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Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act[1]

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The US Foreign Corrupt Practices Act of 1977 (FCPA) is having an unprecedented moment. In 2010, corporations paid $1.8 billion in FCPA fines, penalties, and disgorgements—the most ever recorded in this controversial Act's history and half of all criminal-division penalties at the Justice Department. While this recent pattern of enforcement is itself interesting, a deeper puzzle lies in the origins and early trajectory of the FCPA. Throughout the late 1970s and most of the 1980s, major US business groups opposed its unilateral ban on transnational bribery and lobbied the government to repeal this costly constraint on American businesses operating overseas. Yet, despite a decade of pressure from otherwise powerful groups, the government failed to respond to business demands amidst strategic trade concerns about the FCPA. Why? The paper applies a Constructivist lens, together with concepts from the theory of legal reasoning, to analyze the early history of the FCPA and explain its continued significance in US foreign economic policy. Anti-corruption norm resonance and the pressure publicly to justify norm-transgressing practices made foreign corrupt practices by American businesses "easier done than said."

The US Foreign Corrupt Practices Act of 1977 (FCPA) is experiencing an unprecedented moment. In 2010, corporations paid $1.8 billion in fines, penalties, and disgorgements under the FCPA, the most ever recorded in the controversial Act's history, and half of all criminal-division penalties paid to the United States Department of Justice. To date, active enforcement of the FCPA continues unabated. Record fines, enforcement actions against individuals, an increase in the number of civil and criminal actions, and strengthened enforcement of similar rules in other countries indicate the US government's heightened emphasis on controlling foreign corrupt practices (Cassin 2011; Rubenfeld 2011; SquireSanders 2012).

While this recent pattern of enforcement is interesting in itself, a deeper puzzle lies in the origins and early trajectory of this legislation. Throughout the late 1970s and most of the 1980s, major US business groups vociferously opposed the FCPA's criminalization of bribery in international business and lobbied the government for its repeal, or at least changes that would seriously weaken this constraint on American businesses operating overseas. Yet, despite a decade of direct lobbying from otherwise powerful business groups, the government

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[1]This title draws from Chapman 1998.

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failed to respond. Why? During an era when foreign competitors were permitted by their governments to bribe foreign officials—and write off these bribes as tax-deductible business expenses—both the initial unilateral enactment of the FCPA and the failure of attempts to repeal its "anti-competitive" provisions are puzzling.

The explanation for this puzzle emerges under a Constructivist analysis, which reveals the norm-driven nature of American foreign policy concerning transnational bribery. A deeply held American norm against corruption made continued state support for "foreign corrupt practices," as well as any repeal of the FCPA's anti-bribery provisions, politically untenable—regardless of the material, strategic trade benefits offered by such a move. In particular, high public sensitivity to the norm against corruption—conceptualized as *norm resonance*—in the wake of the Watergate scandal in the mid-1970s limited the potential range of "appropriate" policies regarding transnational bribery. Congress passed the FCPA in the context of a heightened focus on ethics in government and business that was part of the political fallout of the Watergate scandal. In Watergate's aftermath, amidst increased public sensitivity to issues of corruption in business and government, repealing provisions of a law that banned bribery became "easier done than said" (Chapman 1998). That is, policymakers would have done it were they not required to provide reasons in the course of democratic deliberation to justify and defend corrupt practices. When called on to justify their support of foreign corrupt practices, as judges must give reasons when departing from a legal precedent, policymakers could not do so under the terms of the highly resonant norm of anti-corruption and were therefore constrained to endorse a materially costly policy.

Foreign policy analysts have long recognized that, rather than representing the outcome of purposive choices made by value-maximizing actors on the basis of material interest, foreign policies can sometimes be the product of "muddling through" standard operating procedures, of complex processes of bureaucratic bargaining, or of cognitive errors (Allison 1969; Jervis 1976). Yet, only recently have scholars begun to apply the insights of Constructivism from the broader field of IR to demonstrate the importance of ideas, metaphor, identity, rhetoric, and norms in the analysis of foreign policy (Houghton 2007; Widmaier 2007; Browning 2008; Walldorf 2010; Bratberg 2011; Flanik 2011). In applying a Constructivist lens to the analysis of American foreign economic policy on bribery and corruption, this article adds innovative insights from the theory of legal reasoning to explain the mechanism by which social norms can influence foreign policy. In the case of the US FCPA, the Constructivist lens explains the course of US foreign policy where a rationalist, materialist explanation cannot.

The next section of this article introduces the Constructivist lens and the main argument of the paper. Section three discusses the practice of transnational bribery and explains how it functions as a strategic trade policy with important material benefits for states and firms. Section four analyzes the origins and early trajectory of the FCPA in American politics in three steps. First, an overview of business lobbying against the FCPA from its enactment in 1977 until its amendment in 1988 underlines the puzzle surrounding rationalist, material expectations regarding the FCPA. Second, the analysis argues that, while the shift toward business support for international anti-bribery rules, evident from at least 1994 and up to the internationalization of the anti-bribery norm in 2001, is perfectly consistent with a rationalist explanation, this explanation does not resolve the puzzle of the act's initial implementation. The third step applies Constructivist analysis to explain the initial act, the failure to repeal, and the consequent shift toward internationalization in terms of the resonance of the anti-corruption norm in American politics during the Watergate and post-Watergate periods.

This explanation highlights the importance of the American anti-corruption norm—and its post-Watergate resonance—to American policy on transnational bribery. A final section provides some thoughts on the role of the FCPA in the contemporary international regime of anti-corruption and on recent trends in FCPA enforcement.

The Constructivist Lens: Norm Resonance

Constructivist theory in IR posits the importance of social and ideational factors, and non-rationalist dynamics of interest formulation and interest change in explaining political outcomes. In contrast to the materialism of Realism and the instrumentalism of Rationalism, Constructivism "emphasizes the *social* and *relational* construction of what states are and what they want" (Hurd 2008:299) and highlights the importance of *social norms* and *identities* in shaping international politics and foreign policy.

