Coordinating Self-enforcement of National Actors against Transnational Bribery

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The enactment of the FCPA and the formation of the OECD Anti-Bribery Convention created two historical events for theoretical analysis: because the FCPA unprecedentedly criminalized transnational bribery in 1977, its wisdom was initially questioned. Then, since the Convention endorsed the FCPA approach in 1997, academic focus was shifted to the practical effect of the Convention in controlling transnational bribery—which is also the topic of this study.

This study develops argument based on an awareness of the limitation of a popular methodology in current literature—the *problem-solving* paradigm. This paradigm is grounded in the rational-choice tradition, assumes signatories' enforcement of the Convention as resulting from their self-serving purposes, labels the current level of Convention enforcement as "ineffective-enforcement", and borrows solutions from conventional collective action theories to prescribe. This paradigm well explains why most signatories have brought few enforcement actions. Yet its excessive commitment to orthodoxies prevents scholars from grasping the uniqueness of the collaboration and prescribing successful solutions. Besides, it avoids explaining why some signatories have indeed enforced the Convention. A historical approach that draws causality from a process's historicity is thus proposed as a supplementary methodology.

This study analyzes signatories' compliance with the Convention by four steps: First, it explains a seemingly outdated but unexplained question—the dynamic of the institutionalization of the OECD anti-bribery collaboration, and finds that the central institutions did not result from signatories' trading off conflicting values and interests, but from their attempts to coordinate demands of different stakeholders within given institutional contexts.

Second, this study explains why most signatories tend to defect rather than faithfully enforce the Convention, following the logic of the *problem-solving* paradigm: destabilizing factors in the indigenous collaboration encourage defection in the first place, and the monitoring program in the collaboration fails to resolve these destabilizing factors in the second place. More fundamentally, the surreptitious nature of transnational bribery fails central monitoring—a conventional effective solution to collective action problems.

This study then formulates a three-level solution model to address the monitoring problem: first, this model encourages private sector actors to report clues of transnational bribery so as to resolve the lack of first-hand information. Second, given the weakness of private sector actors in collecting solid evidence, this model stresses the dominant role of national prosecutors in the home country of

bribe-paying companies to conduct in-depth investigations. Third, given that prosecutors may shirk duty because of protectionism, this model suggests to authorize prosecutors in the home country of victimized competitors the right to monitor the investigation process.

Forth, this study takes the US as an example to analyze the positive side of Convention enforcement. Given that FCPA enforcement is embodied in the SEC and the DOJ's independent performance of their own statutory duties, this study reviews variation in the SEC and the DOJ's enforcement efforts in past decades, and finds that this variation results from their adherence to their own missions in an evolving institutional context—which gradually incorporates their duties of enforcing the FCPA into their central missions.

摘要

美国的《反海外贿赂法》和世界经合组织的《关于反对在国际商务活动中贿赂外国公务人员行为的公约》(《公约》) 为学界提供了两个重要课题:《反海外贿赂法》开创性地将跨国商业贿赂规定为犯罪,其合理性曾饱受质疑;《公约》将《反海外贿赂法》的精神推广到其他国家后,学界进而关注其执行效果,并提供政策建言—此亦是本文的论题。

本文的论述建立在对学界的“问题导向型”研究范式批判继承的基础之上:该范式植根理性主义传统,假定国家决策的自利属性,将《公约》的执行现状拟制为“非有效执行”,并试图从传统集体行动理论中借鉴对策。该范式阐释了为何多数缔约国执行《公约》乏力。然而其过于依赖传统理论,忽略《公约》项下集体行动的独特性,难以找准对策。同时该范式完全回避解释少数缔约国认真履约的现实。因此,本文在肯定该范式的理论贡献之上建议采用历史分析方法,从《公约》执行实践中总结经验,以为补充。

本文首先分析了《公约》项下反贿赂集体行动的制度化进程,发现《反海外贿赂法》和《公约》等核心制度的产生并非源自各缔约国对利益和价值的权衡取舍,而是立法者在既定的社会制度和价值体系中协调各主体的利益关切的必然选择。随后,本文立足于 “问题导向型”范式的理论成果,阐释了大部分缔约国不执行《公约》的原因:反贿赂集体行动存在着诸多结构性不安定因素,而《公约》项下的监督体制未能克服相关问题。《公约》项下集体行动问题需要系统的、三层次的应对模式:鼓励私人主体提供贿赂案件的原始线索;将私人主体获取原始线索的优势和公权力搜集确凿证据的优势整合;赋予受损的竞争者的母国对调查取证的参与权,促成缔约国相互监督。最后本文分析了美国日益激进的战略,发现其对《反海外贿赂法》的执行力度随着执法部门的执法义务和本部门中心任务的逐渐兼容而得以加强,其轨迹不同于理性主义对国家行为逻辑的预测。美国的激进战略客观上造就了国际规制竞争,为提高公约执行水平提供了新路径。

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CONTENTS

Chapter I: Topic & Methodology[1]

1. Introduction

1.1 The Current Topic for Transnational-Bribery Regulation Analysis

Transnational bribery, sometimes called "international corruption", [2] "extraterritorial payment of bribes",[3] "overseas bribery",[4] or "bribery of foreign public officials",[5] generally refers to one country's nationals or entities paying bribes to foreign public officials in international business transactions. The acts of transnational bribery often take place in the home country of bribe payees, and the bribe payers often (although not necessarily) seek to gain or retain business opportunities.

Many jurisdictions had criminalized domestic corruption separately in their own history.[6] However, transnational bribery used to be a legal business activity that

[1] A similar version of this Chapter titled "The Global Anti-Bribery Collaboration in Evolution: A Systemic Analysis of Historical Puzzles and Key Contemporary Questions", will be published in *Journal of Financial Crime*, 2014.

[2] Magnuson calls it "international corruption", and describes that "international corruption, as opposed to domestic corruption, occurs when a national of one country bribes a government officials of another country." Magnuson (2013: 369).

[3] E.g., Salbu (1997: 233).

[4] E.g., Tarullo (2004: 673).

[5] According to the definition of Article 1 of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, transnational bribery is called "bribery of foreign public officials" and is defined as acts of "any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." OECD (1997a: Article 1).

[6] For example, the US's anti-corruption initiatives can be traced to at least in 18th century. The US's enactment of the False Claims Act of 1863—a law about private enforcement of public law—was in essence an effort to overcome the difficulty in detecting governmental

enjoyed tax deduction until middle 20th Century.[7] The criminalization of transnational bribery around the world was a recent event,[8] marked by two milestones: (a) in 1977, the US enacted Foreign Corrupt Practices Act ("FCPA"), which for the first time in human history took acts of transnational bribery as criminal offense;[9] and (b) in 1997, 34 countries (including the US) signed the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions ("OECD Anti-Bribery Convention"),[10] which internationalized the FCPA approach.[11] Among a series of international treaties on like theme launched since the 1990s, such as the OAS Inter-American Convention against Corruption, the EU Convention against Corruption 1997, and

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corruption. See Carrington (2010: 149). For detailed discussion on history of the False Claims Act of 1863 see Chapter V, 3.2.1. The United Kingdom's anti-corruption initiatives can be traced to at least 1769. Other European countries also had had anti-bribery laws for centuries before their criminalization of transnational bribery. See Schmidt (2009: 1125). For further discussion see Nichols (2000: 650-655), Davis (2002: 315-316), Johnstone & Brown (2004), and Schmidt (2009: 1126).

[7] The US abolished tax deduction policy for transnational bribery in 1958. For detailed discussion on the history of the US's changing tax policies on transnational bribery see Chapter II, 2.1.1. For the OECD rules banning the tax deductibility of transnational bribery see OECD (1996). For information on when and how countries other than the US abolished tax deduction policies for transnational bribery see *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

[8] See Schmidt (2009: 1125).

[9] As Magnuson states, "The passage of the FCPA marked a watershed moment in the history of anti-corruption legislation. Before 1976, countries had fought corruption through purely domestic anti-bribery laws: they prohibited individuals from paying bribes to their own government officials. With the FCPA, however, the United States became the first country to adopt an international approach to fighting corruption, one in which they prohibited domestic concerns, and later foreign individuals, from bribing *foreign* officials…The United States stood largely alone in this effort until a multilateral treaty, the OECD Anti-Bribery Convention, was concluded in 1998." Magnuson (2013: 383). For a detailed discussion on the historical background of the enactment of the FCPA see Koehler (2012). For a detailed discussion on the dynamic of the enactment of the Foreign Corrupt Practices Act of 1977 see Chapter II, 2.

[10] OECD (1997a). For a detailed discussion on the dynamic of the formation of the Convention see Chapter II, 3.

[11] Almost all western industrialized countries signed the Convention before or around 2000. As of June 2014, there are 41 signatories to the Convention. See OECD Press Release "Status of Ratification", available at: http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf, (last visited: 12 June 2014).

the UN Convention against Corruption 2003,[12] the OECD Anti-Bribery Convention is the central governing legal instrument with the strongest enforcement. For this reason, this study takes the formation of the OECD Anti-Bribery Convention as the landmark of the internationalization of the FCPA approach.

The creation and internationalization of the FCPA approach raised two questions for theoretical analysis. First, the FCPA is an anti-corruption initiative which unprecedentedly relies on supply-side control of corruption and extraterritorial enforcement of criminal law, and as such its wisdom has been questioned.[13] Academic attention used to focus on the nature of transnational bribery (e.g., its deleterious effects on social life), the legitimacy of regulatory tools (e.g., supply-side control of bribery) and the externalities of the anti-bribery initiative (e.g. its impact on one country's business interests in foreign markets). Relevant academic literature gave both liberal and realist explanations of why the FCPA should be retained or repealed.[14] Then, attributed to the efforts of governments, non-governmental organizations ("NGOs") and scholars, the wisdom of the FCPA-style approach was called into question less since the 2000s. Academic focus was shifted to signatories' domestic enforcement of the OECD Anti-Bribery Convention: by 2014, the OECD Anti-Bribery Convention has been enforced for over 15 years. Its practical effect in controlling transnational bribery is a question often studied by scholars.[15]

The central mission of the present-day analysis of global regulation of transnational bribery is to explain the status quo of signatories' domestic

[12] See e.g., OAS (1996), EU (1997), and UN (2003). All of these agreements have provisions about transnational bribery regulation. For a more detailed discussion see Chapter II, 3.1.3.

[13] For a discussion on questions on this subject matter see Chapter I, 2.1.1.

[14] For answers of current literature to these questions see Chapter I, 2.1.2, and Chapter II, 2.2.

[15] For a discussion on this shift in academic attention see Chapter I, 2.3.

enforcement of the OECD Anti-Bribery Convention and prescriptively provide policy recommendations to improve the efficacy of signatories' domestic enforcement of the Convention.

This study is no exception. For this work there are two caveats: First, as previous literature has given a more than elaborate explanation of ***why*** we should regulate transnational bribery, my study only focuses on ***how*** to realize this goal, taking the legitimacy of the activity as a given premise. Out of the path-dependence of scholarship, this study has to frequently revisit early debates on the wisdom of the FCPA-style approach. However, this work only comes to serve the interpretative and prescriptive analysis of signatories' domestic enforcement of the OECD Anti-Bribery Convention in the discourse of this study.

Second, this study focuses systemically on general characteristics of signatories' domestic enforcement of the Convention, rather than an *ad hoc* analysis of any specific signatories. Even though it sometimes highlights special cases — for example, Chapter V conducts a case study of the US's enforcement of the FCPA, in which US's treaty obligations under the OECD Anti-Bribery Convention have been incorporated — the purpose of this kind of work is to draw generally applicable experience. This stance is taken because of two considerations: on the one hand, transnational bribery regulation is inherently of international relevance. We cannot understand it deeply until we understand it systemically. On the other hand, although the OECD Anti-Bribery Convention has been enforced for 15 years (as of 2014), given the revolutionary nature of such regulatory efforts, both practice and theory on this topic remain in a primary stage so that a systematic analysis can set a baseline for future work on an *ad hoc* basis.

1.2 The Standard Analytical Model: the *Problem-Solving* Paradigm

At the beginning of a systemic analysis, one needs to define the analytical

question. Defining analytical questions is a vital but difficult part of any theoretical analysis because the posed question means more than setting the logical starting point of one's argument. The posed question epitomizes a scholar's preconception of the subject matter and orients the selection of methods. In a prescriptive analysis of how to systemically improve signatories' domestic enforcement of the OECD Anti-Bribery Convention, the way one poses the question often reflects how one has portrayed the status quo of the enforcement of the Convention. For example, a question such as "why did the apparent commitment of signatories to combat corruption dissipate after the international agreements were signed?"[16] reflects one's preconception that signatories' showed positive performance in the stage of establishing the Convention but negative performance in the stage of enforcing the Convention. These preconceptions are not often employed explicitly, but serve as underlying forces orienting one's analysis into different lines of logic. It is no exaggeration to say that the most significant difference among academic arguments on the same subject matter frequently lies in the questions they pose.[17]

With an awareness of this operational assumption, we can realize how current scholarship on the enforcement of the OECD Anti-Bribery Convention describes questions biasedly from a single perspective. The standard analytical model in current literature is a normative analysis which portrays the status quo of signatories' domestic enforcement of the OECD Anti-Bribery Convention as suffering a problem of "ineffective enforcement"[18], causally attributes the problem of "ineffective enforcement" to flawed institutional setting (e.g.,

[16] As Tarullo puts it, "The ineffectiveness of the arrangements raises the question of why the apparent commitment of state and non-state actors to combat corruption dissipated after the international agreements were signed." Tarullo (2004: 666).

[17] For discussion on the importance of posing questions see Keohane (1989: 29). For discussion on how preconceptions affect questions posed see Robinson (2011: 88).

[18] See Tarullo (2004: 680). This "problem" is also phrased by Heimann & Dell (2010: 8) as "lagging enforcement" or "under-enforcement" by Magnuson (2013: 388).

ineffective monitoring),[19] and then purports to overcome the problem through institutional improvement.[20] So many academic works on the enforcement of the OECD Anti-Bribery Convention are fitting under this critical approach that the divergent forms of the questions they have posed and answered only reflect the great inclusivity of this single perspective for scholars to study the enforcement of the OECD Anti-Bribery Convention.

In this study, I style this analytical model that starts its analysis by formulating the current level of Convention enforcement as "ineffective" as a *problem-solving* paradigm. The term *problem*, in a general sense, connotes the existence of a gap between a real situation and a desirable ideal one. The term *problem-solving* refers to an attempt to span the gap between the real situation and the desirable one.[21] And the term of *paradigm* refers to an accepted framework of assumptions and rules following which scholars ask and answer questions.[22] In the discourse of this study, the *problem-solving* paradigm refers to a generalized analytical model employed by a large group of scholars in their explanation of and prescription for signatories' collective enforcement of the OECD Anti-Bribery Convention during the past years. Based on scholars' common preconceptions of how the OECD Anti-Bribery Convention should have been enforced,[23] a *problem-solving* analysis portrays the status quo of the enforcement of the Convention as below expectation, attributes this gap between reality and expectation to the existence of "problematic" institutional settings, and then seeks to span this gap by amending the problematic institutional settings.[24]

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[19] See Tarullo (2004: 680-689). Also see Chapter I, 4.1 and Chapter III, 2 &3.

[20] See Chapter I, 4.2, Chapter III 4, and Chapter IV.

[21] See Savranshy (2000: 3).

[22] See Robinson (2011:88).

[23] For a discussion on how the preconceptions of how the Convention should have been enforced shaped the way people explain the status quo see 2.3 of Chapter I.

[24] The article of Professor Tarullo titled *the Limits of Institutional Design: Implementing the*

1.3 The Necessity of a Reexamination of the *Problem-Solving* Paradigm

For the purpose of analyzing the dynamics of the enforcement of the OECD Anti-Bribery Convention on an international level, this *problem-solving* paradigm that emphasizes the gap between reality and expectation, enables people to borrow wisdom from existing knowledge to identify problematic institutional settings and prescribe solutions. However, after over a decade's research practice, this *problem-solving* paradigm turns out to have contributed far fewer successful solutions than it expected.[25] On the one hand, the excessive collective action theory focus of the current *problem-solving* literature created by economists and political scientists in the 20th century[26] merely addresses one level of interactions among signatories. This simplistic analytical approach is good at describing the "collective action problem" signatories confront but fails to prescribe effective solutions to address the problem. In order to release the full potential of the *problem-solving* paradigm in prescription, there is a need to restructure the specific problem-solving methods applied by current *problem-solving* literature. On the other hand, the *problem-solving* paradigm which prejudges the current level of Convention enforcement as "ineffective" avoids drawing inspiration from a few signatories' zealous enforcement against transnational bribery, it does not enable a comprehensive understanding of its object.

This introductory chapter discusses the methodology for a systemic study of the

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OECD Anti-Bribery Convention is a perfect example of the *problem-solving* paradigm: Section II of the article introduces the establishment of the OECD Convention; Section III labels the enforcement of the OECD Anti-Bribery Convention as "ineffective" and causally attributes the problem; and Section IV searches institutional solutions to this problem. See Tarullo (2004).

[25] For a skeptical view of the solutions prescribed by the problem-solving paradigm see 3.2.3 of Chapter I.

[26] See Chapter I, 3.2.

enforcement of the OECD Anti-Bribery Convention by analyzing the formation of the *problem-solving* paradigm and its theoretical functions (and limits). This work does not negate the academic contributions of current *problem-solving* scholarship in interpreting the status quo of the enforcement of the OECD Anti-Bribery Convention, but rather seeks to optimize the specific *problem-solving* methods so as to release the full potential of the *problem-solving* paradigm in prescribing effective solutions. Then, given that the problem-solving paradigm is inherently unable to explain why a few signatories have indeed enforced the Convention effectively, this Chapter seeks to develop an alternative analytical model that breaks away from the popular preconception about "ineffective Convention enforcement" and draw inspirations from actual experience. Thus the objective of this Chapter is twofold: to optimize specific problem-solving methods under the *problem-solving* paradigm, and to develop an alternative paradigm to supplement (but not to negate and replace) the *problem-solving* paradigm.

