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SYMPOSIUM

Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act and its impact on the global governance of corruption

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Abstract The USA vigorously enforces its Foreign Corrupt Practices Act (FCPA), increasingly on an extraterritorial basis. The application of the FCPA to persons and circumstances outside the territory of the US shapes international anti-corruption efforts in ways that may run counter to effective governance practices and meaningful anti-corruption reform in the global economy. This short essay explores three aspects of FCPA enforcement which detract from the broader goals of global anti-corruption governance: the narrow conception of corruption upon which the FCPA is based, the strategic trade frame which underlies the FCPA's internationalization, and the legitimacy problems these raise.

Keywords Extraterritoriality · Foreign Corrupt Practices Act · Global governance of corruption · Transnational bribery

Introduction

In the 1990s, a so-called "corruption eruption" brought the issue of corruption in the global economy to the forefront of international politics (Elliott 1996; Naím 1995). Since then, as governments, international organizations, civil society groups, business actors, and scholars have recognized the costs of corruption—particularly as it impedes market efficiency, economic growth, sustainable development, democracy, human rights, and political stability—the effort to control corruption in its many guises has become a primary focus of global governance. Dozens of international and regional treaties and agreements, transnational

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activist campaigns, and private sector initiatives now aim to stamp out corruption in the global economy (Gutterman 2016a).

The USA has been among the leaders of these developments from the beginning, using its *Foreign Corrupt Practices Act* (FCPA) as its principal vehicle. Enacted in 1977 and twice amended—in 1988 and 1998—the FCPA prohibits corrupt payments by individuals and companies to foreign government officials for the purpose of "securing any improper advantage" in obtaining or retaining business abroad. Jointly enforced by the criminal division of the Department of Justice (DOJ) and the enforcement division of the Securities Exchange Commission (SEC), the FCPA applies to any US person (individual or entity) and to any non-US persons with securities registered in the USA ("non-US issuers") and their employees engaged in proscribed acts outside the territory of the USA. In short, the FCPA bans bribery abroad by US persons and some non-US persons alike (Bartle et al. 2014; Gutterman 2015).

Over the past decade, FCPA enforcement has surged. US agencies have collected record fines and disgorgements of profits totalling more than $5 billion USD, exacted prison sentences of up to 15 years for individuals, and influenced anti-bribery enforcement in other jurisdictions (Gutterman 2016b; Kaczmarek and Newman 2011; Urofsky 2014). They have relied to an unprecedented extent on deferred prosecution (DPAs) and non-prosecution agreements (NPAs) to demand steep financial penalties and robust corporate compliance regimes from those suspected of foreign bribery, while avoiding costly trials (Thomas 2009; Wirz 2013). These diversion agreements have become essential to FCPA enforcement: since 2008 not a single corporate criminal action for FCPA violations has been concluded without a DPA or NPA in place. This surge in enforcement has also been accompanied by a marked escalation in the extraterritorial enforcement of the FCPA. Without judicial oversight the agencies have expanded the theories of jurisdiction upon which they base their claims of authority over bribery committed by foreign nationals outside the territory of the USA (Ashe 2005; Koehler 2014; Wilson 2014).

These enforcement trends have triggered extensive media analysis and legal scholarship devoted to the FCPA and its impact on business (Ashcroft and Ratcliffe 2012; Chaffee 2013; Deming 2011). Most of this literature expresses consternation that the SEC and the DOJ have become "overzealous" in this "new era" (Koehler 2014) of FCPA enforcement, which has sharply increased the risks of international commercial ventures (Isaacson 2014; Vardi 2010; Weissmann 2012).

Much less attention has been paid to the impact of FCPA enforcement on the global politics of controlling corruption. While a growing scholarly literature in political science, international relations, and international law addresses the problems of power, legitimacy, efficacy, compliance, and extraterritorial regulation in global governance (Avant et al. 2010; Brassett and Tsingou 2011; Hall and Biersteker 2002; Putnam 2009; Raustiala 2009), scholars have been slower to examine the global governance of corruption in particular (cf. Jakobi 2013). Given that the notion of "corruption" invokes standards of appropriateness in the global economy and that such practices as transnational bribery shape the distribution of money, legitimacy, power, and security in the world, corruption is a core problem in

international relations and US enforcement against bribery abroad is ripe for political analysis.