Social norms are collectively understood standards of appropriate behavior for actors with a given identity (Katzenstein 1996; Finnemore and Sikkink 1998). Norms are *regulative* when they prescribe certain behaviors and proscribe others. They are *constitutive* in the sense that norms define the identities of agents within a social environment and constitute the "range of legitimate and acceptable interests which these agents can pursue" (Risse 2002:14). Politically important norms and ideas also take *intersubjective* and *institutionalized* forms. That is, they become embedded not just in the individual's mind but also in "collective memories, government procedures, educational systems, and the rhetoric of statecraft" (Legro 2005:6; Hurd 2008:301). Constructivist literature in IR has examined international norms and their effects across a range of issue areas (Finnemore 1996; Katzenstein 1996; Klotz 1999; Tannenwald 1999; Crawford 2002; Finnemore 2003). Finnemore and Sikkink (1998) have examined the progression of international norms through a predictable life cycle involving emergence, institutionalization, and internalization. Notably, while norm violation may reveal norm hypocrisy (Krasner 1999; Weaver 2008), violations per se do not invalidate a norm (Shannon 2000).

Fewer studies have examined the domestic societal norms in which foreign policies are embedded. Norms are widely acknowledged to play a role in the "social construction of reality" (Searle 1995; Hacking 1999), and Ruggie has emphasized that "the specific identities of specific states shape their perceived interests" (Ruggie 1998:14). Hopf (2002) has shown how a state's "identities" and multiple self-understandings affect its understanding of other states in world affairs, while Keohane (2009:3) notes general agreement that "the politics of local and national societies cannot be understood without understanding the role of social norms". But the manner in which domestic societal norms shape the formulation of foreign policy—the realm of foreign policy analysis (FPA)—remains underexplored.

How do social norms affect the formulation of foreign policy in a liberal democratic state? The theory of legal reasoning offers some clues. In adjudication, a judge may depart from an established legal category or rule only if she can provide a *justifiable reason* for the departure. The process of legal reasoning therefore creates a "concept-sensitive strategy space" that limits the range of options available to decisionmakers (Chapman 1998). Like a legal precedent, the presence of a social norm can oblige policymakers to give reasons for departures from the norm, thereby making some policies hard to enact: "The obligation to give reasons for a proposed move within the space of alternatives can expose some such moves as less sensible (although, perhaps, no less preferred) than others" (Chapman 1998:305). Put differently, some policies are more easily

articulated and justified than others within the social structure of norms (Chapman 1998:295, 305). As Bruce Chapman puts it,

> While there might be things we could "do" if it was only a question of what we preferred, we might, nonetheless, not be able to do those things if we had to articulate a set of publicly accessible reasons, or justifications, for such a doing. After all, some things just do not bear thinking about, at least if they have to be thought about openly…they are more easily done than said. (1998:293)

An important working concept here is that of a norm's *resonance*: the degree to which a norm or idea activates public sensitivity and sentiment within a given social context. Like norms, public sentiments are ideas that constrain the range of publicly acceptable solutions available to policymakers (Campbell 1998). Certain norms and ideas generate higher levels of public sensitivity in some countries than in others.[2] Strong norm resonance can increase the difficulty of justifying non-compliance. In the case of the FCPA, policymakers found that, due to the strong resonance of the anti-corruption norm in post-Watergate American politics, they could not muster acceptable reasons to justify state support for bribery in international business, regardless of material, strategic trade incentives.

In sum, Constructivism's task is to explain the mechanisms by which norms and public sentiments shape and constrain international policymaking. While the Constructivist literature in IR has advanced a great deal of knowledge concerning global norms, much less attention has been paid to these dynamics in the literature on FPA (Houghton 2007). This theoretical approach examines the normative features of the FCPA that are overlooked by materialist and rationalist analysis. Constructivist analysis uncovers a powerful norm of anti-corruption that animates the FCPA and that, in the post-Watergate era of American politics, re-cast the appropriate practices for American businesses engaged in international commerce.

Methodological Issues

The Constructivism preferred in this study is both pragmatic and modernist (Katzenstein 1996; Adler 1997; Fearon and Wendt 2002). Used chiefly as an analytic lens, it is agnostic on the ontology of international relations and loosely causal ("soft-positivist") in its epistemology. Empirically, the Constructivist theory developed here assumes that actors behave according to the "logic of appropriateness" and that preferences are endogenous to a given social interaction (March and Olson 1998; Fearon and Wendt 2002:54–5). Applying a Constructivist lens, the paper explains the origins and trajectory of the FCPA by giving a detailed account of the events that preceded its enactment, and of the public discourse surrounding it. This discussion follows an inductive methodology characteristic of Constructivists, which works to "develop and support their general claims about particular cases by working 'upwards' from the details of those cases to theoretically informed claims that capture relevant patterns and relationships" (Dessler and Owen 2005:599). As with much Constructivist inquiry, the effort is "to account for the properties of things by reference to the structures in virtue of which they exist" (Santa-Cruz 2005:670; see also Wendt 1999:85; Dessler and Owen 2005). The explanation arrived at is therefore *constitutive*, as distinct from causal in the positivist sense. Constitutive explanations seek "to establish the conditions of possibility for objects or events" (Fearon and Wendt 2002:52).[3] Rather

[2] In liberal democratic states, public sentiments do not need to be institutionalized in order to constrain government's policy choices. Public opinion polls, analyses of public discourse, and popular culture can reveal levels of public sensitivity to certain ideas.

[3] Dessler and Owen prefer the term "constitutive *analysis,* or constitutive description" (2005:599).

than operating through a mechanistic cause-and-effect logic, the resonance of the norm in question "*constitutes* certain behavioural possibilities and, in that sense, *cause[s]* them" (Wendt 1998, 1999:77–89; Finnemore 2003:15). Norm resonance is a "cause" of the history of the US FCPA in the sense that the resonance of the 1970s anti-corruption norm in American politics is the background condition against which this policy came to be—the *permissive* cause (Kratochwil 1989; Finnemore 2003).