An analysis of the *problem-solving* paradigm requires most of an entire chapter because detailed analysis is required to enable us to grasp how our preconceptions enslave our perspective to the study of the enforcement of the Convention. Many deep-seated beliefs that we hold about transnational bribery regulation (e.g., our preconception of what makes the FCPA approach wise, and how should the Convention be enforced) have oriented most of present prescriptive analyses to a *problem-solving* paradigm. They are so deeply embedded in the thinking of scholars, practitioners and ordinary people that we cannot legitimately take a different approach without penetrating deeply into its genesis and development, and laying bare its structural and functional limits. It is therefore the stubbornness of habitual thinking that necessitates the work of this chapter.

1.4 Outline of this Chapter

The structure of this Chapter is as follows: Section 2 analyzes the formation of the *problem-solving* paradigm which is based on the theoretical outcomes of scholars' decades-long analysis of why and how transnational bribery should be regulated. Section 3 extracts components (i.e. fundamental assumptions, theoretical resource, reasoning logic, and possible conclusion) of the *problem-solving* approach in current literature. Section 4 reveals the virtue of the current *problem-solving* approach in explaining why most signatories did not enforce the Convention effectively, and the failure of the *problem-solving* approach in current literature in prescribing effective solutions. To resolve this limitation, it suggests that the *problem-solving* approach in current literature should be restructured. Then, Section 5 discusses the possibility of developing an alternative paradigm to explain the developmental reality in leading jurisdictions, a blind area beyond the reach of a *problem-solving* paradigm. This alternative paradigm would no longer portray the current level of Convention enforcement as ineffective, but encourage a positive analysis of the developmental reality of Convention enforcement. Section 6 outlines the structure of the rest of this thesis.

2. The Formation of the *Problem-Solving* Paradigm

Academic scholarship is path-dependent. The genesis and development of the *problem-solving* paradigm can trace its ideological and theoretical origins in early scholars' interpretations of the wisdom of the FCPA approach — i.e., why national actors have come to regulate transnational bribery. Their answers to this question in past decades have aggregated to the intellectual foundation of the current *problem-solving* paradigm. With this awareness, in this Section I trace how the *problem-solving* paradigm took shape in past decades. In particular, how anti-bribery scholars have developed the *problem-solving* paradigm gradually on the basis of early interpretations of the wisdom of the FCPA approach.

In general, there are four major phases of the historical trajectory of academic progression on transnational bribery regulation which characterize the formation of the *problem-solving* paradigm as a dominant approach to the contemporary study of the enforcement of the OECD Anti-Bribery Convention:

(1) The first phase: scholars gained academic insights into the wisdom of the FCPA approach. After the enactment of the FCPA in 1977, people needed to make sense of such an unprecedented anti-bribery approach. So scholars came to offer personal explanations of the wisdom of the FCPA approach from divergent perspectives based on their different presumed answers to the question of "what made the FCPA wise (or unwise)".[27]

(2) The second phase: academic insights were transformed from personal views to public beliefs. Scholars' explanations of the wisdom of the FCPA approach gradually won public acceptance. These broadly-accepted beliefs began to navigate public attitudes toward a new round of policymaking. Against this background, There was a broad consensus that the FCPA approach should be internationalized and the OECD Anti-Bribery Convention was created.[28]

(3) The third phase: after the creation of the OECD Anti-Bribery Convention, those public beliefs evolved into informed observers' preconceptions of how the Convention should be enforced in a new context. A general consequence of this logic is that current level of Convention enforcement is ineffective; and the institutional setting of OECD anti-bribery collaboration is problematic.[29]

(4) The fourth phase: As a product of the academic path dependence described above, a *problem-solving* paradigm, with a set of similar assumptions on how

[27] For detailed discussion see Chapter I, 2.1.

[28] For detailed discussion see Chapter I, 2.2.

[29] For detailed discussion see Chapter I, 2.3.

should the Convention have been enforced, the same tendency to resort to orthodoxies of anti-corruption literature and collective action wisdom is formed. This standard paradigm has characterized a significant part of current scholarship in this issue-area.[30]

2.1 Phase 1: Academic Insights to the Wisdom of the FCPA Approach

2.1.1 Ideology-Shaped Perspectives

A review of previous literature reveals that scholars used to take a variety of perspectives to interpret the wisdom of the FCPA approach. After the US enacted the FCPA in 1977 as a response to a series of cases in which US companies bribed foreign officials, the FCPA challenged people's conventional understanding of anti-bribery approaches in at least three ways:[31]

First, the transformation of the legal status of transnational bribery needed an explanation: transnational bribery used to be an acceptable business activity which even enjoyed tax deductibility in the US, but was criminalized by the FCPA. The dramatic change of attitude of the US was a question that drew academic attention.[32]

Second, the legitimacy of regulatory tools needed an explanation. On the one hand, the FCPA provides criminal liability for bribe-paying companies independently of the responsibility of bribe-accepting officials. This sanction broke with conventional understandings of corruption, which took bribe-accepting officials as the principal actors in bribery deals.[33] In addition,

[30] For detailed discussion see Chapter I, 2.4.

[31] For a summary of answers to this question in current literature see Chapter I, 2.1.2 and 2.2 of Chapter II.

[32] For detailed discussion on the US's attitude change see Chapter II, 2.1.1& 2.1.2.

[33] See Getz & Volkema (2001). Also see Chapter IV, 3.2.

the FCPA extended jurisdictional reach to nationals' activities abroad. This approach institutionalized the nationality principle, which was previously an exceptional principle of law application under customary international law.[34] In an era when demand-side control was the dominant approach to check corruption, and territoriality was the dominant principle under customary international law, the regulatory means employed by the FCPA was questioned.[35]

Third, the negative impact of the FCPA on US business concerned scholars. Based on the belief that national law should serve national interests, the practical impact of FCPA enforcement was a concern. One structural problem of FCPA enforcement is that if the US prohibited the US nationals from paying bribes to foreign officials, it increased their costs of paying bribes, and disadvantaged them in competition with international rivals. In other words, the FCPA as a unilateral approach undermined US business interests.[36]

The three puzzles challenged conventional understandings of anti-corruption and law enforcement. Whether they could be explained adequately determine whether the FCPA approach was wise. For this reason, early scholars set out to solve these puzzles so as to profess support for or rejection of the FCPA approach.

Despite their variety, the three perspectives were quite isolated. There was no coherent account of the underlying logic combining them together. In theory, when scholars proved the wisdom of the FCPA from any of the three perspectives, they should have dealt with a premise question in the first place: "what is the right criterion against which to judge the wisdom of the FCPA?" Is the FCPA approach wise because of the evil of transnational bribery, or the legitimacy of regulatory tools, or its practical impact on US national interests? In

[34] See Magnuson (2013:394-396). For general information on law application principles see Ryngaert (2008).

[35] See e.g., Salbu (1997: 275).

[36] See e.g., Chaikin (1997: 289), Wallace (2002: 1130-1131), and Magnuson (2013: 376).

other words, they needed to justify why the wisdom of the FCPA can be proved solely or jointly on the basis of their own perspectives. However, there is no serious answer to the problem of this logical premise predicament in current anti-bribery scholarship. Even if some scholars tried to support their standpoints from more than one perspective — for example, Nichols tried to defend the FCPA by arguing about the evil of transnational bribery and the effectiveness of supply-side control of corruption simultaneously,[37] — they did not really deal with the "premise question". They just employed a normal operation of any qualitative analysis — "a strategy to add rigor, breadth, and depth", in Denzin's words — to the analysis.[38]

The fragmentation of analytical questions is determined by the fact that the topic of the FCPA's wisdom is ideology-shaped. It is these ideology-shaped preconceptions, rather than any ideology-free criterion, that define scholars' analytical questions.

The term "ideology" is an important concept for this Section. Although it is frustratingly difficult to give an accurate definition, a useful one is that it refers to a set of *taken-for-granted* preconceptions based on which people make sense of new facts they confront.[39] Even if scholars confronted the same fact — the enactment of the FCPA — their analysis parted ways as soon as they posed questions. Scholars from other disciplines of social science have elaborated on how ideological beliefs delimit the way a person or a community make sense of social facts.[40] Sometimes, as they argue, the acceptance of same preconceptions

[37] See e.g., Nichols (1999).

[38] See Denzin (2011: 5).

[39] See Beyer (1981:166-202), Villoro (1998: 5), and Robinson (2011: 88).

[40] For example, Robinson points out that "in any intellectual age there will be some fundamental assumptions that advocates of all the different ways of thinking unconsciously take for granted…These deep-seated attitudes constitute our ideology and they set the boundaries of theory, by inclining us to this or that set of issues and explanations…If our explanations are theoretical, our questions are ideological." Robinson (2011: 88). Nelson *et al.* suggest that "the choice of research practices depends upon the questions they are asked, and they questions depend on their context". Nelson (1992:2); Denzin & Lincoln state that

was a precondition for one to access the specific reasoning of others.[41]

Despite the same zeal to make sense of the FCPA approach, scholars had quite different preconceptions of the criteria for judging the wisdom of the FCPA approach. As a result, they posed different questions. For example, a scholar who believed that the wisdom of the FCPA approach rested on eliminating the evil of transnational bribery tended to phrase his question as "what are the deleterious effects of transnational bribery on human welfare?"[42] A scholar who believed that the wisdom of the FCPA approach rested on the legitimacy of the regulatory tools set by the FCPA tended to phrase his question as "whether supply-side control of corruption, or the extraterritorial application of anti-corruption law, is legitimate?"[43] And a scholar who took protecting national interests as the main duty of domestic laws tended to formulate his question as "what influence does the FCPA have on US national interests?"[44]

There are no objective criteria to privilege one of these preconceptions over others, and they are often irreconcilable.[45] For example, Professor David Kennedy criticized the basic belief of some scholars that the wisdom of the FCPA approach lied in the evil of transnational bribery as a "dangerous ideological mix" selectively neglecting costs of transnational bribery regulation. Alternatively, he stressed the importance of taking into account operational costs

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the "research is an interactive process shaped by his or her personal history, biography, gender, social class, race and ethnicity, and those of the people in the setting," and terms it as "storytelling traditions". Denzin (2011:3).

[41] See e.g., Villoro (1998: 126-128).

[42] For example, Nichols' argument that "transnational bribery is harmful" is an attempt of this kind. See Nichols (1999: 270-279).

[43] For example, Sung's argument about "the potential of effective bribery reduction through supply-side controls", and Nichols' argument that "extraterritorial regulation is unremarkable from a legal perspective" were attempts to answer questions of this kind. See Sung (2005), and Nichols (2000: 650-654).

[44] For example, Copeland *et al.*'s argument that "it is better to have no method to counter the bribery of foreign officials than to have one which binds only American interests unilaterally" is an attempt of this kind. See Copeland & Scott (1999: 51).

[45] Denzin (2011: 2-3).

of transnational bribery regulation.[46] However, because it is impossible to specify the costs of transnational bribery regulation, this argument was simply another *taken-for-granted* ideological perspective.

Scholars' preconceptions, though often an implicit part of their theories, set the boundaries of their arguments at the very moment they pose questions.[47] This means that the fragmentation of scholars' interpretative perspectives does not result from the absence of a serious analysis of whether the FCPA approach is wise — something like a solvable technical omission in the reasoning process. It had already been shaped up before the reasoning process began.

2.1.2 Two Interpretative Models: the Bribery-Centric Model and the Regulation-Centric Model

Given that earlier scholars analyzed the wisdom of the FCPA approach from different perspectives, we can categorize the fragmented interpretations into two juxtaposing models—a *bribery-centric* model and a *regulation-centric* model – according to their preconceptions of the relation between the problem of transnational bribery and the intervention of national regulators.

2.1.2 (A) the Bribery-Centric Model

This model considers transnational bribery as an objective phenomenon that exerts influence on social life. Regulators stayed detached from it until they perceived that this problem went against interests which they sought to protect. In the relation between the problem of transnational bribery and the regulator, the deleterious effects of transnational bribery exists objectively, and the regulator is in the second place to respond to this undesired phenomenon. The FCPA approach is a logical result of regulators' perception and evaluation of the deleterious effect of transnational bribery. Therefore, when scholars seek to analyze the wisdom of the FCPA approach, the deleterious effect of transnational

[46] See Kennedy (1999: 458).

[47] See Robinson (2011: 88).

bribery is the logical starting point, and the causality between the deleterious effect of transnational bribery and countermeasures of national regulators is highlighted. A general underlying argument is that because transnational bribery is pernicious, it is worthwhile the regulatory costs to combat it.

This interpretative model draws much support from conventional understanding of domestic corruption to prove that transnational bribery is pernicious. Despite the nuanced cultural differences in crimes and penalties, regulators and citizens from different jurisdictions all find corruption pernicious.[48] The universal condemnation of (domestic) corruption[49] around the world provides a good perspective for scholars to preach the "evil" of transnational bribery and the wisdom of regulatory intervention. For this reason, earlier *bribery-centric* analyses tended to emphasize the similarities between transnational bribery and domestic corruption, and explain the FCPA approach as an extension of domestic corruption control. In most early academic and policy literature, scholars mentioned transnational bribery and domestic corruption together without a distinction.[50]

Technically, this interpretative model extends conventional anti-corruption knowledge to suit the transnational context. Conventional anti-corruption doctrine condemns bribery because it harms the integrity of public power.[51] As Sung notes,

"Most corruption research views bribery as an abuse of public roles by politicians and civil servants for private gains, and emphasize the harmful consequences of pervasive corruption

[48] As is also stated in Chapter I, 1, the US's anti-corruption initiatives can be traced to at least in 18th century. See Carrington (2010: 149). The United Kingdom's anti-corruption initiatives can be traced to at least 1769. Other European countries also had had anti-bribery laws centuries before their criminalization of transnational bribery. See Schmidt (2009: 1125). For further discussion see Nichols (2000: 650-655), Davis (2002: 315-316), Johnstone & Brown (2004), and Schmidt (2009: 1126).

[49] See Nye (1967), Rose-Ackerman (1997; 2009), and Donald (2013).

[50] See e.g., Waldman (1974), Elliott (1997: 186), German (2002), Johnstone & Brown (2004), Young (2009) and Baughn *et al*. (2009).

[51] See Nichols (1997), Young (2009: 144-145).

on the social well-being and governance of the country…A quick overview of several reviews of existing empirical studies of corruption reveals that most research adopts a demand-pull perspective and concentrates on the identification of political and social characteristics of the corrupt nations."[52]

The country of the bribed officials and its citizens are understood as the victims of the bribing.

As Vega states,

"Prior to the late 1970s, bribery by a TNC of a foreign official was regarded by many as a necessary evil to protect or obtain foreign business. Although bribery has always been universally condemned as unethical, it was simply the way business was done overseas."[53]

Sung also states that,

"many believe that bribery of local officials in developing countries is a worthy, if not required, investment to penetrate otherwise closed markets or sources of natural resources and labor…They saw themselves as reluctant co-offenders pulled into the game by the corrupt gatekeepers of developing economies."[54]

Copeland & Scott state that,

"In many countries, bribing high-level officials is the only way to procure a government contract: Firms have been warned in the past that when doing business with certain former Soviet States, or Eastern European nations, monetary payments to Russian officials are in order. The *Finish Times* reported that one must accept that bribery is a way of life in the business community in India. The International Trade Reporter proclaimed that the Middle East Business environment typically obtains bribes by foreign companies involved in procuring lucrative contracts."[55]

The bribery-centric interpretations which seek to demonstrate the wisdom of the FCPA approach by highlighting the similarities between the FCPA approach and domestic corruption control must answer this question, given that nationals' acts of transnational bribery seemed to have no obvious negative effect on the home country's national interests.

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[52] Sung (2005: 112-113). Also see Bayley (1966), Khan (1998), Olsen & Torsvik (1998), Mauro (1998), Rose-Ackerman (1999), and Cartier-Bresson (2000).

[53] Vega (2010: 386).

[54] Sung (2005: 114).

[55] Copeland & Scott (1999: 47).

In order to answer this question, some scholars define the context as one of globalization and introduce the concept of "global welfare" to explain the evil of transnational bribery. Once people accept that there exists some "global welfare" beyond the interests of national territories, the damage caused by transnational bribery on an international scale can be easily grasped.[56] For example, Nichols attributed the increase in transnational bribery to increasing international business transactions that took place in the background of globalization, and further demonstrated the regulatory responsibility of home countries by stating that:

> "A growing number of commercial transactions are transnational in nature; globalization offers benefits to all; there is no supranational agency that can create or enforce transnational regulations; transnational bribery is widespread and possibly growing; and transnational bribery is extremely harmful. There is a very strong suspicion that the explosion in transnational bribery is attributable in part to bribe offers from foreign investors, and there is a very strong argument that host country agencies cannot effectively regulate transnational bribery. Given these facts and observations, home country regulation is both pragmatically and morally mandated."[57]

After the "evil" of transnational bribery is demonstrated, the progressive manner in which an understanding of the problem of transnational bribery and reasonableness of supply-side control and extraterritorial application becomes possible. Transnational bribery, as a problem can be addressed by the supply-side control approach, given (a) the active role of bribe-paying transnational companies ("TNCs") in bribery deals; and (b) the effectiveness of supply-side control of corruption. For the first point, a number of works have demonstrated the active role of bribe-paying business people in the furtherance of transnational bribery deals[58] and the effectiveness of reducing transnational bribery by

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[56] See e.g., Glynn *(*1997), Heidenheimer & Johnston (1989: 685-700), Elliott (1997: 198-199), Leiken (1997: 58), Williams & Beare (1999: 119), Rose-Ackerman (1999: 31-60), Almond & Syfert (1997), McCormick & Paterson (2006), Baughn *et al.* (2009: 15), and Holmes (2009: 393-395).

[57] Nichols (1999: 285).