What is the impact of aggressive, extraterritorial FCPA enforcement on the global governance of corruption? On the one hand, FCPA enforcement can be read as a sign of laudable and necessary "US leadership in this area of global concern" (Rose-Ackerman 2013, p. 255). On the other hand, this essay argues, the application of the FCPA to persons and circumstances outside the territory of the US shapes and constrains international anti-corruption efforts in ways that may run *counter* to effective governance practices and meaningful anti-corruption reform in the global economy. This essay explores three aspects of FCPA enforcement which detract from the broader goals of global anti-corruption governance: the narrow conception of corruption upon which the FCPA is based, the strategic trade frame which underlies the FCPA's internationalization, and the legitimacy problems these raise (Gutterman 2016b). Before turning to this discussion, the next section briefly examines recent trends in FCPA enforcement. The article concludes with suggestions for further research.

US enforcement of the FCPA: recent trends

From 1977 to 1997, the DOJ and the SEC pursued a combined total of forty-four enforcement actions against corporations and individuals for FCPA violations—an average of two per year.[1] From 1998 to 2003, after the FCPA's norms became internationalized in the OECD's Convention against transnational bribery (OECD 2011), the USA gradually increased enforcement, while its OECD partners focused on monitoring one another's implementation of new anti-bribery rules. Then, starting in 2003, US enforcement of the FCPA dramatically intensified. From 2003 to 2013, the DOJ and the SEC concluded 166 FCPA enforcement actions, representing a five-fold increase over the average annual rate of enforcement of the previous 25-year period. To date, this trend continues.

A number of corporate cases have proved particularly headline-grabbing. In 2008, the German multinational Siemens paid $800 million in fines and penalties for FCPA violations in its widely covered foreign bribery scandal (Schubert and Miller 2008; US Department of Justice 2008). Other prominent cases include enforcement actions against Halliburton/KBR ($579 million) in 2009; Technip ($338 million) and BAE Systems ($400 million) in 2010; JGC Corp ($218 million) in 2011; and Total S.A. ($398 million) in 2013 (Koehler 2013a; US Department of Justice 2010). The DOJ also increased enforcement against individuals, implicating 142 individuals in 59 FCPA enforcement actions; forty-five individuals were criminally sentenced to probation or to prison sentences ranging from 9 months to 15 years.

[1] Figures in this section are drawn from Shearman and Sterling LLP's "FCPA Digest of Cases" (Urofsky 2014); US Department of Justice (DOJ 2014); US Securities Exchange Commission (US SEC 2014); and the author's previously published calculations (Gutterman 2016b).

Individuals guilty of FCPA violations were also charged over $180 million in penalties, with an average individual fine or penalty of $32 million.

Perhaps most notably, the DOJ and the SEC also increased enforcement actions against non-US entities and individuals. Since 2003, more than a third of enforcement actions against individuals have been against foreign defendants and 40 per cent of those against corporations—including some of the most notable actions yielding the greatest fines—have been against foreign issuers. Between 2003 and 2013, 37 per cent of all foreign bribery actions and investigations by the US involved a company headquartered outside the USA or an individual employed or retained by such a company. Prominent cases against the Swiss firm Panalpina (Koehler 2016), Germany's Siemens (US Department of Justice 2008), and the UK's BAE Systems (US Department of Justice 2010), all involved non-US companies engaging in proscribed behaviour outside the USA.

While it is clear that domestic concerns are subject to the FCPA by virtue of nationality, SEC issuers by the terms of the statute, and foreign entities due to the territoriality principle for acts committed in the USA in furtherance of a violation, since 2012 the DOJ and SEC have also asserted jurisdiction over any foreign national or company that "aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the USA" (US DOJ and US SEC, 2012, p. 21). This jurisdictional claim apparently exceeds what the language of the statute actually allows (Casino and Maberry 2013). However, given their reliance on diversion agreements—which preclude the development of case law and judicial oversight that might limit the statue's reach—the enforcement agencies are broadening the FCPA's extraterritorial reach.