The resonance of the anti-corruption norm in the post-Watergate years is evident through an inquiry into the politics and political discourse of the time. In the United States, the norm against corruption is a longstanding, relatively constant feature (Noonan 1984). Yet, as established through historical inquiry (Glaeser and Goldin 2006), this norm has clearly been more prominent at certain times: its *resonance* varies in particular historical conjunctures.[4] Granted, norm resonance is not always determinant; there are many instances when a policy or item of legislation is advocated using non-normative language, following interest-driven considerations, bargaining, logrolling, or other means. There are also plenty of examples of norm-driven policy advocacy falling on deaf ears. This article identifies a correlation between successful norm-driven legislation and the resonance of the norm in society at the time, where resonance is measured by the evocation of the norm in contemporary politics and policy discourse. In the case of the US FCPA, this correlation is very strong indeed.

Transnational Bribery

Transnational bribery is the practice of sending corrupt payments from one national jurisdiction into another to secure influence in the recipient jurisdiction. While the bribery of domestic public officials has long been outlawed in the developed world, the payment of bribes across borders to foreign officials in the pursuit of international business has not. Until the late 1990s, official state support for bribery in international business was a standard practice in many OECD countries, roughly half of whom (including Australia, Austria, Belgium, France, Germany, Netherlands, Portugal, Norway, Sweden, and Switzerland) actively condoned and endorsed such payments by permitting them as tax-deductible business expenses (Milliet-Einbinder 2000). While other states did not render bribes tax-deductible, only a few of them explicitly prohibited the practice. Not only did several OECD states publicly defend and legitimate the practice of transnational bribery, Germany, France, and others also firmly *opposed* any multilateral effort to change this approach (George, Lacey, and Birmele 2000). Officials from these states argued that the bribery of public officials was a normal business practice in many countries—particularly less developed countries—and was therefore an acceptable practice for Western businesses engaged in commerce abroad (Brademas and Heimann 1998).

This political support for bribery in international business is not surprising, given that bribery directly implicates the strategic trade interests of states. From a material standpoint, at least three aspects of transnational bribery evoke strong state support as a rational policy. First, the economic sectors in which transnational bribery is most prevalent are closely tied to national interest, in terms of economic competitiveness and national security: armaments and defense procurement, energy, heavy manufacturing, and large-scale public works and construction (Transparency International 2011). Transnational bribery is most

[4] Pre-Watergate periods of strong resonance of the anti-corruption norm include those of the Grant administration in the 1870s (the Credit Mobilier scandal, the Whiskey Ring, and Reconstruction and the Ku Klux Klan) and the Teapot Dome scandal of 1922–1923 (Glaeser and Goldin 2006).

prevalent in these sectors because government contracts in them tend to facilitate clandestine payments. They invariably require approval at many levels, a process that positions foreign officials to offer benefits in return for bribes; they are often very large, and payments which are meaningful to public officials are more likely to be relatively small proportions of the contract price as a whole; and they usually involve significant external procurement, which facilitates the concealment of bribes sent to external accounts.

A second factor leading to domestic policy support for the bribery of foreign officials is an asymmetry in the cost/benefit analysis of such a policy. The national benefits of a policy supporting transnational bribery tend to be quantifiable and specific (in the form of success for national champions in international contract procurement competitions) and concentrated within important national industries. In contrast, the costs of foreign bribery—general economic inefficiency in the global economy, problems of development in the global South, the spread of illicit global financial activity (Mauro 1996; Elliott 2002)—are difficult to quantify, collective in nature, and less identifiably significant to the domestic political context.

Third, from the point of view of firm preferences and state support for those preferences, the use of bribery in international business transactions presents a prisoner's dilemma. Faced with a choice to bribe (or not) in pursuit of foreign contracts, every firm's dominant strategy is to bribe. If competitors bribe, then a firm will secure more contracts and higher profits by bribing than by not bribing. If competitors do not bribe, then a firm will secure even more contracts and even higher profits by bribing than by not bribing. Less efficient firms prefer bribery, as this may be their principal source of advantage in contract procurement (Rose-Ackerman 1997; Elliott 2002); meanwhile, more efficient firms prefer to bribe rather than to lose contracts to less efficient firms that bribe. Hence, the dominant strategy is to bribe. At the same time, where two or more unscrupulous firms compete for the same contract, such competition obviously raises the cost of the contract and, ironically, the costs of the bribes themselves. Moreover, if all firms bribe, the less efficient firms lose the advantage sought by the bribe. Thus, if no firms bribed, efficient firms would be better off and less efficient firms would be no worse off. As in the prisoner's dilemma, players' dominant strategies yield sub-optimal results.

Ultimately, state support for transnational bribery is, from a strategic, material standpoint, a rational policy. In this light, the unilateral US FCPA is especially puzzling. At a time when most states accepted bribery in the competition for foreign contracts, the FCPA was perceived as having placed American companies at a competitive disadvantage to their unconstrained French, German, and British competitors. Why did the United States unilaterally enact the 1977 FCPA in the first place? Given powerful arguments about its costliness to US economic competitiveness, why was it so difficult to amend this act, much less repeal its anti-bribery provisions? As shown below, a rationalist, materialist explanation cannot explain the origins and trajectory of the FCPA.

The Foreign Corrupt Practices Act: Origins and Trajectory of a Once Controversial Law

The FCPA outlawed the bribery of foreign public officials in international business transactions through two sets of provisions. First, criminal law provisions under the jurisdiction of the Justice Department made it a criminal offense for any US person (individual or corporation) to make payments to foreign government officials to assist in retaining or obtaining business. Second, accounting and reporting provisions of the Act under the jurisdiction of the Securities and Exchange Commission (SEC) introduced record-keeping rules designed to

expose such unlawful payments. Criminal penalties under the Act included fines of up to $2 million dollars for firms, and up to $100,000 and 5 years' imprisonment for individuals.

Business Lobbying Against the FCPA: 1977–1988

From the time of its introduction in 1977 and throughout the 1980s, major US corporations, manufacturers' lobbyists, and exporter groups opposed the FCPA on several grounds. First, they argued that its prohibition of "questionable" payments in foreign jurisdictions represented an unacceptable effort to impose American morality on other states (Pastin and Hooker 1984; Salbu 1997). Second, critics claimed that the FCPA caused US companies to lose business, thereby contributing to the expanding US trade deficit. They argued further that a unilateral US prohibition on foreign bribery was foolhardy, and a multilateral approach leading to an international agreement was needed (US General Accounting Office 1981). Finally, opponents maintained that the FCPA's ambiguity and onerous accounting requirements would cause many US companies to abandon international business opportunities.