[58] See e.g., Sung (2005), Holmes (2009), and Baughn *et al.* (2010).

restraining bribes influx.[59] Likewise, the extraterritorial application of criminal laws can be justified by proving that (a) it is in line with international law; and (b) it is in fact effective for reducing transnational bribery. Many scholars suggest that the nationality principle is a public acknowledgement around the world, even though it is not a routine.[60] They also clarify that the claim of "moral imperialism" directed at such extraterritorial application[61] is actually a misunderstanding.[62] Besides, the extraterritoriality of the FCPA approach has been proved to be effective in reducing transnational bribery.[63] Of course, there are also dissents admitting or reserving an opinion on the evil of transnational bribery, but claiming the illegitimacy of supply-side control and the inappropriateness of extraterritorial application of criminal law.[64]

2.1.2 (B) the Regulation-Centric Model

This model takes the FCPA approach as the logical starting point to explain its wisdom: in the relation between the regulator and the evil of transnational bribery, it is the regulator in the first place that defines the evil of transnational bribery. Although it admits that a regulator's condemnation of transnational bribery is fully or partly out of their perception of the evil of transnational bribery, however, it considers the FCPA approach as resulting from the regulator's active choice. This model believes that the wisdom of the FCPA approach lies in its very nature and impacts rather than the nature of the regulated "problem". The work of scholars should not merely revolve around the value judgment declared by lawmakers, but should weigh benefits and costs of the concrete means. For example, Kennedy criticizes the *bribery-centric* model for

[59] See e.g., Nichols (1999).

[60] See e.g., Nichols (2000: 648), and Ryngaert (2008: 88-91). Also see Chapter IV, 5.2.

[61] See e.g., Salbu (1997: 275).

[62] See Nichols (2000: 650-654).

[63] See e.g., Kaczmarek (2011), and Magnuson (2013).

[64] See e.g., Salbu (1997: 275-280), and Kennedy (1999).

transforming "the politically or ideologically contestable into the technically necessary and the morally imperative,"[65] but asserts that "people who seem to oppose an anti-corruption effort obviously do not support corruption … they must be opposed to some procedures or technicalities or unintended consequences of the particular campaign."[66]

This *regulation-centric* model is popular in the US because of its complementarity with US national interests. *Regulation-centric* interpretations start from the very nature of the FCPA approach to analyze its potential impact on US national interests. Technically, it permits focus not only on similarities between transnational bribery regulation and domestic corruption regulation, but also on their differences. Particularly, the legal interests protected by the FCPA and those of conventional anti-corruption law are highlighted.[67] The unilateralism of the FCPA and its possible damage on US exports are highlighted.

The FCPA approach distinguished itself from conventional anti-corruption approaches because it had potential negative impact on US business interests in overseas markets. FCPA enforcement, either as a unilateral action of the US in the early years or as a part of a multilateral collective action after the creation of the OECD Anti-Bribery Convention, obligates domestic companies to reduce the influx of bribes into foreign countries. From the perspective of business interests, it is an altruistic behavior of national regulators which would "level the playing field" for all foreign business competitors but probably disadvantage domestic companies.[68] For this reason, some scholars concluded that the FCPA approach resulted from the US's altruism or "an ideological commitment to disseminating

[65] Kennedy (1999: 462).

[66] Kennedy (1999: 457).

[67] See Kennedy (1999: 460-462).

[68] See Pieth (2007: 21).

particular conception of the rule of law and democracy."[69] Because this altruism seems to go against the popular assumption on the rationality of state behavior,[70] U.S academia has long been curious of, or concerned about the negative effects of the FCPA on US national interests.

But how scholars evaluated the impact of the unilateralism of the FCPA approach also has close link with scholars' preconceptions. Scholars who believed that transnational bribery was an activity accelerating overseas business tended to consider the FCPA approach as an action of the US's "unilateral disarmament".[71] Based on the general belief that national laws are principally missioned to serve national interests, academic and policy literature of the day concluded the economic effects of the FCPA approach to be unwise, and suggested to repeal or internationalize it.[72] On the contrary, other works argued that there was no evident causal relationship between the FCPA enforcement and the business loss of the US.[73] There are also some works suggesting that the FCPA approach is partially consistent with the US economic interests and conclude that the FCPA can be partially enforced "in a manner consistent with the economic interests of payer states."[74] Despite the conflict among viewpoints, arguments of this sort take the economic impact of the FCPA as the evaluative criterion of the wisdom of the FCPA approach.

Another interpretative approach under the *regulation-centric* model does not revolve around the FCPA's impact on overseas business opportunities, but seeks to demonstrate the wisdom of the FCPA by illustrating its consistency with the

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[69] Davis (2002: 316).

[70] See Keohane (1989: 40).

[71] This phrase is borrowed from Magnuson (2013: 379).

[72] See e.g., USDOC (1980:10-11), Kaikati & Label (1980: 38-43), USGAO (1981), Kim (1981), Beck & Maher (1989), LeVine (1989), Hall (1994: 302), Hines (1995); Salbu (1997), Zagaris & Ohri (1999), and Copeland & Scott (1999). Also see Chapter I, 2.2.3.

[73] See e.g., Richman (1979), Graham (1984), Beck (1991: 295-303), and Richardson (1991).

[74] Davis (2002: 314).

long-term, overall national interests of the US. Research of this kind is loosely grounded on the rationality assumption on state behavior — which is one popular assumption of international relations theory.[75] It defines the wisdom of the FCPA not as a question of altruism or rationality, but as a question of how to understand its rationality. This approach rids commentators of the purely economic dimension, and explains the FCPA as a result of an evaluation of trade-offs in which short-term export interest brought by transnational bribery is sacrificed for the sake of more superior national interests (e.g., defense interests).

For example, Pieth conveys this message by arguing that:

"scholars have taken the enactment of the FCPA more or less for granted; few discuss the reasons for such an unusual step in the 1970s…there must have been strong domestic reasons for the US legislator to take this step unilaterally, reasons going beyond the general sympathy of the Carter administration for business ethics."[76]

Specifically, scholars of this kind argue that although transnational bribery accelerates export industry on a short timescale, a laissez-faire policy may lead the US companies to become so dependent on paying bribes that they can hardly maintain their real competitiveness.[77] Besides, the prevalence of transnational bribery had a tendency to affect other national interests (e.g., defense interests) beyond export interests.[78] It is also argued that the US engaged in such an unprecedented action for the purpose of rebuilding the reputation of the business community and American democracy which were damaged by the cases revealed at that time.[79]

In contrast to the arguments mentioned above which exclusively focus on economic interests, these arguments emphasize that the US started the FCPA

[75] See Keohane (1988: 381; 1989: 40) and Wendt (1992: 392). Also Chapter I, 2.1.3 and 5.2.1.

[76] Pieth (2007: 7-8).

[77] See Pieth (2007: 7-8), and Johnson (2010: 94-98).

[78] See Pieth (2007: 8).

[79] See Abbott & Snidal (2002: 162), and Klich (1996).

approach out of a holistic consideration of the country's national interests.

2.1.3 Interim Summary: A Common Ground—the *Political-Will* Assumption

Both interpretative models capture some important characteristics of the FCPA approach. They existed side-by-side and yielded important insights, with no one prevailing over the other.

Based on different sets of ideological beliefs, the two models differ from each other in two aspects: First, the two models conflicted in terms of their views of the wisdom of the FCPA. The *bribery-centric* model professed support for the FCPA by emphasizing the anti-corruption nature of the FCPA. Meanwhile, it was also often criticized because of its pan-moralism.[80] The *regulation-centric* model was concerned with the self-sacrificing nature of the FCPA in terms of export interests and focused more on the negative effects of the FCPA on the US national interests, at the risk of being criticized for its utilitarianism.

Second, the two models have quite different theoretical functions. As *bribery-centric* interpretations highlight the corruption nature of transnational bribery, they produce public knowledge in the face of neutrality and impersonality. This model is good at reasoning with people from different jurisdictions. On the other hand, *regulation-centric* interpretations set forth insights on the costs of the concrete regulatory measures. They tend to be an *ad hoc* one, fixing on the specific measures of the FCPA approach. It revealed the potential issues which might affect the performance of the FCPA-style approach in practice.

Despite the fragmentation of interpretations under the two models, they share a common assumption that countries can think independently and perform rationally, like human beings. Whether defining the enactment of the FCPA as signatories' reactive response to the evil of transnational bribery, like the *bribery-centric* model does, or defining it as an active disposal of certain national

[80] See e.g., Kennedy (1999).

interests, like the *regulation-centric* model does, they assume that FCPA enactment as completely resulting from the active choice of the US as a state actor which has anthropomorphic free will to make decisions. It is the value preferences of state actors that drive them to make decisions, and it is often their rational calculation of different strategies that determine their final choices. If the FCPA approach seems to be inconsistent with some US national interests, it can be well explained by the FCPA approach's consistency with other kinds of US national interests (e.g., democratic values or national security).[81] Otherwise, it can be taken as an irrational decision, in the context of which scholars discussed the altruism or rationalism of country behavior.[82]

I call this ground assumption a *political-will* assumption. Two elements of this assumption are (a) anthropomorphizing individual countries as single-willed actors — state actors therefore have free will and independent decision-making power in international affairs in an anarchic world;[83] and (b) (always but not necessarily) assuming that state actors act rationally in most situations, according to their payoff calculations among certain strategies. Individual countries can always choose optimal strategies based on the information at hand.[84] According to this logic, it is the free will of unitary state actors other than any external forces that is central to an understanding of signatories' legislation and enforcement against transnational bribery.

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[81] See e.g., Pieth (2007: 8).

[82] See e.g., Davis (2012).

[83] This politically psychological phenomenon that hypothesizes the existence of *State Personhood* is *State Anthropomorphization*. It is a cognitive heuristic that helps the mass, policymakers, and intellectuals to make sense of the complexity of world politics. The realist research tradition of international relations theory which defines states as rational "state actors" reflects the popularity of this tradition. For a detailed description of state anthropomorphization (also phrased as state "personification") see McGraw & Dolan (2007).

[84] The whole process of one's payoff calculation takes place within a mathematical model. Based on a group of variables with given values, a mathematician can work out the optimal strategy by doing the simplest additions and subtractions, or ranking. For a different view on how individuals make rational choice see Professor Ahdieh's theory of coordination game. See Ahdieh (2010). Also see Chapter II, 2.3.

This assumption follows from a predefined logic to be distinguished from that of the rationalistic approach in international relations theory — which conceives of the world as an anarchic play of interests with no central authority in which individual state actors struggle for wealth and power.[85] With or without any awareness of this academic origin, scholars' taking the *political-will* assumption for granted only reflects the significant influence of the rational-choice tradition on the way in which people make sense of world politics.[86]

2.2 Phase 2: From Academic Insights to Public Beliefs

After scholars (view producers) explained the wisdom of the FCPA under either the *bribery-centric* model or the *regulation-centric* model, they needed to convince policymakers and the general public (view receivers) of their explanations. During this process, scholars' personal explanations evolved to public beliefs.

Here comes the question: in reality, all academic explanations of the wisdom of the FCPA approach are value-laden, technically non-exhaustive, and lack scientific precision; and it is these "imperfect" explanations that convince people of the wisdom of the FCPA approach. So what factors make a scholar's explanation more acceptable to view receivers than another scholar's?

2.2.1 Imperfect Explanations

[85] For a realist view of anarchy see Milner (1991:69), and Keohane (1989:1).

[86] The rationality assumption on state behavior is shared by neorealism and neoliberalism. Regarding state anthropomorphization, as Keohane & Nye argue, "states have been and remain the most important actors in world politics." Keohane & Nye (1972: xxiv). Regarding the rationality assumption which is combined with the *political-will* assumption, as Keohane describes, "Realist and Neorealist theories are avowedly rationalistic, accepting what Herbert Simon has referred to as a 'subjective' conception of rationality, characterizing 'behavior that can be adjudged objectively to be optimally adapted to the situation." See Keohane (1988: 381; 1989: 40) and Wendt (1992: 392). Herbert A. Simon defines the term "rational" as "behavior that is appropriate to specific goals in the context of a given situation." Simon (1985: 294). According to Felix E. Oppenheim's description of rationality, for human beings, that A's action X is in his or her self-interest entails that it is rational for A to do X with respect to his or her own welfare. For governments, "foreign policy X is in A's national interest" implies that it is rational for government A to adopt X in view of its national interest. Oppenheim (1987: 371).

Consider the process of how scholars interpret the wisdom of the FCPA: Based on a certain amount of knowledge and information, a scholar answered the question set by his/her preconception. For example, a scholar who believed that the wisdom of the FCPA lays in the deleterious effect of transnational bribery on human welfare (e.g. economy or democratic values), would defined his/her analytical question as "how does transnational bribery affect the economy of importing (or exporting) countries", and then uses his knowledge and information at hand to answer this question.

Yet an answer developed in this way is a mere "insecure supposition", in Villoro's words.[87] The scholar needs to communicate with the outsider world and convince others. For this reason, a scholar often wishes to figure out context-independent conclusions that apply to different people.[88] In this zeal, a scholar seeks to take a value-free position as positivists do,[89] and reason rigorously to get an objectively "correct" answer.

This attempt often fails in real circumstances, especially in our topic. First, as noted, the value-laden nature of the topic of the wisdom of the FCPA determines that any explanation is by its nature biased, so that it can only express reason to a closed set of people.[90] Second, even for people who accept similar preconceptions, a scholar can hardly develop exhaustive reasons, constrained by objective conditions such as techniques to access certain data, and subjective conditions such as one's personal habits to select information.[91] Third, the nature of the topic determines that any explanation of it suffers from an inherent lack of scientific certainty,[92] given the unquantifiability of corruption variables, such as

[87] Villoro (1998: 7).

[88] See Becker (1986: 122).

[89] See Denzin (2011: 6).

[90] See Chapter I, 2.1.1.

[91] See Robinson (2011: 147).

[92] The popular eager for scientific certainty reflects the influence of the rationalist tradition after the Renaissance. See Denzin (2011:4), and Robinson (2011: 87-108).

the sources, frequency and influence of corruption.[93] For the above reasons, scholarly arguments on the wisdom of the FCPA were inherently value-laden, non-exhaustive, and imprecise, waiting to be supplemented, modified and developed in a changing context.[94]

2.2.2 The Public's Acceptance of "Imperfect Explanations"

There is a paradox that it is precisely these "imperfect explanations" that steer most of our social life. Our social life is oriented by various forms of knowledge other than rational and precise science.[95] In real circumstances, people rely on many unsubstantiated viewpoints influenced by many biases to make decisions.[96]

The case of the transformation of academic explanations of the wisdom of the FCPA to public beliefs is no exception. There were many factors other than the preciseness of scholars' personal arguments that determined whether the public accepted them. The follows are two major determinants that are relevant to the argument of this Chapter:

2.2.2 (A) the First Determinant: the Explanation should Reflect Social Values

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[93] Scholars' attempts to give scientific certainty to their reasons were reflected in the occasional empirical verifications in scholarly works. Given the unquantifiability of corruption variables, such as the sources, frequency and influence of corruption, they were just a type of qualitative analysis affected by positivist traditions, and relevant conclusions in the facet of objectivity can hardly stand stringent tests. See Nichols (2000: 628), Denzin (2011:5), and Aichele (1990: 75).

[94] A long-lasting challenge for qualitative researchers is the absence of an undisputed set of axioms, methods and procedures by which they can build theories and communicate with others. This absence determines that when the correctness of scientific proofs in physical science is self-expressed by their accurate logical structure, the "correctness" of qualitative analysis, such as the interpretations of the wisdom of the FCPA leaves a space for view-receivers' participation. See Denzin (2011: 4). Also see Chapter I, 3.1.

[95] Villoro has given an explanation of this phenomenon. He suggested that social life is oriented by various forms of knowledge other than rational and precise science, and points out that imprecision is the inherent nature but not a flaw of justifications of arguments. Villoro argued that empirically based reflection should be distinguished from philosophical reflection. In many situations, this nature does not reduce the objectivity of arguments at all. See Villoro (1998: 14).

[96] For detailed information on how heuristics and bias affect human decisions see Kahneman & Tversky (1973), and Tversky & Kahneman (1974).

The first determinant of whether a scholar's personal view on the wisdom of the FCPA is acceptable to the public is whether this explanation reflects the established or unexpressed consensus of the society. During times of social developments, it often happens that some collective consciousness of a society is fermented.[97] Social science researchers are missioned to mine these latent social consensuses of a given time and space, and express it to the society.

Explaining the wisdom of the FCPA, like many other topics of social science, was not a process of discovering objective truths, but discovering the latent consensus of the society at that time. For this purpose, scholars were supposed to observe subtle sentiments of the whole society, and express them to the public. When their explanations appropriately echoed the latent consensus of the society, the society would accept it as a new kind of social value.

This means, whether an academic explanation of the wisdom of the FCPA was acceptable to the society lay principally in its reflection of the latent consensus of the society, but not the scientific precision of the argument. This idea is of course not original to us: just as Holmes suggests, "our knowledge about the goodness and badness of laws that I have no practical criterion except what the crowd wants."[98] Also as Alexander Bickel posed and Gary J. Aichele paraphrased as a response to the popular realist thoughts in the 20th century, "in the absence of a clear social consensus, the choice of one alternative over another necessarily involved more faith than reason."[99]

2.2.2 (B) the Second Determinant: the "Disposition to Act"

Our everyday experience informs us that there are no uniform criteria of the precision of an argument in order for us to accept it as a belief. In practice, whether people tend to accept an argument depends on the disposition of this

[97] See Aichele (1990: 88).

[98] Holmes (1942: 163).

[99] Aichele (1990: 88).

argument. Villoro has given an elaborate explanation of how an interpretative view's "*disposition to act"* determines the necessary degree of justification. He suggested that most personal beliefs have their own "disposition to act", which means in a given circumstance, people who hold a certain belief tend to act in a certain way.[100] As Villoro states, "in every case we can have the degree of precision that we need in order to satisfy the goal that leads us to knowledge: have a secure orientation for our life…It is the will that decides the extent of the process of justifying a belief; it is the will that agrees to halt the examination of reasons and proceed to accept a belief as valid."[101]

This means, in real circumstances, the inclination of a person to assent to certain beliefs is significantly affected by the weight of decisions that the view would lead them to make. For example, when making a purchase decision in connection with the influence of advertising, people may make more prudent decisions on valuable items than daily necessities, even when they are equally affected by advertisements.