In 2013, the French firm Total SA paid the third largest settlement in FCPA history ($398 million) in a case with only a tenuous territorial connection. The case involved improper conduct alleged to have occurred between 1995 and 1997, during which time the French oil and gas company allegedly bribed an Iranian official through use of an employee of a Swiss private bank and a British Virgin Islands company. The sole US nexus (the required legal element for an anti-bribery violation, since Total is a "foreign issuer") was a 1995 wire transfer of $500,000 (representing less than 1 per cent of the alleged bribe payments at issue) from a New York-based account (Koehler 2013a, b).

In addition, a 2013 decision of the US District Court for the Southern District of New York—concerning an FCPA case against three Hungarian former executives of Magyar Telekom—held that email messages in furtherance of a bribery scheme "from locations outside the USA [and to recipients also outside the USA] but routed through and/or stored on network servers located within the USA" (Sullivan 2013) were sufficient to trigger the jurisdiction of the court to hear the case, whether or not the defendants had the intention of using any US means or instrumentalities of interstate commerce in furtherance of their bribery scheme. This accords with the DOJ position that minor or pass-through acts such as emails or wire transfers through American correspondent bank accounts are sufficient to establish jurisdiction, even if the money is not knowingly or intentionally routed to the USA and does not remain in the USA for a significant length of time (Ross 2012). In sum, the US

government has established that it intends to assert jurisdiction over foreign defendants accused of bribery, aiding and abetting bribery, or conspiracy to bribe, even when the defendants themselves may not be directly implicated in acts of bribery per se (Urofsky 2014, p. x).

It may be that in enforcing on an extraterritorial basis the government expects companies to settle with diversion agreements rather than test the limits of the government's jurisdiction in court (Casino and Maberry 2013). Thus it stands that, although US courts up to and including the Supreme Court have been *limiting* the extraterritorial application of US law in recent cases such as *Morrison v Australia National Bank, Ltd*. in 2009 and *Kiobel v Royal Dutch Shell Co.* in 2013 (Bright 2013; Stephan 2013), the ambit of FCPA enforcement remains one of *expanding* extraterritoriality in which US anti-corruption law reaches farther and farther into global regulatory environments and into other sovereign jurisdictions.

What is the impact of FCPA extraterritoriality on the global governance of corruption?

Ironically, although US-based experts bemoan vigorous FCPA enforcement as a constraint on commercial enterprise, closer scrutiny reveals that the FCPA *promotes* US commercial interests—in ways that may hamper the global governance of corruption. Three aspects of FCPA enforcement challenge the broader goals of global anti-corruption efforts: the narrow conception of corruption upon which the FCPA is based, the strategic trade frame that underlies the FCPA's internationalization, and the legitimacy problems these raise.

Narrow conception of corruption

To the extent that the chief instrument of US leadership in the global governance of corruption is FCPA enforcement, it is limited to one specific aspect of corruption: bribery in international business transactions. The FCPA prohibits any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person,

> while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person (FCPA, §30A (a) 3).

While transactional bribery is the most basic and universally recognized manifestation of corruption around the world (Noonan 1984), it is one slice of the complex patterns and myriad forms of corruption that affect the daily lives of ordinary people. Broader, network-based patterns of corruption—such as kleptocratic regime practices, including outright theft from the public treasury by

governing elites; the infiltration of official bodies by organized crime; election-rigging; illicit political campaign finance; and various other forms of police, judicial, political, and business corruption—do not always manifest in explicit *quid-pro-quo* transactions.

In the Elf-Aquitaine scandal in France in the 1990s, for example, elite social networks linked members of the French political class in formal and informal relationships and permitted both legitimate and illegitimate pursuits within established institutions. Policy networks comprised of graduates of the elite French postgraduate schools overlapped with elite business and social networks. Illicit networks of associates across these spheres became nested within legitimate associations, enabling corruption in France to occur on a grand scale—not always through explicit transactional bribery (Heilbrunn 2005).