Not surprisingly, the FCPA immediately became "a major source of controversy" among government officials and US businesses (Morgan 1979). As one member of the House of Representatives put it in 1979, "[t]he Foreign Corrupt Practices Act has had a history of attempts to undermine its effectiveness, even before it was passed" (Kramer 1979). As early as September 1978, fierce opposition caused President Carter to promise that the Justice Department would "issue guidance" to US companies to clarify its enforcement policy, a move that failed to mollify critics. In March 1979, the *Washington Post* reported: "Dozens of American businessmen interviewed around the world said they now feel at a disadvantage working in countries where extortion and corruption by foreign officials is commonplace" (Morgan 1979).

During this period, the Carter administration undertook a comprehensive review of its export promotion programs. As a result, a special White House Export Disincentive Task Force concluded that overseas bribes can be an export incentive and that the FCPA, by barring US companies from partaking in this practice, cost the United States $1 billion per year in lost trade. In a draft report produced for the White House, the Task Force presented recommendations for offsetting this loss, including "gutting" the FCPA and removing enforcement power from the SEC (Kramer 1979). This report was leaked to the press in June 1979. SEC and Justice officials said that "much of the draft proposal reflected intense lobbying on the White House and the Commerce Department by businessmen seeking to undermine the bribery law" (Kramer 1979). Criticism of the report's proposals to diminish the FCPA's impact on corporate practices, led mainly by Democrats in the House of Representatives, ultimately caused the Task Force to abandon its recommendations (Kramer 1979). When the President's export council produced its final recommendations, however, they did not neglect the FCPA. The Task Force recommendations included a series of steps aimed at improving the trade balance, including the mandate to eliminate or reduce export disincentives. Among these latter were listed "laws and policies which unreasonably or unnecessarily operate as unilateral, self-imposed disincentives on U.S. export" and which should be eliminated or "administered more reasonably." One law specifically listed in this category was the Foreign Corrupt Practices Act (US Department of Commerce 1980a,b:17–18).

In November 1980, Ronald Reagan defeated Jimmy Carter in a landslide electoral victory with his legendary promise to Americans to "get government off your backs." Among the Reagan administration's first orders of business in early 1981 was a response to ongoing complaints by American companies about the

FCPA. In March 1981, the General Accounting Office of the White House produced a report stating that "55 percent of the largest industrial firms polled opposed the act's accounting and anti-bribery provisions" (Hamilton 1981a). The General Accounting Office thus recommended to Congress that it significantly amend the FCPA, to the extent of repealing some of its criminal provisions, to "meet business community objections to the act" (Hamilton 1981a; US General Accounting Office 1981). US Trade Representative Bill Brock subsequently supported these recommendations in a *Washington Post* op-ed column, and Senator John Chafee proposed a bill in Congress to amend the FCPA in tune with the wishes of the Reagan administration and the business community (Brock 1981; Hamilton 1981b). The Chafee Bill proposed to eliminate the FCPA's "reason to know" provisions (forbidding payments to an agent if one has a reason to know that the payment might be used to bribe a foreign official); to reduce the burden of corporate record-keeping from the standard of "reasonable detail" to require only information that is "material"; and to remove the enforcement purview of the SEC. Senator William Proxmire, the originator of the 1977 Act, called the Chafee Bill "a slug through the heart of the FCPA" (Hamilton 1981b).

Other opponents of the proposed amendments concurred, arguing that under the guise of clarification of "alleged ambiguities of the statute" (Heymann 1981), the Chafee amendments would so hamper enforcement of the FCPA that the Senate might as well repeal all of the FCPA's anti-bribery provisions. Former SEC Chairman Harold Williams, for instance, was particularly concerned about two aspects of the proposed amendments. First, whereas the original Act required that corporations to a "reasonable degree" keep "accurate and fair" records and internal controls, the Chafee Bill's imposition of a materiality standard for reporting—set at a dollar threshold—would allow big expenditures in large corporations to go unreported. Williams' second concern was that the proposed removal of the "reason to know" provision would make the legislation virtually toothless. Instead of these changes, argued Williams, "I would rather have the anti-bribery provisions repealed" (Heymann 1981).

Evidence suggests that a loosening of both the FCPA's accounting and anti-bribery provisions to a point effectively similar to repeal was exactly what business and government opponents of the Act wanted. Pursuing this end, a number of prominent corporate executives and representatives of major industry groups testified in Senate committee hearings in support of the Chafee Bill (US Senate 1981). Among them were representatives of the National Small Business Association, the Emergency Committee for American Trade (an organization of 63 large firms with extensive overseas operations), and the National Association of Manufacturers. An executive of Ingersoll Rand—at that time a $3 billion producer of industrial machinery—asked Congress in his testimony to grant the President power to suspend the FCPA's anti-bribery provisions (Hamilton 1981c). When the Senate Banking, Housing, and Urban Affairs Committee reported the Chafee Bill and approved a number of amendments to the FCPA in September 1981—including renaming the legislation the Business Practices and Records Act—that were subsequently passed, the *Washington Post* reported: "The Senate voted yesterday to soften the provisions of the FCPA because American firms claimed they have been losing business abroad as result of the law" (Berry 1981).

The Chafee Bill became the subject of legislative controversy in Congress for the next 7 years; despite continued support from business groups, it did not survive. House Representatives hotly debated proposed FCPA amendments, and jurisdictional disputes over which subcommittee had purview delayed resolution. Throughout, a coalition of major business groups, including the Chamber of Commerce of the United States, the National Association of Manufacturers, the Business Roundtable, and the Emergency Committee for American Trade,

continued to support amendments to the FCPA. In June 1986, tension over trade policy peaked as the White House moved to block a major House trade bill that it considered too protectionist. Critics of the White House argued that the executive branch was not doing enough to control the record trade deficit ($148.5 billion in 1985). Major business groups did not back Reagan's efforts to block the trade bill, but supported measures in the bill that would weaken the FCPA (Auerbach 1983; United Press International 1986).