This also means, apart from the preciseness of academic explanations, whether their explanations reflected latent social consciousness, and the weight of "*disposition to act*", in Villoro's wording,[102] affect whether the public would accept their explanations. With this awareness, let us review how early *bribery-centric* and *regulation-centric* explanations of the wisdom of the FCPA were accepted by the public and oriented human actions.

2.2.3 *Bribery-Centric* and *Regulation-Centric* Explanations: Irreconcilable Models with the Same "Disposition to Act"

It is of course no wonder that both *bribery-centric* interpretations and *regulation-centric* interpretations reflected certain social values. As already

[100] See Villoro (1998: 26-40).

[101] Villoro (1998: 187-197).

[102] See Villoro (1998: 26).

noted, *bribery-centric* explanations stressed the evil of transnational bribery — which echoed public's condemnation of corruption. *Regulation-centric* explanations stressed the FCPA's impact on US national interests — which echoed the public's conception of the function of laws. However, as also noted above, as neither of the two models can override the other, the two interpretative models are in nature juxtaposed and irreconcilable. This is why the widespread controversy on the wisdom of the FCPA had always existed before the OECD Anti-Bribery Convention popularized the FCPA to other countries.

Meanwhile, both *bribery-centric* and *regulation-centric* explanations had their own "*disposition to act*" in terms of whether the FCPA should be retained or repealed:

The *bribery-centric* model, with the underlying argument that "each country should combat transnational bribery, no matter what others do," advocated all countries which strived for advantageous development to join the fight. The FCPA approach is supposed to be popularized to as many jurisdictions as possible for the sake of the welfare of the whole human community. As this model makes use of people's condemnation of corruption, it won worldwide endorsement from academia, national regulators and international organizations in the 1990s and the early 2000s, which is an extraordinary stepping stone to the organization of the OECD Anti-Bribery Convention.

The *regulation-centric* model which does *ad hoc* analysis of the impact of the FCPA approach on US national interests, with the underlying argument that "if other countries do not regulate transnational bribery, our country should not either," tended to draw the conclusion that the FCPA approach should be internationalized, otherwise it should be repealed to protect US national interests. Starting solely with the standpoint of US national interests, interpretations of this model warned US policymakers of a problem to be concerned in the enforcement of the FCPA, and well explained the aggressive efforts by the US to popularize the FCPA approach in the 1990s.

This means, although interpretations of the *bribery-centric* model and the *regulation-centric* model made different explanations of the wisdom of the FCPA, they converged on the same inclination to internationalize the FCPA. Faced with this task, American politicians and scholars needed to convince foreign politicians and their constituencies. It is no wonder that during their proselytizing, they stressed *bribery-centric* explanations focusing on the evil of transnational bribery, instead of *regulation-centric* explanations outlining the negative impact of the FCPA on US national interests[103]

Based on this intellectual foundation and as a result of the US's zealous efforts, around Year 2000 there was a wave of international and regional anti-corruption agreements being signed.[104] The OECD Anti-Bribery Convention is generally considered as the central instrument among these agreements.[105] Except for some specific provisions, the Convention endorses the spirit of the FCPA and advocates controlling transnational bribery from the supply-side (i.e., reducing the influx of bribes from TNCs to foreign officials).[106] During this period, various international and national political documents restated the evil of transnational bribery as well as the necessity to regulate it.[107] The wisdom of the FCPA-style approach gradually evolved to a global public belief.

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[103] In fact, in 1989, President Bush sought to negotiate an OECD agreement with other countries after being instructed to do so by the Congress. However, because of the Bush Administration framed its arguments in terms of the side-effects of the unilateral enforcement of the FCPA, and the US's demand for a level playing field, it failed to persuade European countries. When President Clinton took office in 1993, he began to adopt a policy of value strategy, backed up by economic leverage, and the negotiation of the agreement finally made some progress. See Abbott & Snidal (2002: 162). For US's specific strategies to persuade other countries see Chapter II, 3.1.

[104] See e.g., OAS (1996), EU (1997), and UN (2003).

[105] See Pieth (2007: 11-12), and Spahn (2012: 251). For the creation of the Convention see Chapter II, 3.

[106] For this reason, the essence of the participation of other major industrialized countries is to turn the US's unilateral enforcement of the FCPA into a "collective unilateralism" — as Professor Mark Pieth calls it. See Pieth (2007: 20-26).

[107] See Abbott & Snidal (2002: 157-176).

2.3 Phase 3: From Public Beliefs to Preconceptions of Convention Enforcement

The wave of international anti-bribery agreements shifted academic attention from the wisdom of the FCPA approach to the practical effects of these agreements, especially the OECD Anti-Bribery Convention, in controlling transnational bribery. Scholars discussed the achievements in the formation of international treaties, analyzed the regulatory instruments and compliance programs, identified underlying issues and predicted the next steps.[108]

Since the 2000s, academic and policy literature began to evaluate signatories' compliance with the OECD Anti-Bribery Convention. However, because of the lack of accurate data and techniques, this evaluation was interpretative rather than positive once again. It overly relies on their existing conceptions of the wisdom of the FCPA-style approach to explain the practical effects of Convention enforcement.

2.3.1 Two Indictors of Convention Enforcement: Lawmaking and Law Enforcement

After the ratification of the Convention, how Convention obligations are incorporated into national legal systems of signatories and how relevant anti-bribery laws are enforced in signatories are two central concerns. As a result, relevant lawmaking and law enforcement are two indictors of the effectiveness of the enforcement of the Convention.

2.3.1 (A) Lawmaking: A Remarkable Success

Academic and policy literature in the early years after the ratification of the Convention shed a great deal of attention on the achievement in embodying the Convention obligations to individual legal systems of signatories. Given the

[108] See e.g., Nesbit (1998), Doig (1998), Low (1998:151-156), Pieth (1999), Williams (1999), Zagaris & Ohri (1999), and Healy *et al.* (2003).

heterogeneity of global politics, how provisions of the Convention could be equally incorporated into different jurisdictions without violating their own logic used to be a technical concern.

Parties of the OECD foresaw this problem. As a result, instead of uniform legislation, the Convention adopted a principle of "functional equivalence" to allocate obligations to signatories. This principle means that the OECD Convention requires signatories to adopt measures of which the "overall legal effects" but not "literal provisions" meet the requirements of the Convention when signatories incorporate treaty obligations into domestic legal systems.[109] As this scheme involves unique characteristics of a variety of jurisdictions, there are no uniform evaluative criteria for the "overall legal effects" of individual jurisdictions. It is the peer-review system organized by the OECD Working Group on Bribery ("the OECD WGB") that helps evaluate whether treaty obligations are properly incorporated in domestic legal frameworks. In reality, the OECD WGB has done a good job of evaluating whether and how treaty obligations are incorporated into national legal frameworks by way of its three-phase program.[110]

The power of the OECD peer-review system to ensure the "functional equivalence" of measures adopted by individual signatories is edifying. In fact, this monitoring system is a principal reason why the US could muster international anti-bribery agreement under the OECD framework.[111] Basically, academic and policy literature has little disagreement about the significant achievement at the level of lawmaking.

2.3.1 (B) Law Enforcement: An Unquantifiable Indictor

However, there is a gap between effective lawmaking and effective law

[109] See Pieth (2007: 27-28).

[110] See OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014). Also see Chapter III, 3.3.

[111] See Pieth (2007: 9-10), and Clinton (1998: 2290).

enforcement. The OECD peer-review system was soon found to be incompetent to evaluate Convention enforcement, although it aims to do so. Basically, the OECD WGB evaluates country compliance by collecting and publishing data on investigations and prosecutions in signatories. Both anti-corruption scholars and criminalists, however, believe data of this kind has no direct correlation with the actual level of enforcement.[112] The weakness of the OECD peer-review monitoring system in measuring enforcement has been confirmed by a lot of academic and policy literature.[113]

Transparency International, as a NGO endeavored to combat corruption, has made attempts to produce technical means to monitor and quantify corruption. Among all its measurements, Bribe Payers Index (BPI) is most relevant to our topic. First issued in 1999, BPI measures the relative propensity of TNCs from leading exporting countries to pay bribes in foreign countries. The data sources mainly come from interviews to business people in emerging economies.[114] This methodology is widely acknowledged to have inherent limitations. It is compiled on the basis of data gathered from people, who are subject to emotional opinions, and their rankings reflect only a subjective evaluation rather than objective reality. Another imperfection is the artificially defined 0-10 scoring system, where the scores themselves are meaningless unless being used for comparison purposes. As a result, although academia has long been thirsty for quantitative data on corruption, the methodological reliability and the usage of the BPI are in constant disputes.[115] Apart from the BPI data, in the Transparency International's periodical reports on the enforcement of the OECD Anti-Bribery Convention, the data on investigations and prosecutions is still taken as an evaluative criterion of

[112] See Tarullo (2004: 683), Burger (2006: 47), and Trace (2011: 1). Also see Chapter III, 3.3.

[113] See e.g., Tarullo (2004: 685), and Pieth (2007: 30). Also see Chapter III, 3.3.

[114] See Transparency International Press Release, "Bribe Payers Index", available at: http://www.transparency.org/research/bpi/ (last visited: 31 July 2014).

[115] See Chaikin & Sharman (2009: 12-13).

individual compliance — the weakness of which has been mentioned above.[116]

2.3.2 Two Labels for Convention Enforcement: "Effective" and "Ineffective"

The difficulty in quantifying Convention enforcement does and will continue to plague research on transnational bribery regulation. Scholars have to rely on prosecution data and Transparency International data to evaluate, or more precisely, to interpret the level of Convention enforcement. As a consequence, the label of "effective enforcement" and the label of "ineffective enforcement" are given by scholars to Convention enforcement.

2.3.2 *(A) The Label of "Effective Enforcement"*

Generally, scholars who label the enforcement of the Convention as effective observe the gradual improvement in BPI scores and/or on prosecutions by signatories, and conclude that transnational bribery is effectively controlled by the enforcement of the Convention.[117]

A lot of political literature and a few academic papers holds this viewpoint. For example, as Mark Pieth, Chairperson of the OECD WGB stated in 2011 OECD WGB Annual Report, "Since 2011, the Working Group on Bribery took a number of important steps to take the fight against foreign bribery forward…we have led a full and productive agenda in 2011."[118] Cuervo-Cazurra examines how corruption impacts foreign direct investment and finds that "corruption results in relatively lower FDI from countries that have signed the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Transactions. This suggests that laws against bribery abroad may act as a deterrent against engaging in corruption in foreign countries."[119] Sanyal & Samanta did a set of statistical analyses and concluded

[116] See e.g., Heimann & Dell (2010).

[117] See e.g., Heimann & Dell (2006), Razzano (2008), and Sanyal & Samanta (2011).

[118] See OECD (2012b: 5).

[119] Cuervo-Cazurra (2006: 807).

"the perceived level of bribe-giving by firms from the major exporting countries has been declining. This decline has occurred at a time when the enforcement of national anti-bribery laws has been stepped up greatly and international treaties against bribe-giving have been adopted and increasingly enforced."[120] A natural inference is to maintain the status quo with moderate policy improvements.

2.3.2 *(B) The Label of "Ineffective Enforcement"*

Scholars who label the current level of Convention enforcement as ineffective often refer to the small number of investigations and prosecutions, and notice that by 2013 a large number of signatories still keep zero records of investigations and prosecutions. The remaining number of investigations and prosecutions available for study is also very small.[121]For example, Tarullo states that, "one potentially good indicator of implementation would be prosecutions by OECD member state governments for overseas bribery by their nationals... Although there have been reports of some investigations, the only prosecution initiated by a country other than the United States for bribery of a foreign official was by Canada. That prosecution, it should be noted, was for bribery by on Canadian company of a U.S. customs official based in Canada, in order to harm a Canadian competitor."[122] For another example, Transparency International's progress reports on the enforcement of the OECD Anti-Bribery Convention always take the number of cases and investigations as a criterion for classifying signatories into categories of "active enforcement", "moderate enforcement" and "little or no enforcement".[123]

Although the correlation between prosecutions under and the enforcement of the Convention obligations is disputable, the remarkable records of the US, which are many times bigger than the sum of prosecution records of all other signatories, seems only to reconfirm the ineffective enforcement of the Convention in most

[120] Sanyal & Samanta (2011: 151).

[121] See e.g., OECD (2011: 14).

[122] Tarullo (2004: 683).

[123] See e.g., Heimann *et al.* (2006; 2010; 2011).

signatories.[124]

Mainstream scholars affirm the ineffectiveness of Convention enforcement.[125] Tarullo suggested in 2004: "Unfortunately, the Convention does not appear to have induced many signatories and companies to adopt the requisite cooperative strategy."[126] Heimann & Dell stated that "Current levels of enforcement are too low to enable the Convention to succeed…With active enforcement in only seven of the 38 parties to the Convention, the Convention's goal of effectively curbing foreign bribery in international business transactions is still far from being achieved."[127] Schmidt commented in 2009: "Although the United States and most European nations passed strict laws to prohibit transnational bribery, less accord exists in the enforcement of these laws. The United States enforced its anti-bribery legislation with renewed vigor, while European nations have been slow to prosecute offending corporations."[128] Brewster suggested in 2010: "Compliance with the OECD treaty is lacking because governments see an advantage to cheating on the agreement."[129] Magnuson suggested in 2013: "The Anti-Bribery Convention…has suffered from severe under enforcement by its member-states."[130]

2.3.3 Preconceptions Accounting for the Popularity of the Label of "Ineffective Enforcement"

[124] *Progress Report 2011 on Enforcement of the OECD Anti-Bribery Convention* (Transparency International) suggested that the number of enforcement actions of the US was 169 in 2009 and 227 in 2010. In both years the number of enforcement actions of the US exceeded the aggregation of enforcement actions of other signatories. See Heimann *et al.* (2011: 8). Trace Report suggested that the US brought nearly four times enforcement actions than the total number of all other signatories during the period from 2000 to 2010. Trace (2011).

[125] See e.g., Heifetz (2002), Tarullo (2004), Schmidt (2009), Brewster (2010), Heimann & Dell (2010), and Magnuson (2013).

[126] Tarullo (2004: 682).

[127] Heimann & Dell (2010: 8).

[128] Schmidt (2009: 1130-1131).

[129] Brewster (2010: 309).

[130] Magnuson (2013: 388).

This popularity of the label of "ineffective enforcement" is first of all attributable to the intellectual atmosphere of the early 2000s which placed high hopes on the OECD Anti-Bribery Convention in regard to transnational bribery control. As people had quite optimistic expectations regarding the practical effects of the OECD Anti-Bribery Convention, the gap between the reality and this expectation lead them to label the status quo as "ineffective".[131]

More fundamentally, people's early conceptions of the wisdom of the FCPA approach accounted for their high expectation. On the one hand, the early 2000s was significantly influenced by earlier *bribery-centric* interpretations which viewed transnational bribery as the extension of domestic corruption, so that policymakers, practitioners and intellectuals expected signatories to the Convention, most of which had managed to cope with domestic corruption to control transnational bribery as well as domestic corruption. This general expectation is reflected in the provisions of the OECD Anti-Bribery Convention, Article 1 of which states that: "Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party."[132] Given this general expectation, once there is a gap between the reality and the expectation, it must result from some unexpected factors (e.g., a change in signatories' attitude after they signed the Convention), but not be a natural consequence from the nature of the activity. Logically, after years scholars began to shed light on the gap between the actual enforcement of the Convention and this general expectation, and defined the status as "ineffective". For example, Burger & Holland even considered the US's enforcement of the FCPA as ineffective, even if the US had brought the largest number of prosecutions among

[131] See Clinton (1998: 2290).

[132] OECD (1997a: Article 1).

signatories.[133]

On the other hand, people affected by *regulation-centric* interpretations which stressed the self-sacrificing nature of the FCPA-style approach, expected the OECD Anti-Bribery Convention to level the playing field for US companies in international markets, as they had been disadvantaged by the FCPA enforcement.[134] As President Clinton stated in 1998, "Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), US businesses have faced criminal penalties if they engaged in business-related bribery of foreign public officials…The OECD Convention... is designed to change all that. Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions."[135] Given this optimistic expectation at the signing of the Convention and the stark contrast between the number of prosecutions of the US and that of other countries, the gap between the reality and the expectation was evidently huge.[136]

2.4 Phase 4: The Formation of the *Problem-Solving* Paradigm

After labeling the status quo of the enforcement of the Convention as a problem of "ineffective enforcement", scholars need to causally attribute the problem and prescribe solutions to address the problem. In this way, the framework of the current *problem-solving* paradigm takes shape.

There are several basic ingredients that characterize the standard *problem-solving* paradigm:

(1) The Logical Starting Point: the Political-Will Assumption

[133] See Burger & Holland (2006: 46). For discussion on earlier *bribery-centric* interpretations see Chapter I, 2.1.2 (A).

[134] See USGAO (1981).

[135] Clinton (1998: 2290).

[136] See Copeland & Scott (1999). For detailed discussion on *regulatory-centric* interpretations see Chapter I, 2.1.2 (B).

Current *problem-solving* analysis is generally based on this hypothetical premise that assumes signatories' political will as the driving force of Convention enforcement. This assumption generally embraces another two doctrinal assumptions in international relations theories: (a) the *state-centric* assumption that highlights the decentralization of world politics, and considers countries as the most important actors in world politics;[137] and (b) the *rationality* assumption of state behavior, which assumes countries as rational utility maximizers in world politics.[138] The assumed anthropomorphic character and self-seeking nature of countries in signatories' creation and enforcement of anti-bribery laws allows scholars to explain any consequences related to the creation and enforcement of the OECD Anti-Bribery Convention as resulting from the active choice of rational signatories. This political-will assumption is not an inevitable component of a *problem-solving* approach. Yet it is the *taken-for-granted* logical starting point of most current literature on signatories' collective enforcement of the OECD Anti-Bribery Convention.[139]

(2) Theoretical Resource: Metaphoric Application of Anti-Corruption Literature and Collective Actions Theory

As people's conceptions of the wisdom of the FCPA approach and the Convention evolved to part of their preconception of how the Convention should be enforced, these conceptions of the wisdom of the FCPA approach also help people to attribute the problem of "ineffective enforcement" and provide techniques to span the gap between the reality and the ideal situation. In other words, a *problem-solving* scholar often has determined the theoretical resource to which he/she can causally attribute the problem and prescribe solutions while portraying the existence of a "problem".