In other contexts social networks based on primary interpersonal relationships such as family, kinship, and ethnicity slant officials' exchanges and communications and shape their norms to favour close relatives and other groups or individuals over the interests of the general public (Holt 2012; Khan 1998). Social networks based on secondary relations such as professional and religious ties produce non-transactional corruption in countries with more advanced bureaucracies. *Guanxi* networks in China, for example, indicate the presence of direct, particularistic ties between individuals or organizations that draw on underlying moral principles derived from the Confucian heritage—hierarchy, interdependence, and reciprocity—to fill in governance gaps during periods of uncertain transition, relative disorder, and social inequality (Zhan 2012). *Guanxi* and social networks like it often override the norms and desired outcomes of formal institutions and produce corruption without specific bribery transactions. In such cases, anti-corruption policies that do not take into account the informal institutions of society that may sustain corruption—cultural practices, norms, or various types of social network—are doomed to fail.

In sum, corruption is not always as obvious as the payment of money in exchange for services rendered or "the abuse of entrusted power for private gain." (Transparency International 2018) It can occur in much more subtle (and also deeply societally entrenched) ways involving longstanding relationships of mutual benefit, exchanges of favours among people in advantageous positions, and expectations of reciprocity within ongoing relationships maintained by exclusive networks of trust, both licit and illicit.

Through its embrace of a narrow conception of corruption as transactional bribery and its focus on discrete incidents of bribery, FCPA enforcement singles out specific actors and instances of corrupt transactions rather than tackling the embedded networks and practices in which opportunities for corruption are cultivated both locally and in the global economy writ large. Corruption in international commercial activity entails multiple sets of connected transactions, processes, and relationships that unfold within a variety of transnational networks—both licit and illicit—and they are rarely isolated instances (Cooley and Sharman 2013). For all its vigour, FCPA enforcement challenges none of the practices of transnational corruption networks. Rather it "stovepipes" (Garrett 2007) anti-corruption resources towards a narrow focus on transnational business bribery, ignores the broader, networked practices in which bribery transactions are embedded and in which US actors often are

complicit, and prevents the emergence of a global approach to curbing corruption in its many forms.

The strategic trade frame

In addition to its narrow focus on bribery transactions, FCPA enforcement is shaped by strategic trade concerns rather than anti-corruption concerns. Taking a view of trade as competitive and not a source of mutual gain, strategic trade policies pursue national power through increased income at the expense of competing states (Busch 1999; Krugman and Smith 1994; Walzenbach 1998). For decades prior to the "corruption eruption" of the 1990s, state support for transnational bribery through tax deductibility or the public characterization of bribery as a normal business practice functioned as a crucial prong in the toolkit of export promotion and strategic trade among major trading states (Milliet-Einbinder 2001).

Viewed through the strategic trade lens, the international regime of anti-corruption is an attempt by the USA to internationalize specifically American norms concerning the conduct of international business, which first took shape in the FCPA (Gutterman 2015). For years following the enactment of the FCPA in 1977, US businesses saw themselves at a disadvantage in the global market for such bribery-prone transactions as those for arms and defence-related technology and for big-ticket sales of goods in the aerospace, telecommunications, energy and construction sectors (Transparency International 2013). In the strategic trade frame, FCPA enforcement is a US response to other states and their firms' longstanding and routine recourse to bribery in competitive export markets. The key point is that the central purpose of FCPA enforcement is to ensure competitive access to global markets by US firms—not to control corruption more generally. It is an effort to level the playing field for US-based multinationals by enforcing a standard set of US-led global regulatory rules, rather than a credible or efficacious policy of anti-corruption. In sum, FCPA enforcement reflects US interests and not those of the millions of people around the world who are in desperate need of credible and effective strategies to curb the damage of complex corruption problems.

Legitimacy

The strategic trade analysis of transnational bribery raises a third point about the way in which US enforcement of the FCPA shapes and constrains not just the efficacy of the global regime of anti-corruption, but its legitimacy as well. Legitimacy problems raise complicated questions about power, democracy, ethics, and justice that are often glossed over in global governance, as the most powerful states—and the non-state actors of which they approve—tend to set the agenda and shape the rules for international action. As scholars of global governance interrogate the sources of political legitimacy beyond the state, legitimacy remains a central concern in ongoing debates about reforming global governance for greater effectiveness, accountability, and justice (Bernstein 2011; Brassett and Tsingou 2011; Gutterman 2014).