In October 1987, a major House-Senate conference tried to develop one piece of trade legislation out of different bills produced by the House and the Senate, among which were proposed changes to the FCPA. The Senate's amendments to the FCPA, based on the Chafee Bill of 1981, were designed to "lighten the burden on business," while the House had approved measures to "clarify and strengthen" the Act (Mintz 1987). At the same time, six major business organizations mobilized around the bills. Calling themselves the Business Coalition on Trade and purporting to "represent the mainstream of U.S. business," they endorsed six major provisions, including amending the FCPA to relax its constraints on American businesses (Auerbach 1986).[5] In November 1987, Democrats won control of both the House and the Senate, and in March 1988, Congressional conferees finally hammered out a compromise on changes to the FCPA, in which more moderate House proposals won out over the Chafee Bill (Mintz 1988). These amendments became part of the US Omnibus Trade and Competitiveness Act of 1988.

The 1988 FCPA amendments altered the Act's accounting provisions and its anti-bribery provisions. Although some critics argued that the changes effectively "killed" the legislation (Lissakers 1988; Brennan 1990), the amendments stopped short of several of the demands made over the previous decade by US businesses (and by the Reagan administration), and indeed stopped short of the Chafee Bill. For instance, while business groups had lobbied for a decriminalization of the Act's accounting provisions, together with a repeal of the SEC's enforcement power, the 1988 amendments retained the joint enforcement jurisdiction of the SEC and Department of Justice. The amendments also codified the SEC's existing policy on criminal prosecutions of accounting failures; these would be restricted to situations of deliberate ("knowing") circumvention or failure to implement control systems, meaning that criminal prosecutions would continue but would not be initiated for negligence or technical violations. The amendments did not adopt several measures for which the business groups had lobbied hard.

Congress added a new section to the 1988 amendments indicating its desire that the President negotiate an agreement with the OECD to internationalize the FCPA's anti-bribery norms. This new language further required the President to report to Congress on the progress of negotiations and on any steps taken should such negotiations fail. These provisions responded specifically to business concerns that the FCPA's unilateral approach harmed US economic interests. They did not, however, include the stipulation requested by some lobbyists that the President be permitted to suspend the FCPA's anti-bribery provisions in the event that international negotiations failed to produce an agreement on foreign bribes.

In sum, the changes stopped far short of almost all the amendments that the business lobby had promoted, and even these watered-down amendments proved extremely difficult to achieve. It had taken "an extraordinary 8 year effort by some members of Congress and some business lobbyists" to produce any

[5] The Business Coalition on Trade was comprised of the following groups: The Business Roundtable, Emergency Committee for American Trade, National Association of Manufacturers, National Foreign Trade Council, US Chamber of Commerce, and US Council for International Business.

amendments whatsoever, and ultimately these could only pass as part of the huge omnibus trade legislation (Brennan 1990:229). Brennan noted that, "The 1988 FCPA amendments are only six pages in this approximately four hundred page piece of legislation whose goals only indirectly, at best, were to amend the FCPA" (1990:229). Ironically, as Cragg and Woof point out, "[a]lthough these changes restricted the scope of the FCPA, the actual number of potential FCPA cases investigated increased after passage of the Omnibus Trade Act, in part because the amendments defined more clearly the legal obligations of corporations" (2001:187).

Business Support for Anti-Bribery Rules: 1994–2001

Despite a decade of lobbying for changes that would significantly weaken the effectiveness of the FCPA, businesses after 1988 were left with an FCPA that was very much alive. At the same time, the 1988 amendments introduced a new legacy: a mandated effort on the part of the US administration to internationalize the FCPA through the OECD. From at least 1994 US businesses strongly supported this effort. In a neat parallel, 10 years after the passage of the US Omnibus Trade and Competitiveness Act, almost all the same business groups that had once lobbied against the 1977 FCPA now lobbied just as ardently in favor of the nascent OECD anti-bribery Convention, ultimately signed in 1997 and implemented in 2001. These groups expressed their views to Congress via the US branch of the international anti-corruption NGO Transparency International (TI-USA) and in several open letters to the Senate Committee on Foreign Relations. One of their key demands was that the United States be among the first OECD member states to comply fully with the new Convention.

The CEOs of 35 major corporations signed a letter to Senator Sarbanes to express their "support for the speedy ratification and implementation" of the 1997 OECD Convention, noting:

> The OECD Convention is a major victory for the United States in its battle against international corruption and bribery … Speedy ratification and implementation of the OECD Convention by the United States is, however, an absolute imperative in order for the Convention to succeed.[6] (US Senate 1998:36–7)

As part of his testimony to the Senate committee, the Chairman of TI-USA, Fritz Heimann, underlined the business community's support for the Convention as having "the overwhelming support of a broad coalition of major business organizations, including the Business Roundtable, the US Council on International Business, the National Foreign Trade Council, the National Association of Manufacturers, and the Emergency Committee for American Trade" (US Senate 1998:18). Overall, the Convention met with acclaim in American political and business circles (Blustein 1997; Goldschlager 1997; Marcuss and Goldschlager 1997; *Washington Post* 1998a,b).

This shift in policy preference on foreign corrupt business practices by US corporations is readily explained as a rational response to their previous failure to change American policy. Once it became clear that anti-bribery provisions would remain a fixture of US corporate regulations, business shifted

[6] The complete list of signing companies is as follows: ABB Inc.; AlliedSignal, Inc.; AMP Incorporated; Bethlehem Steel Corporation; Caterpillar Inc.; Chrysler Corporation; Digital Equipment Corporation; DuPont Company; Foster Wheeler Corporation; Honeywell, Inc.; ITT Industries, Inc.; Mentor Automotive, Inc.; Raytheon Company; Tenneco; Textron Incorporated; The Perkin-Elmer Corporation; United Parcel Service of America; Westvaco; Air Products and Chemicals, Inc.; American International Group, Inc.; AT&T; Cargill, Inc.; CBS Corporation; CSX Corporation; Dresser Industries, Inc.; Eastman Kodak Company; General Electric Company; Ingersoll-Rand Company; Merck & Company, Inc.; Phillips Petroleum Company; Rockwell International Corporation; Texas Instruments Incorporated; The Boeing Company; TRW, Inc.; United Technologies Corporation.

its emphasis to internationalizing the American rules with the aim of "leveling the playing field" to the level of US regulations. However, what this analysis does *not* readily explain is (i) why the United States enacted this costly unilateral constraint in the first place and (ii) the failure of the 1980s lobbying effort against it. The next section explains this puzzle in terms of the high resonance of the anti-corruption norm in American politics that resulted from the Watergate scandal in the 1970s. Understanding the normative context of the FCPA is the key to explaining the course of US policy on transnational bribery.