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[137] See e.g., Waltz (1979: 88), and Keohane (1989: 40).

[138] See e.g., Bueno de Mesquita (1981: 29-33).

[139] For detailed discussion on the *political-will* assumption also see Chapter I, 2.1.3, and Chapter III, 2.1.

Early *bribery-centric* interpretations justified the FCPA approach by emphasizing the corruption nature of transnational bribery and considering the FCPA approach as another example of anti-corruption initiatives. With this ideological belief, scholars tended to focus their attention on the secretive nature of transnational bribery and the high costs of detecting transnational bribery, and causally attribute the problem of "ineffective enforcement" to signatories' concern about the high operational costs of transnational bribery regulation or the lack of detecting techniques.[140]

At the same time, early *regulation-centric* interpretations already realized that one exporting country's unilateral enforcement against transnational bribery would disadvantage domestic companies in international business transaction.[141] The formation of the OECD Anti-Bribery Convention did not change this situation because the Convention is non-binding.[142] As a result, the problem of "ineffective enforcement" of the Convention can also result from signatories' worry of free riders in public goods game — a conventional topic in international collective action theory.[143] Given that economists and political scholars have contributed a lot of explanations of and solutions to collective action problems,[144] scholars tended to borrow theories from economic and political literature (e.g., game theory,[145] and "prisoner's dilemma[146]) to causally attribute the problem of

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[140] For detailed discussion see Chapter II, 2.2.1.

[141] See e.g. Kaikati & Label (1980), Hall (1994: 303), Chaikin (1997: 289), Copeland & Scott (1999), Magnuson (2013: 383), and Schmidt (2009: 1126). Generally see Chapter I, 2.1.2 (B).

[142] See Tarullo (2004: 380), Brewster (2010: 309), and Magnuson (2013: 388).

[143] See Olson (1971), and Ahdieh (2010).

[144] See e.g., Neumann (1944), Olson (1971), and Goldsmith & Posner (1999; 2003).

[145] See e.g., Brewster (2010: 310).

[146] See e.g., Chaikin (1997: 289), Davis (2002: 321), Tarullo (2004: 671), and Magnuson (2013: 388). As Matthew Mulford and Jeffery Berejikian summarize, "Modelling state strategic interactions with the prisoner's dilemma was one of first applications of game theory in the study of international relations (e.g., Snyder, 1971; Stein, 1982; Oye, 1985). Scholars continue to find the game relevant to understanding state choice for issues as diverse as security, trade, and environmental policy. The strengths of the approach lie in an

"ineffective enforcement" of the OECD Anti-Bribery Convention and prescribe solutions.

During this process, the suitability of borrowing explanations and solutions from anti-corruption literature and collective action theories is *taken-for-granted*. This is because both anti-corruption wisdom and collective action theories are accumulated through academic efforts of scholars in the collective history of human beings. People have a natural tendency to use existing knowledge to explain and address new problems. The *problem-solving* process is quite analogous to the process of medical diagnosis that selects a symptom-malady nexuses from already-known diseases and applies it to the problem at hand by deductive reasoning.

(3) The Logic of Reasoning: Abduction

Abduction is a reasoning process explaining anomalous observations which run counter to people's general prediction of things. To makes sense of these anomalies people propose explanatory hypotheses of which the anomalistic phenomena are a logic consequence, and then try to prove or disprove these explanatory hypotheses.[147] For a problem solver's causal analysis of the problem,

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explicit emphasis on anarchic interactions, deductive theorizing, and the ability to unify the study of conflict and cooperation." Mulford & Jeffery (2002: 209). Scholars who conceive of transnational bribery regulation as a prisoner's dilemma is simply the deductive application of existing international relations theories.

[147] For instance, when we find the ground in an arid region is wet, we may hypothesize that it just rained, because rain usually wets the ground as a physical consequence, though it is rare in arid regions. One inherent characteristic of abduction is that the explanatory hypotheses are plausible explanations instead of definite sources even when we manage to prove strong correlation. Therefore, conclusions can be refutable. This characteristic is an inherent part of abduction. We assume "A" is an explanation for "B" because once "A" is true, "B" must be true. But the problem here is, "B" really exists, "A" is the hypothesized one. Therefore, we can only prove that "A" is a plausible but not a definite cause of "B". Abductive reasoning inherently relies on existing knowledge to generate its explanatory hypotheses and prescribe causes for new anomalies. Meanwhile, as a complex anomalistic situation often has more than one explanatory hypothesis, an evaluation of predominant explanations and subdominant explanations is unavoidable in many situations. See Magnani (2001).

abductive reasoning is a necessary phase.

(4) Conclusion: Control-Oriented Solutions

Another necessary phase for the *problem-solving* paradigm is prescribing solutions to the problem. As a logic consequence of the *political-will* assumption, current *problem-solving* literature often (if not necessarily) produces prescriptions which seek to improve signatories' domestic enforcement of the OECD Anti-Bribery Convention by altering signatories' political will and choices. I call this kind of prescription as "control-oriented" solutions—a term borrowed from international relations theory.[148] In the discourse of this study, the term control-oriented solution is used as a counterpart to other kinds of solutions which deny the existence of a political will of signatories to be controlled.

3. Structural Flaws of the Standard *Problem-Solving* Paradigm

The standard *problem-solving* approach in current literature is inclined to frame arguments on the *political-will* assumption, and rely on an image of the conventional wisdom of human beings on corruption control and collective action to explain and solve the "problem" of the "ineffective enforcement" of the OECD Anti-Bribery Convention through abductive reasoning. There is no space in this logical structure for drawing inspiration from the developmental reality of the OECD anti-bribery collaboration. However, both the preconceptions of Convention enforcement based on which scholars label the current level of Convention enforcement as "ineffective", and the logical structure through which scholars causally attribute the "problem" and prescribe solutions are questionable.

[148] Professor Keohane used the term "control-oriented regimes" to describe coalitions with power to control country behavior. In his context this terminology is used as a counterpart to "insurance regimes" which cope with uncertainties in collective actions by sharing risks. See Keohane (1989: 123-126).

3.1 Questioning the Formulation of "Ineffective Convention Enforcement"

A historical review reveals that attitudes towards anti-corruption initiatives, of which the FCPA approach is one, are seldom final, but indeterminate, refutable and mutable in an evolutionary context. For example, economists once argued that corruption was economically favorable before its opposite becomes dominant and remain refutable.[149] Transnational bribery used to be considered as a necessary business activity for TNCs to obtain or retain contracts, but was criminalized worldwide in merely two decades in the context of the collapse of the former Soviet Union and global economic integration.[150]

The logic of the creation and the popularization of academic interpretations of the wisdom of the FCPA[151] determines that people's conception of the wisdom of the FCPA is profoundly context-dependent, with close correspondence to values and demands of its social context. The context-dependent nature of interpretations suggests that the variation in people's attitudes toward the same phenomena can find its sources in the value preferences of a specific social context: the change in attitudes toward corruption was accompanied by the skepticism of the function of markets in the allocation of resources; and the

[149] For example, Davis states that "Payee states benefit economically from transnational bribery to the extent that it involves a transfer of wealth to their nationals." Davis (2002: 318). Tarullo notices a transfer of academic attitude toward transnational bribery and states that "the views of many development economists on the impact of bribery in developing countries had also shifted. Instead of regarding bribery as a means for getting things done in rigid bureaucracies, by the 1990s, development economists were characterizing corruption as one of the principal impediments to both economic growth and democratic accountability." Tarullo (2004: 676). Abbott & Snidal also note this change in attitude toward corruption: "Until recently, the dominant view was that some forms of corruption are necessary, even beneficial, aspects of development… A similar perspective informed World Bank policies until recently. The Bank regarded payments to local officials as a necessary, even valuable, way to cut through bureaucratic red tape and implement development projects…Beginning in the 1980s, however, some development experts, as well as officials and NGOs in developing countries, began to change their views." Abbott & Snidal (2002: 158-159).

[150] See e.g., Nesbit (1998: 1274-1275), Pieth (1999), Schmidt (2009: 1126), and Magnuson (2013: 387).

[151] See Chapter I, 2.1 & 2.2.

change in attitudes toward transnational bribery was accompanied by the development of transportation, the expansion of international markets and the demand for fair competition among multinational entities. [152] The context-dependent nature of people's beliefs in terms of transnational bribery regulation suggests that people's attitude toward the issue is never a question of ethical correctness, but one of timeliness or untimeliness.

Early interpretations of the wisdom of the FCPA approach were created to make sense of the revolutionary anti-corruption initiative, and to orient policymakers to certain policy making. In order to convince policymakers, corporations and ordinary people of the wisdom of the FCPA approach, academic and policy literature in the 1990s dramatically emphasized the corruption nature of transnational bribery, and argued that the FCPA-style approach was necessary for controlling the deleterious effects of transnational bribery on human welfare. This excessive emphasis on the corruption nature of transnational bribery was endorsed by international organizations, policymakers and intellectuals, and built the intellectual foundation for the establishment of a series of international anti-bribery agreements.[153]

However, the context-dependent nature of people's beliefs also informs us of the importance of reexamining whether these beliefs remain reliable in an evolving context with changing values and demands. The relation of any interpretative insight to its context, is very like that of visible branches and leaves of trees to their invisible roots. An excessive emphasis on the visible parts may be able to explain characteristics of things in a given time and space, but cannot predict and account for changes taking place in a dynamic process. The static viewpoints should always be modified to suit the new reality.

When academic focus was shifted from the wisdom of the FCPA approach to the

[152] See e.g., Abbott & Snidal (2002: 158-160). Also see Chapter I, 2.1.2 (A).

[153] Many agreements stress the corruption nature. See e.g. OECD (1997a).

actual enforcement of the Convention,[154] such a necessary reexamination is absent. After these propositional beliefs served their historical mission (i.e., they help people make sense of the FCPA approach), they settled down in people's consciousness and became their preconceptions of the FCPA-style approach in new social context. As a result of the excessive emphasis on the corruption nature of transnational bribery, people tend to conceive of the FCPA approach as a logical response to the evil of transnational bribery, and expect transnational bribery to be controlled as effectively as domestic corruption in individual countries. If the consequence is observed to be below this prediction, people are inclined to consider it as a "problem" to be solved. In that case, there is little space for a full discussion on the real driving force of the global anti-bribery collaboration.

3.2 Questioning the Basic Ingredients of the Standard *Problem-Solving* Paradigm

3.2.1 A Skeptical View of Logical Starting Point

Because the standard *problem-solving* approach in current literature takes the *political-will* assumption as its logical starting point, academic analysis following this paradigm cannot call into question the *political-will* assumption, but must take it as a given.[155] Based on this assumption, signatories are assumed to be unitary actors, acting independently, and under most situations rationally. The level of Convention enforcement by signatories is considered a function of these signatories' political will, which in turn is a function of signatories' calculation of how the strategy of Convention enforcement would affect their national interests.[156]

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[154] See e.g., Nesbit (1998), Doig (1998), Low (1998:151-156), Pieth (1999), Williams (1999), Zagaris & Ohri (1999), and Healy *et al.* (2003).

[155] For a detailed introduction of the *political-will* assumption see Chapter I, 2.1.3 & 2.4.

[156] See Chapter I, 1.

However, this formulation does not take us far, given the uncertainty of "national interests". Factors affecting state strategy vary across jurisdictions as well as periods of time. Therefore, national interests are not definitively specifiable.[157] Thus explaining signatories' choice on whether to enforce the Convention as resulting from national actors' rational calculation of interests can neither give an accurate explanation of what has took place retrospectively, nor give insightful prediction of their actions prospectively.

More importantly, the *political-will* assumption causes academic analysis to lose sight of the heterogeneity problems inside individual countries with regard to transnational bribery regulation. Treating all signatories as homogeneous actors, academic analyses only needs to focus on one level of interactions among signatories which seek to maximize their overall national interests when they make choices on whether to regulate transnational bribery.

This formulation is too simplistic to capture the complexity of the real decision-making procedure that involves the participation of multiple domestic agencies. A precondition for trading off multiple interests is to give certain value to each interest in the first place, it can only happen in cases where people agree on the values of different national interests — in other words, it only applies to homogeneous circumstances. However, signatories' domestic enforcement of the OECD Anti-Bribery Convention seems not to be the case. The influence of anti-bribery laws is quite heterogeneous. As a type of corruption, it is considered as immoral and unfair which contradicts the moral values of democratic societies.[158] As an economic phenomenon, however, it is considered a type of market behavior that raises the question of whether governmental interference is appropriate.[159] As one type of business activity, it is considered as a means to compete with business competitors, and indicates the tension between business

[157] See Keohane (1989: 60), and Wendt (1992: 392).

[158] See Chapter I, 2.1.2 (A).

[159] See e.g., Salbu (1997: 280-286).

competitors from the same or different countries.[160] As a type of multinational activity, it involves more than two jurisdictions, and raises the question of extraterritorial application of laws.[161] Because of the multiplicity of stakeholders, governmental departments, private sector actors like TNCs and general public, all have an interest in the decision of legislators on transnational bribery regulation. Each interest group seeks to realize their value preferences regardless of those of others to the largest extent practical.

The variety of interest groups and demands indicates that the decision-making process would not be one of payoff calculations like that done in a human brain seeking pleasure and avoiding pain, but rather a product of debates, compromises and concessions between various groups of stakeholders. This is in particular true in societies with a democratic power structure, given that many interest groups will have channels to express their interests and demands.[162] This means that the *political-will* assumption, which makes academic analysis lose track of internal dynamics of individual signatories, is inaccurate.

3.2.2 A Skeptical View of the Theoretical Resource

People draw patterns from sensory experience to develop theories.[163] On this basis, theoretical models help people discover and explain new phenomena generated in an evolving social context.[164] However, while metaphoric application of conventional theoretical models empowers people to capture and understand common characteristics of new phenomena, it also leads people to overlook unique characteristics of the new phenomena.

Current *problem-solving* literature's excessive commitment to metaphorical

[160] See Chapter I, 2.1.2 (A).

[161] See Chapter I, 2.1.1.

[162] See Magnuson (2013: 366-372).

[163] See Husserl (1970).

[164] See Keohane (1989: 38).

application of conventional wisdom on domestic corruption control or international collective action to the analysis of the enforcement of the OECD Convention has a fatal flaw: in order to metaphorically apply conventional wisdom contributed by anti-corruption scholars, economists and political scholars, researchers tend to act in a Procrustean way, highlighting characteristics of OECD anti-bribery collaboration already precompiled by orthodoxies, but neglecting unique characteristics of OECD anti-bribery collaboration. For example, scholars who focus on the corruption nature of transnational bribery tend to stress how the surreptitiousness of transnational bribery — a common characteristic of corruption — impedes effective investigation and prosecution,[165] but are unlikely to notice that in the eyes of prosecutors, the deleterious effect of transnational bribery are not as influential as that of domestic corruption.[166]

The application of game theory to explain Convention enforcement is a good example that illustrates how scholars have become accustomed to making successive assumptions, approximations and simplifications to explain and prescribe solutions for the "ineffective enforcement" of the Convention.[167] Describing the anti-bribery collaboration as a game or a "prisoner's dilemma" needs to presume the existence of "a common good" for signatories. This assumption implies that signatories participate in the Convention to serve "common interests", thereby inevitably affirming the consistency of signatories' motives to participate in the Convention and their motives to enforce the Convention — which means, signatories indeed want to enforce the Convention when the signed the Convention.[168] Following this logic, signatories do not mind

[165] See e.g., Burger & Holland (2006).

[166] As Burger & Holland state: "Government law enforcement will always have competing priorities, whether combating terrorism, the drug trade, organized crime, or other domestic objectives; and governments are not unitary actors. They are typically divided into ministries or agencies that sometimes have inconsistent priorities." Burger & Holland (2006: 47).

[167] See Neumann (1944).

[168] See Chapter III, 2.2.1.

paying a cost to combat transnational bribery unless their payoffs are unsatisfactory. Any shirking is explained as resulting from high operational costs of transnational bribery regulation[169] or a country's concern about the risk of being exploited by others.[170]

However, up until now there is no solid evidence proving that signatories participated in the Convention because of their pursuit of the "common good" (i.e., a good international trade atmosphere). On the contrary, there are arguments that countries may strategically accept the Convention that they have no intention to comply.[171] Given this possibility, the real motives of the US to create the FCPA approach and the real motives of other signatories to establish the Convention should not be assumed, but rather treated as a variable.[172]

In fact, the applicability of making successive approximations and simplifications to characterize real cases has been questioned as early as in the 19th century by physical science. Given the complexity of social life, linear conception of complex issues might not only lead to inaccurate conclusions, but wrong conclusions.[173] Some scholars who analyze the enforcement of the OECD Anti-Bribery Convention, have shown awareness of this problem too, even if they have not seriously posed it as an important issue. For example, Tarullo has questioned the interpretative and prescriptive power of game theory after he applied it to explain the "ineffectiveness" of Convention enforcement. As he puts it, "like all social science models, game theory is a heuristic, rather than representational, device. Even in versions considerably more elaborate than that employed in this article, it cannot capture all relevant factors, much less

[169] See e.g., Tarullo (2004: 688), and Burger & Holland (2006: 47).

[170] See e.g., Chaikin (1997), Abbott & Snidal (2002), and Brewster (2010).

[171] See Tarullo (2004: 709).

[172] See Chapter III, 2.2.1.