With respect to the global governance of anti-corruption, FCPA enforcement raises two sets of legitimacy concerns. First, are the norms, rules, and principles of international anti-corruption efforts right, correct, and appropriate? Are the makers of these rules right and appropriate in making them? Is it appropriate to rely on powerful states, private governance, and firm-led compliance promises to deliver results and expectations concerning the control of corruption? Other authors have noted that the use of corruption indicators such as the country-ranking system of Transparency International functions as a technology of governance and power (Davis et al. 2012; Löwenheim 2008). Similarly, US enforcement of the FCPA in the global regulatory environment can be read as an exercise in hegemonic power. Rather than applauding FPCA enforcement as a boon for global anti-corruption efforts, scholars and practitioners should probe more deeply into the normative implications of US leadership in this area—driven as it has been by US strategic interests and particularly American norms of international business regulation.

A second set of legitimacy concerns arises out of the impact of FCPA enforcement on the centralization of global regulation, which international law scholars suggest may be contrary to fairness and global justice (Dunoff and Trachtman 2009). There is a powerful trend towards centralization in international business regulation and international law generally, which invites an examination of global enforcement regimes. In the emerging area of Global Administrative Law (GAL), for example, scholars are noting how increasingly developed, overlapping sets of diverse mechanisms of global regulation have become important to the strengthening—or erosion—of legitimacy and effectiveness in a range of governance regimes. GAL has become a focus for examining the extent to which global regulatory regimes meet sufficient standards of transparency, consultation, participation, rationality, and legality, and provide effective review of global rules and decisions (Kingsbury et al. 2005). A similar analysis of the global anti-corruption regime is needed. To the extent that the global regime of anti-corruption is today almost completely driven by unilateral US enforcement of the FCPA, this pattern should be scrutinized by the legitimacy standards established by GAL scholars and assessed on the basis of how it functions to shape markets and legal norms in global business regulation and anti-corruption policies alike.

Conclusion

US enforcement of the FCPA reflects specifically American political imperatives. It offers the veneer of leadership but very little efficacy to curbing corruption on a global scale or to reducing in a meaningful way the harmful effects of corruption in the daily lives of ordinary people around the world. And yet extraterritorial enforcement of the FCPA by the USA remains a crucial component of the global governance of corruption in the twenty-first century. For scholars wishing to better understand the global governance of corruption, further research on the FCPA is needed.

Important questions remain about the drivers of US anti-corruption policy. In addition to the strategic trade considerations discussed above and system-level explanations such as the rise in global crime governance in general (Jakobi 2013),

several explanations grounded in domestic US politics suggest themselves. Recent trends in FCPA enforcement may be a function of stricter controls in the domestic regulatory environment more broadly, such as the 2002 Sarbanes–Oxley Act which requires public disclosure of "material events" including potential acts of bribery (US Congress, 2002). In a time of tight budgets, FCPA enforcement may be a lucrative revenue-generating strategy for US agencies (Koehler 2013b; Perlis and Chais 2009; Prager 2012). Other possibilities include the existence of "a thriving and lucrative anti-bribery complex" that produces FCPA enforcement actions within a self-interested system of consultants, professionals, and anti-bribery compliance experts who profit from a perpetual need of their services (Vardi 2010). In a more critical vein, one might conjecture that this lucrative anti-bribery complex also serves as a convenient strategy of public distraction in a time of systemic crisis (Podgor 2011). To the extent that extraterritorial enforcement of the FCPA may be driven by such factors particular to the US context, the impact of FCPA enforcement on the global politics of corruption deserves further scrutiny.

For scholars of international law and international relations, FCPA enforcement also raises questions about extraterritorial jurisdiction across issue areas. As the US Supreme Court has been scaling back extraterritorial jurisdiction driven by private litigants—the recent Morrison (securities law) and Kiobel (human rights) cases, for example—why have government agencies enforcing the FCPA been expanding its jurisdictional scope to include non-US-based activities by non-US actors? Why does US policy evince an intense focus on bribery and corruption, but a reluctance to promote extraterritorial application of human rights laws, labour standards, environmental regulations, and other areas?

The application of the FCPA across borders is a function of state interests and state power. By extending the scope and reach of US domestic legislation into the global regulatory environment and into other sovereign territories, this practice raises broader questions about power, legitimacy, efficacy, and national interest in global governance and International Relations, generally. Implicating as it does competing claims to authority and challenges to state sovereignty, extraterritoriality in US anti-corruption enforcement remains an important topic for further study.

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