Explaining the Shift, 1977–2001: Anti-Corruption Norm Resonance in American Politics

Corruption and scandal have always been features of American political life (Williams 1995; Roberts and Doss 1997; Williams 2003; Glaeser and Goldin 2006). Nonetheless, the norm against corruption has operated since the earliest days of the republic. As Noonan notes, for Americans generally, "bribery has nearly always had a high interest. Treason and bribery are the two crimes mentioned by name in the Constitution" (1984:xvi). This is not to say that this norm has been universally adhered to, but rather that "the reality of the concept in the society is indicated by its invocation, even though the extent to which the idea affects official conduct cannot be closely calculated" (Noonan 1984:xiv).

Bribery is an object of condemnation across the American political spectrum, with the anti-corruption norm representing a national ethical ideal. This norm is *constitutive* in that it socially constructs the identity, interests, and practices (Adler 1997:334) of the United States as an affluent market democracy (Johnston 2005:14). The American norm of anti-corruption encompasses other prominent norms and ideals having to do with democratic accountability, a professionalized civil service, and purportedly clear distinctions between state and market, public and private. It stipulates the types of relationships between state, market, and society that are deemed appropriate within an affluent market democracy and thus constitutes of the identity of the United States as one.

Although one can trace a historical pattern of corruption scandals and periods of anti-corruption reform in the United States (Glaeser and Goldin 2006), the issue of corruption in American politics rose to new levels of public attention in the last third of the twentieth century. Opinion polls suggest that public trust in the integrity of politicians also fell sharply during this period (Williams 2003). The turning point was the Watergate scandal of the early 1970s, the effects of which served to elevate the issue of corruption on the political agenda (Mackenzie and Hafkin 2002; Williams 2003). Indeed, the Watergate scandal was a "pivotal event in American political history in many ways" (Mackenzie and Hafkin 2002).

The FCPA and US policy on transnational bribery and corruption in general must be understood in the context of Watergate and post-Watergate American politics. The FCPA arose as a result of Watergate-related revelations about foreign corrupt practices undertaken by major US corporations, the ethical resonance of which led legislators to proceed with the Act, regardless of countervailing material strategic trade considerations. Subsequent efforts to repeal or amend the FCPA were impeded by the post-Watergate significance of the deeply held norm of anti-corruption, which was explicitly articulated in the FCPA. Once the FCPA was in place, any policy designed to retreat from its standard would have been "easier done than said." As the chairman of TI-USA put it, "you simply couldn't get representatives or senators to vote to repeal it … no congressman will want to run for re-election and have his opponent say

that he had voted in favor of committing bribery" (Fritz Heimann, per. comm., 2002).

The Watergate Scandal

The Watergate scandal emerged 2 days before Richard Nixon's presidential re-election in October 1972, when a congressional committee made public its discovery of secret receipts collected by the Nixon campaign, including $30,000 in indirect contributions from a prominent US defense contractor (Emery 1994; Neild 2002). Administration officials at the highest levels responded by initiating an extensive cover-up operation. Eventual disclosures about the cover-up to a grand jury spurred further investigations by a succession of citizens' groups and government bodies, including the public interest group Common Cause, the Senate Watergate Committee, the Justice Department, the Watergate special prosecutor, and the SEC.

In addition to the now infamous burglary of the Democratic Party headquarters in Washington's Watergate building and the President's attempts to cover it up, these investigations revealed illicit links between some of America's biggest corporations and the Nixon White House, including a secret multi-million-dollar fund to finance the cover-up (Boulton 1978:253). In particular, Nixon's Committee to Re-Elect the President (CREEP) had solicited illegal campaign contributions in 1972 from such major companies as Northrop, Gulf, and Goodyear for the express purpose of paying off the Watergate burglars and ensuring their cooperation in the conspiracy.

Concurrent with the Watergate investigation, a Senate sub-committee on multi-national corporations, chaired by Frank Church, also uncovered large-scale, systematic corporate bribery and corruption abroad—particularly by the American oil companies Gulf, Exxon, and Mobil. Convened in 1972 to investigate the extent of US corporations' influence on foreign policy, the Church committee expanded its mandate in 1973 to investigate the questionable corporate practices that were coming to light as a result of the Watergate investigations.

Other government agencies proceeded with inquiries of their own. The Senate Committee on Banking, Housing, and Urban Affairs, chaired by William Proxmire, held extensive hearings on the matter of improper payments to foreign government officials by US corporations and also revealed widespread use of foreign bribery. At the SEC, Stanley Sporkin, head of the commission's enforcement division, devised a voluntary disclosure program in which each of the companies on CREEP's register of illegal contributors "agreed to investigate itself and deliver its detailed findings to the SEC and the courts" (Boulton 1978:257). As a result of this program, between 1974 and 1976, approximately 435 American corporations voluntarily disclosed to the SEC that they had made improper or questionable payments totaling more than $300 million to foreign officials or members of foreign political parties (Cragg and Woof 2001). Moreover, they had kept these payments off the books and maintained secret currency slush funds for that purpose.