[173] Chaos theory, as a denial of the way of thinking of the Newtonian, has attacked the linear thinking of the Newtonian by illustrating how a tiny change at the outset of an intricate system can lead to diametrically opposite conclusions, but not a predictable difference. See generally Kiel & Elliott (1996), and Davis (1999).

accurately quantify them in a payoff matrix."[174] In particular, Tarullo stresses that game theory cannot explain many real facts in Convention enforcement. Magnuson has endorsed the inapplicability of game theory to describe these facts.[175] Yet Magnuson limits his focus to the problems arising in connection with the extraterritoriality of the FCPA, which makes sense but does not help explain the theoretical problem of using game theory here.[176]All these viewpoints remind us of the necessity of a reexamination of the suitability of metaphorically applying conventional theoretical models.

3.2.3 A Skeptical View of the Control-Oriented Solutions

The *problem-solving* paradigm, which is based on the *political-will* assumption, and borrows wisdom from existing anti-corruption analyses and collective action theory to explain the "ineffective enforcement" of the OECD Anti-Bribery Convention, lead scholars to draw *control-oriented* solutions, which suggest to establish coercive international law (e.g. sanction mechanisms) to make signatories cooperate enough to avoid defective enforcement.[177]

However, given the decentralization of world politics, the idea of establishing coercive international law to impose external constraints on countries so as to improve Convention enforcement is unrealistic. Any lawmaking at an international level, especially those with coercive power, requires a new round of negotiations between signatories.[178] At this time, it is a reality of world politics that regardless of whether signatories tend to take the Convention seriously they are unlikely to agree on any institutional arrangements that lead to substantive external constraints on their own behavior.[179] The whole question thus comes

[174] Tarullo (2004: 708). Also see Keohane (1989: 47-49).

[175] See Magnuson (2013: 392).

[176] See Magnuson (2013: 392).

[177] See e.g., Nichols (1997). For detailed discussion on *control-oriented* solutions see Chapter IV.

[178] For detailed discussion see Chapter IV, 3.2.

[179] See Guzman (2005), and Magnuson (2013: 375).

back to an internationally political issue which lacks intellectual ground works. Besides, even if it is possible to establish a sanction mechanism, as the WTO does, a central sanction mechanism would not work as effectively as that in the WTO because of the secretive nature of transnational bribery and the difficulty in identifying signatories' defection.[180]

4. Virtue and Limits of the Standard *Problem-Solving* Approach for Analyzing Convention Enforcement

Theories can be generally labeled as descriptive or prescriptive. Descriptive theories inform us of *what-is*, while prescriptive theories tell us *what-to-do*.[181] Descriptive work is often a logical premise because before knowing *what-to-do*, researchers need to identify *what-is* in the first place.

The *problem-solving* paradigm in the discourse of this study encompasses both descriptive and prescriptive discourses. Regarding the analytical purpose of this study, the standard *problem-solving* paradigm in current literature has done a rather good job of highlighting lags between the actual enforcement of the Convention and people's general expectation. The inherent inclination of the *problem-solving* paradigm to promote reform satisfies the general public's eagerness for beneficial social changes, and its affiliation with conventional wisdom also equips it with both interpretative and prescriptive powers. This is why this paradigm has quite pervasive influence in current academic and policy literature.

However, the *problem-solving* approach applied by current anti-corruption literature does not complete its mission thoroughly and successfully. As suggested at the beginning of this Chapter, the descriptive power of the

[180] See Magnuson (2013: 375). For more detailed discussion see Chapter I, 4.1.2; Chapter III, 4; and Chapter IV, 1.

[181] See Dettmer (2007: 12).

problem-solving paradigm is limited to the "ineffective enforcement" of the Convention by most signatories. It completely avoids explaining the developmental reality in leading jurisdictions (e.g., the increasingly aggressive enforcement of the FCPA by the US). [182] With regard to its prescriptive power, although its metaphorical application of existing collective action theories helps to prescribe solutions for the "ineffective enforcement" of the Convention, the solutions prescribed by current anti-corruption scholarship are not successful enough in addressing the problem identified. In the following subsections is a detailed analysis of the virtues and limits of the standard *problem-solving* approach in current literature for analyzing the enforcement of the OECD Anti-Bribery Convention by signatories.

4.1 Strong Interpretative Power in Causally Attributing the "Ineffective Convention Enforcement"

As described in 2.1.3, academic analyses of the enforcement of the OECD Anti-Bribery Convention often start with the *political-will* assumption, characterize signatory countries as free-will actors, and treat Convention enforcement as a function of signatories' political will to regulate transnational bribery.[183] Many previous works take this assumption as their logical starting point. For example, German states that "Effective enforcement and prosecution will depend on political will, largely demonstrated through the application of resources to the agencies within the criminal justice system which are charged within the criminal justice system which are charged with giving life to its

[182] For more information see Chapter I, 4.3 & 5.1, and Chapter III, 5.1.

[183] Individual countries are conceived of as intellectual actors that have control over their behavior, and it is this behavior that determines the effect of the enforcement of the Convention. This assumption is not a pure artificial creature, but is based on the fact that the Convention enforcement completely relies on actions of national legal systems. Besides, it is also bound up with the popular rationality assumption which views the decision-making of signatories as arising out of a cost-benefit calculation like that of human rational actors. See e.g., Salbu (1997), Nichols (1997, 1999), Davis (2000; 2012), Tarullo (2004), Brewster (2010), and Magnuson (2013).

provisions."[184] Tarullo describes the enforcement of the Convention as a game among signatories and conceives of the level of Convention enforcement as a function of their willingness to adopt cooperative strategies.[185]

Then, as Section 2 of this Chapter has described, the way in which earlier scholars explained the wisdom of the FCPA approach has led to a popular formulation that the enforcement of the OECD Anti-Bribery Convention has been suffering from a problem of "ineffective enforcement". So anti-corruption scholarship tends to attribute the "ineffective enforcement" of the Convention to signatories' "lack of political will". For example, Transparency International's 2010 Progress Report labelled the status quo of Convention enforcement as "lagging enforcement", and attributed it to a lack of political will:

"The principal cause of lagging enforcement is lack of political will. This can take a passive form, such as a failure to provide adequate funding and staffing for enforcement. It can also take an active form, through political obstruction of investigations and prosecutions."[186]

This causal attribution does not deny that individual countries' actual abilities to prevent and monitor transnational bribery have impact on the enforcement of the Convention.[187] Rather, signatories' actual abilities are considered as constants or technical issues, or factors affecting their political will to regulate transnational bribery.

4.1.1 Attributing the Lack of Political Will to Domestic and External Factors

As a still attributable indication other than a solvable source, the argument on the "lack of political will" of signatories becomes an overall version under which specific attributions fit. Given the far-reaching impact of the rationality assumption on state behavior, signatories' lack of political will to enforce the

[184] German (2002: 256).

[185] See Tarullo (2004: 682).

[186] Heimann & Dell *(*2010: 8). Also see e.g. Tarullo (2004: 682), and Magnuson (2013: 372).

[187] For example, Magnuson considers the ability to monitor corruption as a factor affecting domestic enforcement against international bribery. See Magnuson (2013: 372).

Convention is explicitly or implicitly counted as a function of their cost-benefit calculation of the strategies on transnational bribery regulation. As both domestic and external factors affect signatories' payoffs in transnational bribery regulation, their "lack of political will" is further attributed to the high costs of anti-corruption activities (e.g., costs of investigation, prosecution and trial) and/or an undesirable regulatory environment that encourages defection.[188]

The domestic perspective places central focus on the high costs of transnational bribery regulation. Scholars consider the difficulty in and high cost of investigating and prosecuting transnational bribery makes prosecutors disinterested in allocating resources to such cases.[189] Signatories' non-compliance thus results from their consideration of operational costs, opportunity costs,[190] or even the "inertia" of law enforcement organization that makes prosecutors "continue to allocate their time and energies pretty much as before."[191] Logically, scholars tend to seek resolutions which help reduce operational costs of transnational bribery regulation.[192]

The external perspective stresses the international relevance of transnational bribery regulation. Scholars emphasize how regulatory environment, including interrelations among members of the Convention and between members and outsiders affects country compliance with the Convention. Based on the public condemnation of transnational bribery, they assume that the Convention produces "a public good" for the whole human community rather than any single country. A public good game always indicates a tension between one's cost for creating the

[188] See Chapter II, 2.2.

[189] See Chapter III, 2.2.1.

[190] See Burger & Holland (2006: 47).

[191] Tarullo (2004: 688).

[192] One popular opinion suggests to make use of private entities to expose transnational bribery deals (e.g., encouraging civil actions or whistle blowers as alternative forces), so as to free up public resources from the burden of collecting information and evidence on acts of transnational bribery. See Council of Europe (1999: Article 3), German (2002: 256), and Burger & Holland (2006: 45-74). Also see Chapter IV, 3.

"public good" and the potential risk of being exploited by free riders. Members are therefore trapped in a "prisoner's dilemma".[193]For example, Schmidt applies cases about how the UK and France halted investigations into domestic companies.[194]

Another viewpoint that emphasizes the interrelations between signatories and outsiders,[195] can loosely fit under this category as well, given that the essence of its argument is to highlight the exploitability of individual contributions in OECD anti-bribery collaboration.[196] Basically, this formulation describes OECD anti-bribery collaboration as an anti-rationality cooperation model that induces defection.[197] Correspondingly, game theory and the ramifications built by economists and international relations scholars are applied to explain and overcome the collective action problem in OECD anti-bribery collaboration.[198] In this formulation, scholars can further attribute the failure to surmount the collective action problem to the absence of a credible sanction mechanism or the lack of effective information flows.[199]

Numerous papers have discussed the usefulness of a sanction mechanism in guaranteeing compliance. For this reason some scholars have attributed the "ineffective" enforcement of the Convention to the lack of coercive power to guarantee Convention enforcement.[200] However, the lack of coercive power is a

[193] See e.g., Tarullo (2004), Schmidt (2009), Brewster (2010), and Magnuson (2013: 379). Also see Chapter III, 2.2.2.

[194] See Schmidt (2009: 1134-1135).

[195] See e.g., Low (2007: 513), and Nadipuram (2013).

[196] See e.g., Low (2007: 513), Heimann & Dell *(*2010: 8), Tarullo (2004: 678-680), and Pieth (2007: 11-17).

[197] See e.g., Holmes (2009: 309). Also see Chapter III, 2.2.1.

[198] See e.g., Neumann (1944), and Keohane (1989: 47-49).

[199] See Chapter III, 3.1.

[200] See e.g., Nichols (1997: 360), Mendes & McDonald (2001), Tarullo (2004: 687), Veszteg & Narhetali (2010: 668), and Magnuson (2013: 391-393).

question of international law.[201] Both supranational sanction and mutual sanction are unrealistic in most situations. There is no doubt that in international collaboration some agreements are more institutionalized and more enforceable than others. In extreme situations it is realistic to expect countries to commit a certain amount of sovereign power to establish central sanctions to guarantee long-term mutual relationships, of which the dispute Settlement mechanism in the WTO is a good example.[202] However, the applicability of central sanctions needs a powerful coalition whose members have very strong incentives to establish such institutions.[203] The absence of central sanctions in public-goods game is predicted to be an unchangeable reality in the foreseeable future. Therefore, attributing the "ineffective" enforcement of the Convention to the absence of credible sanctions explains the problem but does not help solve it.

More pragmatic scholars tend to focus on informational channels,[204] given that forces other than coercive power (see e.g., countries' concern for reputation) also work to guarantee compliance.[205] The real experience has showed that some public-good-producing treaties can yield considerable products even in the absence of sanction mechanisms; under many international fora, countries are also willing to enforce agreements because of international responsibility.[206] One example is the success of the Montreal Protocol that sought to prevent ozone depletion.[207] A reasonable explanation is that high quality of information can guarantee cooperation in the absence of normal exogenous restraints. With

[201] See Nichols (1997: 360), O'Connell (2008), and Magnuson (2013: 388).

[202] See WTO Press Release, "Dispute settlement", available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited: 13 March, 2014). Also see Nichols (1997: 360).

[203] See Keohane (1989:122-123).

[204] See e.g., Tarullo (2004) and Heimann & Dell (2006: 3). Also see Chapter III, 3.2, and Chapter IV, 1.2.

[205] See Keohane (1989: 30-31), and Goldsmith & Posner (2003: 113).

[206] See Nadipuram (2013: 642).

[207] For detailed discussion on the success of this protocol see Hashim (2009).

sufficient information about others, participants who fulfill Convention obligations can monitor others, reducing the concern of being exploited by others; and potential free riders may be concerned about their reputation, as well as for the criticism and retaliation of others. This is why policymakers, practitioners and scholars count on an effective monitoring mechanism to provide information on the cooperation of participants; and similarly why some of them attribute signatories' lack of motivation to the failure of the OECD monitoring mechanism to monitor individual behavior.[208]

4.1.2 Finding Root Causes: Exploitable but Unmeasurable National Regulatory Efforts

OECD anti-bribery collaboration includes both anti-corruption efforts and multinational collective action. Therefore, a *problem-solving* scholar can start their causal analysis of the problem of "ineffective" Convention enforcement from either a domestic perspective, stressing the anti-corruption nature of the collaboration, or an international perspective, stressing the collective action nature of the collaboration.

As above noted, a *problem-solving* scholar who starts from a domestic perspective, stress the anti-corruption nature of Convention enforcement, focuses on the surreptitious nature of transnational bribery which has made detection and investigation difficult and expensive, and seeks to employ common anti-corruption ideas (e.g., encouraging civil lawsuits)[209] to increase information flows on transnational bribery, and decrease costs of detection and investigation. However, such an analysis avoids discussing the highly complex interrelation among signatories, which transnational bribery regulation necessarily involves. It cannot give a thorough explanation of or solution to the problem.

On the other hand, a *problem-solving* scholar who starts from an international

[208] See e.g., Heimann & Dell (2006: 3). Also see Chapter III, 3.3, and Chapter IV 1.3.

[209] See e.g., Burger & Holland (2006), and Young (2009).

perspective, stresses the public-goods-game nature of Convention enforcement, focuses on the exploitability of national regulatory efforts in the collective action of signatories, and seeks to establish effective information channels (e.g. a central monitoring system) to prevent free riders.[210] However, an analysis following this path would soon find that it can hardly achieve the goal of establishing effective information channels in the anarchy of world politics, given that the tendency of one country's TNCs to pay foreign bribes as well as the regulatory efforts of this country are immeasurable. Scholars are fully aware of that corruption, by its very nature, is a secretive enterprise. As Burger & Holland put it, there is a huge "impunity gap" with respect to transnational bribery.[211] This characteristic makes knowing the number of transgressions almost impossible, and also makes monitoring country compliance with the OECD Anti-Bribery Convention more difficult than other international agreements.[212]

In other words, a scholar who expects to prescribe solutions from international collective action theories soon finds that the surreptitious nature of corruption and the immeasurability of national anti-bribery efforts fail traditional solutions to collective action problems. For example, Tarullo applies game theory to analyze the payoff structure of signatories before and after the ratification of the OECD Anti-Bribery Convention, claims the ineffectiveness of the Convention and attributes it to the institutional failure of the Convention monitoring system in changing this payoff structure of signatories, which has roots in the surreptitious nature of transnational bribery.[213]

[210] See e.g., Tarullo (2004), and Schmidt (2009).

[211] See Burger & Holland (2006: 47).

[212] See Tarullo (2004: 683), and Trace (2011: 1). Also see Chapter III, 4.1.

[213] See Tarullo (2004: 683-690). This approach is restated by Magnuson (2013: 388).

4.2 Weak Prescriptive Power of the Standard *Problem-Solving* Approach in Current Literature

In contrast to the rich landscape of causal attributions it creates, the performance of current *problem-solving* literature in prescribing solutions is unremarkable. Existing *problem-solving* analyses appear to be unaware of how the surreptitiousness of transnational bribery and the exploitability of national regulatory efforts in OECD anti-bribery collaboration have woven an almost insurmountable dilemma for the global transnational bribery control, jointly accounting for the "ineffective enforcement" of the OECD Anti-Bribery Convention. Current problem-solving literature has not yet addressed this problem successfully.

This failure can be attributed to the current literature's attempt to solve a *nonroutine* problem by *routine* solutions.[214] Semyon D. Savranshy defines the terms of routine problem and nonroutine problems.[215] In his opinion, a *routine* problem is one permitting repetitive, already known solutions. A *nonroutine* problem is one for which at least one critical solving step is unknown insofar as people's experience allows so that it requires innovative solutions. The collective action problem in OECD anti-bribery collaboration is an issue more novel than people have understood. The dilemma woven by the surreptitious nature of transnational bribery and the exploitability of national anti-bribery efforts is a strongly *nonroutine* problem.

This *nonroutine* problem fails *routine* solutions. As noted, (domestic) anti-corruption literature has prescribed many solutions to overcome the surreptitious nature of corruption or other kinds of transnational crimes (e.g., money laundering); collective action theories have prescribed various solutions

[214] See Chapter III, 4.

[215] See Savranshy (2000: 4).

for international collective action problems. However, some *problem-solving* scholars have realized that it is the two characteristics together, instead of either one of them that accounts for the current dilemma in Convention enforcement.[216] What is missing in current *problem-solving* literature is an awareness of how the two separately solvable issues, have amalgamated into a complex situation that defies *routine* solutions for either. The problem with the enforcement of the OECD Anti-Bribery Convention is not solvable by a linear, step-by-step application of existing tools. It is a structurally new one demanding a holistic, innovative solution model. Without an awareness of this point, previous *problem-solving* efforts have been quite unsuccessful.

The failure to overcome the current dilemma woven by the surreptitious nature of corruption and the exploitability of national regulatory efforts is not an inherent part of the logic of the *problem-solving* paradigm. In fact, problem solving encourages innovations.[217] Given that it is possible for a *problem-solving* scholar to surmount the current dilemma as long as the one is able to work out a holistic, innovative solution model, the current *problem-solving* literature's failure to prescribe successful solutions is only the failure of the standard *problem-solving* approach which is based on the *political-will* assumption, focuses on merely one level of interactions among countries, and metaphorically applies existing collective action theories. To resolve this technical failure and release the full potential of a *problem-solving* paradigm in analyzing the "ineffective Convention enforcement", the standard *problem-solving* approach in current literature which prescribes linear, step-by-step solutions should be restructured so as to work out a holistic, systematic solution model.[218] In the following part, I call this suggested *problem-solving* model "an improved (restructured) *problem-solving* approach." The difference between the standard *problem-solving* approach in

[216] See e.g., Tarullo (2004: 683), and Magnuson (2013: 388).

