' [2021] Journal of Social Philosophy <http://onlinelibrary.wiley.com/doi/abs/10.1111/josp.12448> accessed 31 March 2022.
[59] Kennedy (n 9) 15.

Taking extraterritoriality as an analytic lens for the study of the global governance, this chapter underscores the centrality of politics and power in international law. As a methodological approach, the analytic focus on extraterritoriality in the global governance of corruption spotlights the extent to which this functions as more than an instrumental tool for policy coordination or a conduit of neo-imperialism. Extraterritoriality provides a useful conceptual tool with which to perceive the complex ways in which processes of globalization, transnationalism, and our very notions of the 'global' are fundamentally rooted within domestic politics and political authority. As such, they tend to reflect the strategic priorities of powerful states.

This approach to extraterritoriality suggests new avenues for theoretical enquiry. It can help focus attention to the forms of network and commercial power that structure global markets.[60] Amidst the decentralized patterns of global exchange that characterize transnational flows of money, goods, and people, extraterritorial enforcement can create asymmetric networks of power, structured by legal regimes able to leverage domestic institutions (embedded in national politics) for the purpose of exercising power abroad. To build on arguments advanced by Henry Farrell and Abraham Newman, extraterritoriality, which may drive efficiency gains and reduce transaction costs, may also serve as a site of control.[61] To what extent does extraterritoriality in the enforcement of foreign bribery law and in other areas of global governance indicate US capacity and willingness to 'weaponize interdependence'? How sustainable is the open global economy if 'weaponized interdependence' becomes a default tool for *other* powerful states to manage international relations?[62]

The focus on extraterritoriality in global governance also generates avenues for inquiry on the appropriate uses of political power and authority beyond the state. As John Ruggie argued in his seminal study of how international regimes for money and trade both reflected and shaped the development of the post-World War II economic order, international regimes represent a 'concrete manifestation of the internationalization of political authority.'[63] For Ruggie, political

[60] Henry Farrell and Abraham L Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) 44 International Security 42.
[61] ibid 75.
[62] Farrell and Newman (n 60); Daniel W Drezner, Henry Farrell and Abraham L Newman (eds), *The Uses and Abuses of Weaponized Interdependence* (Brookings Institution Press 2021).
[63] John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379, 380.

authority – including the willingness of actors to 'submit to the necessities of cooperative systems' – represents 'a fusion of power with legitimate social purpose.'[64] While this chapter's discussion of extraterritoriality has addressed the role of US power at play in the global governance of corruption, Ruggie's notion of political authority invites inquiry into the social purpose of US policy in this area.

If the goal of international anti-bribery regulation is to create and maintain open and competitive markets for global commerce, as Hock suggests, extraterritorial enforcement by the United States would seem to offer a positive and beneficial contribution to global cooperation and the promotion of mutual gains. Can we push this assessment further, to question other possible social purposes that might be important to achieve via anti-corruption governance? Rules about corruption reflect expectations about the proper scope of political authority in economic relations, the basis of state-society relations, and the appropriate balance between 'authority' and 'markets.' Given a singular focus on open markets as the primary public good to be provided, to what extent does this approach side-step *other* purposes to be achieved via norms of anti-corruption: alternative conceptions of social justice, the promotion of human rights, fair representation, legitimate governance, gender equality; these potential goals remain excluded rom the way extraterritoriality currently shapes the global governance of corruption. As ongoing research in this field continues to explore the political drivers of FCPA enforcement actions,[65] there is room to question why extraterritoriality – as a strategic power resource within existing frameworks of international law– constitutes a central feature of US efforts to control foreign bribery, but not of efforts to promote other global public goods, such as justice, equality, human rights, and environmental protection.

[64] ibid 382.
[65] Acorn (n 31).