Various officials subsequently testified about these disclosures to the SEC in hearings before Senator Church's committee, which in 1975 moved from its focus on oil companies to the defense industry, opening hearings on Northrop and, most notably, the Lockheed Corporation, at that time the biggest private defense contractor in the world (Boulton 1978). These hearings uncovered a long history of corporate bribery, kickbacks, payoffs, and otherwise "questionable payments" in the hundreds of millions of dollars to foreign public officials. Lockheed alone admitted paying at least $22 million in bribes to foreign officials and foreign political organizations; at least $106 million in commissions to the arms-trade middle-man Adnan Kashoggi (who was also being paid by Northrop at the

same time); at least $1 million to Prince Bernhard of the Netherlands in connection with a Dutch government purchase of Lockheed Starfighter jets; $12 million dollars to the Minister of Defense of West Germany, also in connection with a Starfighter purchase; and several multimillion dollar payments to a network of Japanese officials in connection with a deal to sell Tristar civilian airliners, including $1.7 million to Japan's Prime Minister Tanaka (Neild 2002). These ongoing disclosures had vast international repercussions and resulted in scandals that led to the downfall of governments and officials in Japan, the Netherlands, and Korea (US House of Representatives 1977; US Senate 1977; Noonan 1984:652–80).

As a result of these various investigations and revelations, a broad consensus emerged in Congress that "foreign bribery is a reprehensible activity and that action must be taken to proscribe it" (US House of Representatives 1977). Senator Proxmire, accordingly, sponsored a bill to criminalize the bribery of foreign public officials. In 1977, the US FCPA passed following relatively little debate; the legislative process took less than 1 year amidst a "tone of moral outrage and the urgency of moral reform" (Longbardi 1987; Cragg and Woof 2001:187).

In opting to criminalize foreign bribery, the US government took the strongest possible stance against corrupt practices, leaving no doubt that it considered these practices "counter to the moral expectations and values of the American public" (US House of Representatives 1977; Lashbrooke 1979:232).[7] The government also argued that foreign corporate bribery tarnished the image of American democracy abroad, impaired confidence in the financial integrity of American corporations, and hampered the efficient functioning of US capital markets (US Senate 1977). In sum, in addition to being unethical, Congress considered foreign corporate bribery to be

> bad business … it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. (US House of Representatives 1977)

Using similar words about the ethical imperative of the FCPA, Senator Proxmire noted:

> Bribery is simply unethical. It is counter to the moral expectations and values of the American public, and it erodes public confidence in the integrity of the free market system. Bribery of foreign public officials by some US companies casts a shadow on all US companies. It puts pressure on ethical enterprises to lower their standards and match corrupt payments, or risk losing business…[8] (US Senate 1976:1)

Despite concerns that a unilateral American ban on foreign bribery would hamper American companies, the potential loss of business contracts was rejected as an argument against the FCPA when Congress debated the Act. As put by one observer, "Congress decided that U.S. companies should be at a competitive disadvantage if their only means of competing is through the payment of bribes" (Klich 1996:142).

Opponents of the Act immediately recognized the political impact of the context in which the FCPA was originally passed. Writing to the *Washington Post* to urge extensive amendments to the FCPA in 1981, US Trade Representative Bill Brock acknowledged that the Act had started out with "good and noble intentions" (Brock 1981). However, Brock considered the FCPA an over-reaction to the Watergate revelations, a response that simultaneously made it politically untenable for any Congressman to oppose it. According to Brock,

[7] Congress had also considered another approach, which would merely have required these payments to be publicly disclosed under threat of criminal penalties. For a complete review see Koehler (2012).

[8] Also quoted by Cragg and Woof (2001:193), who emphasize the FCPA's foreign policy imperatives.

> Congress reacted quickly and emotionally to daily newspaper headlines and public outcry … With members of Congress, the administration and the business community all unwilling to challenge a draft of the law for fear of being accused of favoring bribery, the bill sailed through Congress by unanimous vote and was signed into law in December 1977. (Brock 1981)

Post-Watergate Politics: The Resonance of the Norm of Anti-Corruption

The aftermath of Watergate produced wide-ranging attempts to control corruption in American political and economic life. In addition to the FCPA, Congress enacted amendments to the Federal Election Campaign Act and introduced the 1978 Ethics in Government Act. Each would have lasting impact on the course of American politics (Neild 2002:150). During this period, the FBI also began to make the investigation of corruption one of its most important priorities (Williams 2003).

Numerous scholars have noted that an enduring effect of Watergate on American political life has been a tendency to overreact to corruption scandals by introducing increasingly strict anti-corruption laws (Roberts and Doss 1997; Mackenzie and Hafkin 2002; Williams 2003). Consequently, a "low threshold of unethical conduct" has become a distinctive feature of American politics (Williams 2003:73–8), and the anti-corruption norm is highly resonant. Calvin Mackenzie has described this as a "post-Watergate mentality" (2002:31); Roberts and Doss have called it "the nation's morbid post-Watergate preoccupation with government ethics," consisting of societal suspicion of public servants, and a perceived need to legislate public ethics (1997:xv).

Scholars have explained this preoccupation as the consequence of an overwrought media, a lack of trust in government dating from the Vietnam era counterculture, the push by public interest groups for reform, and the partisan use of corruption allegations to immobilize opponents (Garment 1991; Sabato 1991; Roberts and Doss 1997:xv–xx; Ginsberg and Shefter 1999). Whatever the explanation, no politician wants to be "on the side of less ethics" (Mackenzie and Hafkin 2002:34). In short:

> The response to Watergate was a powerful political force that built on all that came before Watergate. And what it ultimately produced was an array of ethics laws, rules, and procedures that had no precedent in the United States or in any other country in the history of the world. (Mackenzie and Hafkin 2002:35)

The effects of this post-Watergate mentality proved especially trying to the Reagan administration, which was plagued by unprecedented investigations into corruption among its high-ranking officials. The President's National Security Advisor, Deputy Secretary of Defense, Secretary of Labor, and two Attorneys General were all forced to resign amidst a variety of corruption-related scandals in the early 1980s (Williams 1995). In a context of public distrust, then, the Reagan administration and Congress sought to amend the FCPA, a task that proved to be "easier done than said." Administration officials and members of Congress found it difficult to justify calls for amendments that would weaken (or appear to weaken) the FCPA. As Bill Brock noted at the time, "politically it's a hot potato" (Brock 1981).