[217] See e.g., Fogler & LeBlanc (2008).

[218] For such an attempt see Chapter IV.

current literature and this improved (restructured) *problem-solving* approach is a difference in specific methods. Both of them still fit under a general problem-solving paradigm, which portrays the current level of Convention enforcement as "ineffective" and encourages a normative analysis.

4.3 The Inherent Limitation of the *Problem-Solving* Paradigm

One fundamental assumption of the *problem-solving* paradigm is the "ineffective enforcement" of the Convention. So any academic analysis following this *problem-solving* paradigm has to emphasize the local gap between the reality and expectation in a country (or in many countries) with regard to their enforcement of the Convention. Next, the analysis will causally attribute this gap to various institutional factors, and then prescribe policy recommendations for institutional improvement. The most popular *problem-solving* approach in current literature, which is based on the political-will assumption, attributes the gap to signatories' "lack of political will," and suggests to establish effective control-oriented mechanisms (e.g., sanction or monitoring) to improve signatories' compliance with the Convention.

While the *problem-solving* paradigm emphasizes the gap between reality and expectation in a given country or indeed among all signatories and then borrows existing collective action wisdom to explain and fill this gap, it cannot explain the developmental reality in leading jurisdictions. Such reality is the increasingly aggressive enforcement of the FCPA-style approach by the US and several of its allies, such as the UK and Germany.[219] In other words, while the standard *problem-solving* approach in current literature portrays current Convention enforcement as "ineffective" and tends to give a systemic explanation of disincentives that cause signatories' defection, it has to treat the developmental reality in leading jurisdictions as negligible exceptions, and therefore is logically

[219] See Trace (2011), and Heimann & Dell (2010). Also see Chapter I, 5.1 and Chapter III, 5.1.

unable to explore incentives that cause signatories' compliance.

This treatment is advantageous at the outset of academic analysis. Because it simplifies the complex reality of signatories' collective enforcement of the Convention and highlights the causalities between disincentives and "ineffective Convention enforcement," it enables a systemic analysis of disincentives common to all signatories and the utilization of existing collective action theories. After identifying and curing problematic institutional settings at a system level, scholars can go further to gain an *ad hoc* understanding of unique disincentives in given signatories without being distracted by systematic disincentives. This wide applicability of the *problem-solving* paradigm has objectively promoted the prosperity of academic discussion on the topic of Convention enforcement.

However, in the current stage, when the standard *problem-solving* approach has been overexploited to explore systematic disincentives, especially given the cul-de-sac in which much of current problem-solving literature has led us with regard to the cure of problematic institutional settings (as discussed in 4.1 and 4.2), there is a need to develop a supplementary paradigm which no longer starts with prejudgments, but encourages a value-free, positive analysis of the developmental reality in leading jurisdictions. With regard to specific methods, this supplementary paradigm would no longer rely on metaphorical application of existing collective action theories which highlight factors leading members to defect from a collaboration, but incorporate historical specificities and other elements of context that facilitate the causal processes leading to effective anti-bribery enforcement in a given country.

4.4 The Demand for an Supplementary Paradigm

This demand for a supplementary paradigm is first driven by the objective of academic analysis — scholars analyze the enforcement of the Convention for social needs but not intellectual reasons. With regard to the enforcement of the

OECD Anti-Bribery Convention, the current social need is to improve the state of country compliance with the OECD Anti-Bribery Convention regardless of the way we choose to make sense of the status quo. The vitality of the *problem-solving* paradigm in current literature does not come from its own logical setting, but from its strong power in making use of conventional theories to identify and cure disincentives that cause "ineffective an-bribery enforcement" by many signatories. In a similar way, we need another research pathway that explains the dynamic of "effective anti-bribery enforcement" by a few signatories for the reference of other signatories. The two research paradigms that complement each other would enable a full understanding of the dynamic of all signatories' collective enforcement of the Convention.

An even more pragmatic motivation for us to renew our ways of thinking about Convention enforcement is the pursuit of efficient social change. There is no doubt that the *problem-solving* paradigm's inclination to borrow wisdom from existing compliance theories to remedy status quo enables itself to produce applicable policy recommendations. However, this notion is not necessarily true when we take into account our demand for economically feasible social change. Humanity's pursuit of beneficial change is not only characterized by a quest for applicable ideas, but also a need to achieve the given aim with the funds available.[220] Given the complicated interest structure both within and among individual signatories to the Convention, a sense of efficiency is a very fundamental value when we assess the applicability of policy recommendations. For this reason, we need to try multiple approaches that generate different types of policy recommendations for the reference of policymakers. People's pursuit of efficient social change generates the need for divergent analytical approaches.

[220] See Savranshy (2000: 4).

5. Framing the Supplementary Paradigm

5.1 The Mission of the Supplementary Paradigm

As discussed in Section 4, the standard *problem-solving* paradigm is good at explaining disincentives that cause "ineffective Convention enforcement," but avoids explaining the developmental reality in leading jurisdictions. So the supplementary paradigm discussed here is expected to fill this gap, analyzing the causal processes leading to effective anti-bribery enforcement in a few signatories. In particular, this supplementary paradigm should be able to answer questions as follows: (a) Why a few countries like the US and Germany are more active in Convention enforcement than other countries which are just as strong in terms of domestic corruption control? [221] (b) Why several other industrialized countries (e.g., The Netherlands, Australia, and Canada) are moving forward one by one in their Convention enforcement activity, when there are still no systemic external constraints?[222]

In order to answer these questions, the supplementary paradigm should be highly vigilant against forming a prejudicial view on how should the Convention should have been enforce by signatories. It should be a positive analysis that takes historicity into account. Historicity, as Keohane explains, refers to "the social process of reflection on historical experience that human societies undergo."[223] A historicity-enriched analysis in this discourse should analyze internal politics of leading jurisdictions that generate the causal processes leading to effective anti-bribery enforcement.

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[221] As Magnuson suggests, "Current theory (i.e., rational-choice accounts) also fails to explain why the non-compliance of treaty partners with the obligations of the OECD Anti-Bribery Convention has not led to a change in behavior by the United States." Magnuson (2013: 391). Also see Schmidt (2009: 1135). For answers to this question see Chapter V.

[222] See Trace (2011). For answers to this question see Chapter V.

[223] Keohane (1989: 30).

5.2 Existing Theories for Framing the Supplementary Paradigm

5.2.1 Public Choice Theory as the Theoretical Source for Both the *Problem-Solving* Paradigm and the Supplementary Paradigm

The term public choice has been described as "the economic study of nonmarket decision-making, or the use of "economic tools to deal with the traditional problems of political science."[224] Public choice theory originated in the second half of the 20th century,[225] and generally refers to the metaphorical application of economic theories to decision-making in the domain of politics.[226] More specifically, it inherits wisdom from individual rationalism and styles political players (e.g. legislators, regulators, voters and representatives) as utility maximizers driven by self-serving purposes when they make choices in an issue-area.[227]

In this sense, the *problem-solving* paradigm is closely associated with public choice theory because it needs this theory to define the behavioral logic of its central actors. As discussed above, the *problem-solving* paradigm, regardless of the specific *problem-solving* methods, focuses central attention on how disincentives in an issue-area affect the choices of behavioral agents. Both the standard *problem-solving* approach in current literature, which starts with the *political-will* assumption and considers signatories as central actors in their

[224] Tullock (2008).

[225] These works include but are not limited to *Social Choice and Individual Values* by Kenneth Arrow in 1951, *An Economic Theory of Democracy* by Anthony Down in 1957 and *The Logic of Collective Action* by Mancur Olson in 1965. See Ostrom (2007: 240).

[226] The origin of modern public choice theory can be traced to a series of works of Duncan Black. See Black (1948a; 1948b; 1958). Kenneth J. Arrow, Anthony Downs, Gordon Tullock, Mancur Lloyd Olson, William H. Riker and Milton Friedman are considered as important contributors. See Rowley *et al*. (2008: 77-166). For a brief summary of the development of public choice theory see Ostrom (2007: 240-241).

[227] Mueller suggests: "The basic behavioral postulate of public choices, as for economics, is that man is an egoistic, rational, utility maximizer." Mueller (1976: 395). Barbara Black states: "Public choice theory explains that government officials are motivated by self-interest and pursue agendas that advance their interests without regard to the public good." Black (2012: 1113). Also see Ostrom (2007: 240-241).

analytical model, and an improved *problem-solving* approach (as suggested in 4.2 of this Chapter) which unpacks the "unitary identities" of signatories and analyzes interactions among actors in both the public sector and the private sector, count on public choice theory to define the behavioral logic of their respective central actors.

As discussed in 5.1, the most fundamental difference between the supplementary paradigm and the *problem-solving* paradigm is that the supplementary paradigm no longer focuses on the causal relationships between disincentives and signatories' "lack of political will," but highlights the developmental reality in leading jurisdictions. In order to explain the causal processes leading to effective anti-bribery enforcement in these countries, this supplementary paradigm still needs to consider certain domestic agencies as central actors and define how elements of their political context affect their choices. In this sense, it also needs to borrow wisdom from public choice theory.

The core of public choice theory is, however, not limited to the application of rational-choice theory in political areas. After defining behavioral agents as rational actors, public choice theory then emphasizes how the structure of an action situation (e.g., e.g., characteristics of the community and rules for interaction) produces different incentives/disincentives for different actors, and how choices of these rational actors aggregate into a final outcome which is necessarily optimal.[228] Under this general theoretical framework, public choice theorists can further apply economic tools (e.g. game theory) to conduct a positive analysis of a social welfare function in a given institutional framework, or to conduct a normative analysis of how to maximize the social welfare function through institutional betterment.[229] In this sense, public choice theory can be applied to modify the current *problem-solving* approach, perhaps resulting in a theoretical model that allows projection of maximum collective outcome of

[228] See Mueller (1976: 395), Corley (1998: 34-35) and Ostrom (2007: 241).

[229] See Mueller (1976: 395-399).

all actors.[230]

With regard to the framing of the supplementary paradigm undertaken here, public choice theory has at least two other implications. On the one hand, public choice theory does not deny, but rather emphasizes, the heterogeneity of individual preferences in the same political-issue area.[231] Admitting the heterogeneity of individual preferences in a political-issue area makes it possible and unavoidable for scholars to treat individual preferences as variables which can only be identified in real historical contexts, and not treated as constants which can be posited by assumption. In other words, the contribution of public choice theory would not stymie, but rather permit a positive analysis of individual preferences in their actual historical contexts.[232] On the other hand, public choice theory, which also highlights rules and procedures through which different political forces interact, indicates that the way in which multiple political forces interact should not be merely assumed, but rather be treated as variables to be identified in specific political contexts. Accordingly, the study of how domestic agencies make collective decisions on transnational bribery regulation should examine the dynamic processes in real political contexts, rather than presumed archetypes.[233]

5.2.2 Institutionalism that Highlights the Influence of Informal Institutions on Individual Preferences

As long as the study of Convention enforcement is actor-oriented, public choice theory is necessary to define the behavioral logic of the relevant actors. In this sense, both the *problem-solving* paradigm and the supplementary paradigm can

[230] See Chapter IV.

[231] A fundamental argument of public choice theory is that though collective action is necessary for human well-being, not all collective decisions benefit all players involved. Under most situations, they only serve some individuals but harm others. See Mueller (1976: 422). Even if a collective decision benefits all members, it does not benefit everyone to the same degree. See Mueller (1976: 399).

[232] See Chapter II, 2.3 & 3.3 and Chapter V.

[233] See Mueller (1976: 395).

trace their theoretical base partially in public choice theory. What really distinguishes the supplementary paradigm from the *problem-solving* paradigm is its emphasis on the impact of informal institutions, which can trace its theoretical base in institutionalism.

As noted, the *problem-solving* paradigm analyzes what disincentives in the context encourage signatories to defect from the anti-bribery collaboration. Because it portrays the "non-action" of signatories, it cannot be historicity-based, but is rather speculative in its metaphorical application of existing compliance theories. On the contrary, the supplementary paradigm that analyzes causal processes leading to effective anti-bribery enforcement in leading jurisdictions is historicity-based. It does not have to define actors as isolated, self-seeking agents exclusively driven by material interests, but can observe how contextual factors affect actors' choices in specific action situations. Based on empirical evidence, this paradigm permits a discussion of the ideology-laden nature and limited rationality of actors, and the gradual mutual engagement between actors and evolving contexts.

In other branches of social sciences, scholars have analyzed the weakness of a pure choice analytical approach in explaining the operation of international institutions,[234] which has implications for framing the new paradigm suggested in this study. For the academic objective of this study, here I only mention some of the most relevant academic insights.

First of all, institutionalists have criticized the choice of analytical approach, which only analyzes the causality between incentives in the environment and individual choices, and argue that impersonal social forces (e.g., culture, religion and habits) also shape the choice sets available for individuals in an action situation. [235] Douglass C. North, as a key founder of institutional economics,[236]

[234] See Hamilton (1919).

[235] See Hamilton (1919) and Hodgson (1998).

[236] See Ostrom (2007: 242).

depicts institutions as "the rules of the game in a society or, more formally … the humanly devised constraints that shape human interaction."[237] and emphasizes how informal institutions like moral senses and habits, after having been internalized by actors, affect their choices at specific moments of time.[238]North further introduced the notion of "institutional path dependence" to describe how preexisting institutions "lock in" the operation of new institutional arrangements.[239] These theoretical insights suggest that the choice-making process of actors in a given context is not completely driven by material interests, but is delimited by the preconceptions and working habits of actors developed in an earlier context in the first place.

Then, "reflectivists" (using Robert O. Keohane's term)[240] or "constructivists" (using Alexander Wendt's term),[241] whose theories can trace origins in the sociological approach to the study of institutions,[242] have initiated a debate with rationalists. Despite the differences between the two theories or like, they share a skeptical view of rationalism that controls identities and preferences of decision makers as given and discusses variation in decisions on this basis.[243] Instead, they argue that identities and interests of decision makers (i.e., individuals, agencies, or countries) is profoundly affected by impersonal social forces (e.g. culture, and mores).[244] Keohane also argues about the importance of taking into

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[237] North (1990: 3).

[238] See e.g., North (1990: 5).

[239] See Boettke *et al.* (2008: 332).

[240] See Keohane (1988).

[241] See Wendt (1992).

[242] See Barry (1970), Gilpin (1981), and Keohane (1988: 381).

[243] See Keohane (1988: 381), and Wendt (1992: 392).

[244] As Keohane states, "Institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves shape those preferences and that power. Institutions are therefore constitutive of actors as well as vice versa. It is therefore not sufficient in this view to treat the preferences of individuals as given exogenously; they are affected by institutional arrangements, by prevailing norms, and by historically contingent discourse among people seeking to pursue their purposes and solve their self-defined problems." Keohane (1988: 382).

account historicity — "the social process of reflection on historical experience that human societies undergo" — for an understanding of country compliance with international agreements, juxtaposed to an ahistorical economic analysis of human actions.[245] Wendt argues against the rationalist approach's taking country identities and interests as an exogenous given, and calls attention to the "process in which identities and interests of countries are endogenous to interaction".[246] In general, these arguments emphasize that identities and interests of actors which were treated as given by the rational-choice theorizing, change during the process of interactions of individuals. In contrast to the rationalistic approach which argues that "structure matters", they argue that "history (or process) matters."[247] This theoretical framework highlights the mutual engagement between actors and contexts. This means, our analysis of the domestic enforcement of the Convention by a given signatory should incorporate changes in both individual preferences and contexts across a period of time.

Based on North *et al*.'s argument about "institutional path dependence," Boettke *et al*. further analyzed variables that account for the degree of "institutional path dependence."[248] Boettke and other scholars proposed the concept of "institutional stickiness" to assess the relationship of newly-introduced institutions to existing institutions, which, in Boettke's view, affects the ability of new institutions to "take hold" in that institutional context. As they suggest, informal institutions (e.g., culture, norms and conventions) serve as "the glue that gives (new) institutions their stickiness". The closer new institutions to those preexisting informal institutions, the stickier it is to the preexisting institutional framework, and the more likely that those new institutions would function robustly.[249] The argument embodies the general theory of institutional

[245] See Keohane (1988; 1989: 30).

[246] Wendt (1992: 394).

[247] For the phrase of "history matters" see Boettke *et al.* (2008: 331).

[248] See Boettke *et al.* (2008: 331).

[249] See Boettke *et al.* (2008: 332).

path-dependence into an analysis of the performance of newly-introduced institutions in the domestic framework of individual countries. It provides a perfect analogy for this analysis of how treaty obligations under the OECD Anti-Bribery Convention would perform differently after they are incorporated in national legal systems.

Specific to our topic, Gutterman (2005) conducted a norm-based analysis of how the US, Germany, France and UK had incorporated treaty obligations under the OECD Anti-Bribery Convention into their national legal frameworks. He argues that the extent to which signatories comply with the Convention is a function of "the effectiveness with which the global norm at stake in that commitment is articulated in a state's domestic politics", but not the extent to which doing so is consistent with a country's rational calculation of national interests.[250] This study borrows some Constructivist ideas (which, as above noted, can trace its origin in Wendt (1992)'s Constructivism) to challenge previous rational-choice analyses — for example, it takes culture, norms, ideas as crucial determinants of countries' identities and interests, and argues that normative considerations, but not rational calculations, are central to an actors' decision on Convention compliance. As this theory directed toward the compliance problem of the OECD Anti-Bribery Convention, it is relevant to the theme of this study. However, developed in earlier years after the ratification of the Convention, Gutterman's theory focuses mainly on the phase of signatories' incorporation of treaty obligations into national laws, but was not directed to the phase of law enforcement. Besides, this theory did not really call into question the "identities" of signatories (what I call *political-will* assumption in 2.1.3 of this Chapter), but only argued against the *rationality* assumption which assumes individuals would act rationally.[251] Therefore, it is still different from the historical approach suggested here.