Advocates on both sides of the debate noted the Act's politically delicate nature. Those who supported amendments lamented the difficulties they faced. Rod Hills, a former SEC Chairman, noted: "If we looked at it [the Chafee bill] as a cleansing process rather than a repeal, I think that we could approach the amendments with a lot less heat" (US Senate 1981). Senator Chafee felt it necessary during his committee's hearings on the matter to defend himself against any potential allegation that he supported bribery, noting for instance:

> The point we're trying to make is not that we are condoning bribery, or seeking to go back to bribery. We are trying to make the act more effective. (US Senate 1981)

In a similar vein, Chafee commended the business representatives who came forward in support of the proposed amendments:

> I respect each of you for coming forward today because obviously the changes we have made in this act don't connote bribery. What they try to do is create an act that makes sense. (US Senate 1981)

Indeed, those who spoke in support of the Chafee proposal tried in their statements to distance themselves from the appearance of condoning bribery. For example, one business executive noted:

> Before I begin my comments, I would like to state for the record, Enserch Corp. is not in favor of bribery. It is a sad commentary on the political atmosphere surrounding this legislation that those who support the bill feel compelled to make clear that they do not condone corruption. (US Senate 1981)

At the same time, opponents of the 1981 Chafee bill skewered proponents of reform for focusing their criticisms on the Act's alleged ambiguities. One former Carter administration official noted that the debate on the bill had centered on uncertainties about interpretations because, in his words, "[t]his has protected politicians and businessmen from having to defend corruption" (Heymann 1981).

Just as it was impolitic to oppose the FCPA throughout the 1980s, supporting the OECD Convention in the late 1990s proved to be good politics. Senator Feingold was more than pleased to be aligned with this law, noting:

> As a direct descendent of Senator Proxmire's Foreign Corrupt Practices Act, it represents the best of a long Wisconsin tradition of good government and ethics, and I am proud to have been a part of the Senate's ratification of this effort.[9]

An editorial in the *Washington Post* aptly put the situation thus:

> It's not every day that Congress has an opportunity to pass legislation that has no down side whatsoever…and that — perhaps rarest of all — has the ardent support of both President Clinton and Sen. Jesse Helms. The House has such an opportunity now… (*Washington Post* 1998b)

Conclusion

Rational material interests are insufficient to explain the course of US policy on transnational bribery since 1977. Due to the Watergate scandal, the norm of anti-corruption became highly resonant in American politics, resulting in the unilateral enactment of the FCPA counter to strategic trade interests, and in the failure to repeal its anti-bribery provisions despite a decade of lobbying by powerful business groups. Strong resonance of the anti-corruption norm in post-Watergate American politics made support for transnational bribery "easier done than said" (Chapman 1998). Although supporting the practice of bribery in international business would have promoted American trade interests, public defense of such a policy was politically untenable. Insights from the theory of legal reasoning, in which judges must give reasons for decisions which depart from established precedent, alert us to an important mechanism whereby social norms constrain the actions of agents: the need to justify publicly transgressions from highly resonant norms can obstruct policies that appear to contravene those

[9] Congressional Record July 31, 1998, S9669.

norms. In the case of American foreign economic policy on transnational bribery, policymakers could not justify foreign bribery and were thus constrained to endorse the materially costly FCPA.

This analysis of the FCPA is important for the development of Constructivist FPA in general, as well as for understanding the dynamics of the contemporary international regime of anti-corruption. The analysis shows that, in FPA, norms matter. Whereas the instrumental view of foreign policy, implicit in the rational actor model and other models of FPA, holds that states and decisionmakers pursue individual advantage by calculating costs and benefits, the analysis here demonstrates that influences on policy formulation can be *social* (Hurd 2008). The Constructivist lens thus illuminates a different, ideational aspect of the foreign policy process. Although Constructivism and Rationalism can be seen as complementary lenses (Fearon and Wendt 2002; Hurd 2008; Sharman 2009; Houghton 2012), in the case of the FCPA purely instrumental and rational considerations *would have led to a different outcome*. Social context—the strong resonance of the anti-corruption norm—was crucial to the history of the FCPA.

Second, the theory of legal reasoning offers insights into *how* norms matter in the formulation of foreign policy. Norms function like legal precedents in that they create social contexts in which deviations from the norm may legitimately be pursued only when justifiable reasons can be given. In a liberal democratic state, where policies must be publicly deliberated and justified, the need to give reasons can make some policies difficult to pursue, not because they are not preferred in an instrumental sense, but because they are *inappropriate* under the terms of shared norms.[10] As Keohane observes, "social norms do not act by themselves, but they both shape the conceptions of self-interest of agents and can be convenient, or inconvenient, as agents pursue their interests" (2009:14). Within the social structure of norms, Kubálková notes, "the scope of rational choice, and the meaning of what is rational, is re-cast. The structural conditions provide the social context within which agents find themselves and set the limits within which agents exercise judgment" (2001:56). While norms constitute the range of possible options available, the need to give reasons for violating them further constrains the range of choices available.

The Constructivist analysis of the FCPA also highlights the normative underpinnings of the contemporary international regime of anti-corruption. This regime, which emerged in the late 1990s (McCoy and Heckel 2001), arose from a concerted effort by the US government to resolve the FCPA's unilateral constraints by internationalizing the American anti-corruption norm. Recognizing the underlying norm-driven impetus of the FCPA as the condition behind the new regime enables a critical analysis of how a norm particularly compatible with American and neoliberal interests became the animating force in the contemporary global governance of corruption (Hindess 2005). Further research into the features and foundations of this norm in the American context could contribute to understanding the origins of the international regime, and the exercise of American power in this area.

Finally, recent trends in the enforcement of the FCPA, now in the context of the international regime, constitute further evidence of the lasting impact of American anti-corruption norm resonance on the course of world politics and global governance. Further research on the underlying motivations of recent patterns of US FCPA enforcement is needed; the underlying force of the anti-corruption norm that initially propelled the FCPA should not be overlooked in any explanation of contemporary US policy on foreign bribery and corruption.

[10] This argument runs parallel to similar arguments concerning the effectiveness of naming and shaming (Sharman 2009) and what Price has termed a "transnational Socratic method of reversing the burden of proof" (Price 1998), to induce compliance with international norms at the level of global politics.

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