[250] See Gutterman (2005: ii).

[251] Gutterman (2005).

5.3 A Contextual Approach

Drawing inspirations from the theories discussed above, I label the research paradigm supplementary to the *problem-solving* paradigm as a "contextual approach". In addition to its positive nature, this contextual approach's logic includes a richer analysis than the standard *problem-solving* approach in three major aspects:

First, this contextual approach quits the *political-will* assumption applied by the standard *problem-solving* approach in current literature. It does not portray countries as unitary actors in world politics whose "behavior" accounts for the level of Convention enforcement, but treats countries as systems in which actors (i.e., domestic agencies) make choices. Given that an improved *problem-solving* approach suggested in 4.1 of this Chapter would also unpack the unitary identities of countries, this characteristic of the contextual approach only distinguishes itself from the standard *problem-solving* approach rather than a general *problem-solving* paradigm.

Second, the contextual approach stresses that behavioral agents' choices are not only interest-driven, but also context-dependent. It highlights the impact of informal institutions that have probably been internalized by agents (e.g., moral values, conventions, working habits) on their choices.[252] This characteristic, which denies the free will of agents, distinguishes the contextual approach from the *problem-solving* paradigm.

Third, the contextual approach suggests taking into account the process of mutual engagement between actors and contexts. It treats behavioral agents' ideological beliefs and working habits that delimit their choice sets and the context that they need to respond to as variables but not constants across a period of time. So it challenges the static focus of the *problem-solving* paradigm and argues that the

[252] See Chapter II, 2, and Chapter V, 2 & 3.

relation between variation in contexts and variations in individual preferences is a reciprocal causation. This sense of history is another fundamental characteristic distinguishing the contextual approach from the *problem-solving* paradigm.

5.4 The Relation of the Contextual Approach to the *Problem-Solving* Paradigm

The emphasis of a contextual approach which highlights historicity, domestic politics, the impact of informal institutions (e.g., moral values and working habits) and a sense of institutional path dependence does not deny the theoretical function of the *problem-solving* paradigm which emphasizes the gap between reality and expectation, international interactions, the impact of formal institutions (e.g., sanction mechanisms and information channels) and a sense of structure. Both the contextual approach and the standard *problem-solving* paradigm are useful methodologies to broaden our knowledge of the dynamic of signatories' collective enforcement of the Convention. In fact, the *problem-solving* paradigm finds important its power to make use of existing compliance theories. The two approaches differ from each other mainly because they explain signatories' collective enforcement of the Convention from different perspectives and in different logical lines, and therefore generate different knowledge of the dynamic of Convention enforcement. This contextual approach is formulated to supplement the *problem-solving* paradigm that is exploited too much by previous works. As previous works reflect too little how the *problem-solving* paradigm matches their analytical questions, a contextual approach is suggested to fill this gap. This contextual approach cannot replace the *problem-solving* paradigm that is good at explaining structural factors of the international community and complex interactions at an international level.

Outline of the Dissertation

This dissertation comprises 6 chapters. Chapter II discusses the dynamic of the

multilateral de-legitimization of transnational bribery (marked by the enactment of the FCPA and the formation of the OECD Convention). It dismisses the *political-will* assumption, and instead stresses (a) the coordination function of legislators—i.e., how legislators coordinate the demands of different political forces (e.g., the SEC, Defense Department, and State Department) to eventually reach a position; and (b) how existing value systems delimit the value boundaries of the final version of this coordination. Chapter III presents a causal attribution model of the collective enforcement of the Convention. First of all, it systemizes and enriches interpretative insights from current *problem-solving* literature by analyzing the indigenous destabilizing factors of OECD anti-bribery collaboration (e.g. poor expected interests in but high costs of Convention enforcement, the existence of non-signatories and the worry of free riders) as well as institutional flaws (e.g. the absence of credible sanction and external scrutiny) in a logically progressive manner. Chapter IV formulates a three-level solution model to address the collective action problem that was singled out but remained unresolved in current *problem-solving* literature. Chapter V takes the US as an example of faithful signatories, and conducts a contextual analysis of the increasingly aggressive enforcement of the FCPA during the period from 1977 to 2014. Chapter VI summarizes major arguments of this dissertation and future analytical questions.

Chapter II: The Formation of OECD Anti-Bribery Collaboration[253]

1. Introduction

In the discourse of this Chapter, "the institutionalization" of OECD anti-bribery collaboration refers to the establishment of central national and international anti-bribery laws that outlaw transnational bribery. This institutional establishment took place across the period from 1977 to the early 2000s, marked by the creation of the FCPA, and the formation of the OECD Anti-Bribery Convention.

As discussed in Chapter I, 1.1, the enactment of the FCPA and the consequent formation of the OECD Anti-Bribery Convention have marked two watershed historical events for theoretical analysis. First, because the FCPA unprecedentedly criminalized transnational bribery and relies on supply-side control of corruption and extraterritorial enforcement of criminal law, its wisdom was initially questioned. Academic work in anti-corruption before the formation of the OECD Convention placed central attention on this issue.[254] Then, since the Convention's entrance into force in 1999, opinion has shifted toward approval of the FCPA approach. Academic focus was shifted to the practical effects of the Convention in controlling transnational bribery.

To offer successful policy recommendations for the collective enforcement against transnational bribery we need to grasp operative factors of law enforcement at a systemic level. An even more fundamental prerequisite is to grasp the central dynamic of the institutionalization process. The underlying forces that drove the institutionalization process not only indicate the target

[253] A similar version of this Chapter is published as "The Dynamic of the Institutionalization of the OECD Anti-Bribery Collaboration", *South Carolina Journal of International Law & Business*, 2014, 11(2) (forthcoming).

[254] See e.g., Salbu (1997; 2000) and Nichols (1997; 1999; 2000). Also see Chapter I, 2.1.2.

problem to be solved, but also serve as an indicator of the orientation of those established laws. In order to predict law enforcement and address any impediments, we need to understand the central dynamic of the institutionalization in the first place.

However, the dynamic of the institutionalization of OECD anti-bribery collaboration remains an unexplained phenomenon in current academic literature. Existing literature has recounted the story of the institutionalization of OECD anti-bribery collaboration from the enactment of the FCPA to the formation of the OECD Anti-Bribery Convention. However, in the discourses of these works the question of the dynamic between states agreeing to multilateral legislation against transnational bribery is replaced with another question of "***why*** (individual) states legislated". According to this logic, the US and other regulatory states are consciously or unconsciously anthropomorphized. They are attributed with properties of natural persons such as intentions, moral sentiments and interest rationality, and are assumed to have full control over their own strategies.[255] This formulation, as discussed in Chapter I, is called the *political-will* assumption.[256]

Based on the *political-will* assumption and grounded in the rational-choice tradition, the standard account of "why (individual) states legislated" defines the creation of the FCPA and the formation of the Convention as a result of state actors' interest/value preferences, employ the binary opposition of self-interest and moralism to probe the motives of states, and then label relevant lawmaking as resulting from rational (or irrational) choices.[257] Scholars that presume a

[255] This politically psychological phenomenon that hypothesizes the existence of *State Personhood* is *State Anthropomorphization*. It is a popular cognitive mode that helps people to make sense of the complexity of world politics. For a detailed description of state anthropomorphization see McGraw & Dolan (2007). For an example of the popularity of state anthropomorphization see the realist research tradition of international relations theory which defines states as rational "state actors" reflects the popularity of this tradition. See Keohane (1989: 40).

[256] For more detailed discussion on the *political-will* assumption see Chapter I, 2.1.3.

[257] See e.g., Davis (2002; 2012).

commitment to moral values as the motive of state actors to legislate against transnational bribery would then support the FCPA approach for its moral correctness or critique it for its pan-moralism.[258] For example, Klich states that the US's FCPA approach "essentially reflects the view that corruption, and in particular, its subset bribery, is so immoral that not even the loss of business by American companies could justify it."[259] For another example, some other scholars in early years argue that the immorality of transnational bribery is insufficient to justify the FCPA. Legislators should also take costs of the regulation into consideration (e.g. procedural costs). They also stress the unilateralism of the FCPA — which is, the US's unilateral enforcement of the FCPA would increase the cost of transnational bribery for their own nationals and entities, and give their exporters a disadvantage in overseas marketplaces.[260] This negative influence of the FCPA went against the conventional belief that national laws should protect national interests.[261] Another group of scholars who presume self-seeking purposes as the motive of states to legislate tend to rationalize the FCPA approach as a result of trading off conflicting interests, and emphasize the FCPA as a strategy that sacrifices short-term business interests to more superior national interests.[262] Despite the long-standing debate based on the binary opposition of moralism and self-interest,[263] and that of rationality and irrationality of state behavior, the standard analytical model only reflects the dominance of the rational-choice analytical tradition in microeconomics and international relations theory that any explanation of state strategies has to refer to.

However, the whole theoretical framework built using the *political-will*

[258] See e.g., Nichols (1999; 2000: 650-655). Also see Chapter I, 2.1.2 (A).

[259] Klich (1996).

[260] Also see Chapter I, 2.1.2 (B).

[261] See e.g., Kennedy (1999).

[262] Also see Chapter I, 2.1.2 (B).

[263] See e.g., Abbott & Snidal (2002).

assumption as a foundation contains a fatal flaw: it oversimplifies the path of institutional change and completely avoids considering the heterogeneity of interest demands made by different (domestic and/or international) political forces in a regulatory country, as well as the impact of their dynamic interactions on national strategies (e.g., the enactment of the FCPA). Viewed through the veil of the political will of countries, any decision-making of countries is only a story of the active, free-will choice of a state actor among diverse options.[264] Consequently, research has to solely rely on the content of established decisions, rhetoric of political leaders and metaphorical application of our knowledge of human behavior in order to speculate about the motives of "state actors". While this formulation makes the complex actions within abstract countries intelligible for people, it also underestimates the complexity of the dynamic of country decision-making that has both domestic and external interest groups, and offers an inaccurate story of internationally relevant national strategy-making, especially the US's endogenous creation of the FCPA.

Therefore, while the standard approach is a good interpretative device to convince people of the wisdom of FCPA-style lawmaking — which was important in earlier years because most people at that time had ideological impediments to understanding the wisdom of the FCPA and the OECD Convention — it fails to sustain a progressive manner of understanding of the operation of OECD anti-bribery collaboration during its successive stages. Since the 2000s, when academic attention shifted from the wisdom of criminalizing transnational bribery to the actual effect of the OECD Convention, we have needed a more rigorous and less speculative analysis of signatories' collective enforcement of the Convention. The standard approach, which anthropomorphizes signatories and allocates to "state actors" an unchanging function of trading off conflicting interests and/or values, is too rigid to adapt to changes in real circumstances.

[264] See Chapter I, 3.2.

Based on this awareness, this Chapter addresses the seemingly outdated but in fact unsolved question:

"What dynamic governed the institutional generation and development of the global anti-bribery collaboration from the creation of the FCPA to the further expansion of the community of collaboration in the post-Convention era?"

This Chapter analyzes how the institutionalization was driven forward. Methodologically, it does not take the *political will* assumption as the heuristic key for analyzing state strategies, focusing on the static content of laws, policy documents and the statements of politicians, but analyzes historical materials to explore how political forces interacted and finally brought about relevant decisions. In other words, it treats signatories as independent systems in which political forces interact but not actors who have anthropomorphic identities and homogeneous preferences. Technically, this Chapter divides the historical context into three phases: the era of pre-FCPA, the era of US's unilateral enforcement of the FCPA, and the post-Convention era. This categorization is out of the consideration that the three historical eras brought about three salient increases in the number of regulatory states of transnational bribery, and each increase reflects a substantive strategic choice of signatories. Therefore, it is hoped that the categories chosen provide the best angle to observe the real dynamic of the signatories' de-legitimization of transnational bribery.

This Chapter is organized as follows. Section 1 analyzes how the US created the FCPA in 1977 endogenously without the interference of any external forces. It explores the historical context of pre-FCPA to probe whether the FCPA was an active choice of national legislators or an unavoidable consequence of the interactions of domestic political forces. Section 2 analyzes how the Convention was established in the 1990s. It joins existing scholarship by highlighting the central role of the US in the formation of the Convention, but additionally emphasizes the interactions between US strategies and the international ideological atmosphere and economic pursuits in the given historical context. Section 3 analyzes how, during the Post-Convention era, the OECD and existing

collaborators have imposed Convention norms on even more peripheral countries since the 2000s. Based on the analysis of the preceding three sections, Section 4 extracts how the principle of path-dependence defines the trajectory of the institutionalization process and how key operative factors defines the content and rationale of interactions among political forces in each phase of the institutionalization process.

2. The FCPA: An Endogenously-Created Institution in the Economic Context of the US

As the first legislative document in human history declaring transnational bribery to be an immoral act and criminal offense, the FCPA was innovative and revolutionary. However, with no other countries following the US approach, the FCPA's prohibition of transnational bribery decreased US companies' competitiveness in international markets, as the US business community asserted,[265] and therefore was criticized by the US business community and some scholars for its serious side-effects on US overseas business. Consequently, before the FCPA was multilateralized to other countries in the 1990s, an academic justification of the FCPA or any criticism of the FCPA approach could not avoid explaining this paradox of interests contained in the FCPA.

This Section analyzes the dynamic process of the creation of the FCPA in the US in the 1970s. Particular attention is paid to how the US endogenously came to create the "paradoxical" FCPA even without the intervention of external forces.

2.1 A Historical Review: the US's Unilateral Illegalization of Transnational Bribery

Transnational bribery was officially criminalized as early as in 1977. The "climate

[265] See Chapter I, 2.1.2 (B).

change" in the US took place even earlier (at least in the 1950s). A review of the legal history of pre-FCPA reveals that the legal status of transnational bribery in the US was transformed from "being legal" before the 1950s to "being uncertain" by the early 1970s, and finally "being criminal" in 1977. Two events that marked the gradual attitude change toward transnational bribery were the US's abolition of tax deductibility of transnational bribery in 1958, and the criminalization of transnational bribery by the enactment of the FCPA in 1977.

2.1.1 The Abolition of Tax Deduction Provisions (the 1950s)

Transnational bribery in the US, as in many other industrial countries, used to be tax deductible as a business expense.[266] The tax deduction policy, as an active incentive offered by regulatory states, was an express declaration of the legality of transnational bribery. The US Internal Revenue Code of 1939 confirmed the deductibility of transnational bribery in Sec. 23 (a) (1): There shall be allowed as deductions:

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including…rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."[267]

This provision was retained in the 1954 version in Sec. 162 (a).[268]

The tax deduction provision was invalidated by the US in 1958, decades earlier than the rest of industrialized countries.[269] The Technical Amendments Act of

[266] For the OECD rules banning the tax deductibility of transnational bribery see OECD (1996). For information on when and how did countries other than the US abolish tax deduction policies for transnational bribery see *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

[267] § 23 (a) (1) of Internal Revenue Code of 1939 (10 February 1939). Available at: http://www.constitution.org/uslaw/sal/053_itax.pdf (last visited: 21 June 2014).

[268] § 162 (a) of Internal Revenue Code of 1954, Public Law 591-Chapter 736 (16 August 1954). Available at: http://www.constitution.org/uslaw/sal/068A_itax.pdf (last visited: 29 June 2014).

[269] See *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-bribe

1958, which was declared to be an Act to amend the Internal Revenue Code of 1954, defined bribes to foreign officials as "improper payments" in Section 5 (c):

"No deduction shall be allowed under subsection (a) for any expenses paid or incurred if the payment thereof is made, directly or indirectly, to an official or employee of a foreign country, and if the making of the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee."[270]

The abolishment of the tax deduction provisions signaled that transnational bribery was no longer an officially supported business activity in the US. However, as noted, Technical Amendments Act of 1958 described transnational bribery as "improper" instead of "illegal". Besides, according to Section 5, the effective date of the new provision was not retroactive. The wording of the Technical Amendment Act of 1958 implied a lingering, rather lenient attitude toward transnational bribery.

2.1.2 The FCPA Enactment and the Criminalization of Transnational Bribery (the 1970s)

It was the "Watergate Scandal" and its aftermath that caused the formal illegalization of transnational bribery. In the early 1970s, an investigation over questionable funds provided for President Nixon's re-election campaign led to the revelation of false accounting methods for concealing transnational bribery.[271] Astonished by the false accounting issues revealed by the Watergate Scandal, in 1975 and 1976, the SEC initiated voluntary disclosure programs to require public companies to disclose questionable payments made to both domestic and foreign officials.[272] This program revealed that the frequency and actual amount of

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ryconvention.htm (last visited: 4 May 2014).

[270] § 5 of Technical Amendments Act of 1958, Public Law 85-866, STAT 72 (2 September 1958). Available at: http://www.gpo.gov/fdsys/pkg/STATUTE-72/pdf/STATUTE-72-Pg1606.pdf (last visited: 29 June 2014).

[271] For detailed description of the revelation of the issue of transnational bribery see Koehler (2012: 932-934).

[272] Generally see Rubin (1976). For a general introduction of the voluntary disclosure programs in the US see Wolff (1979).

previously unreported questionable payments were huge.[273] As the SEC Report (1976) suggested, the pervasiveness of transnational bribery among listed companies not only signaled an embedded dishonesty of corporate behavior, but also aroused questions about the real competitiveness of US products in foreign marketplaces.[274] At that time, requiring the accounting of listed companies to reveal transnational bribery was already an inevitable instrument to rebuild and maintain shareholders' faith in the US business system and thus the reputation of the US business community.[275]

The real controversy was around transnational bribery concealed by false accounting methods. As the Watergate Scandal and subsequent SEC investigations had already brought the issue into public view, it was impossible for the government to retain an ambiguous attitude toward the legal status of transnational bribery. Any actions or inactions would be a signal of attitude. The US government had to make known its position.

At the very beginning, the Administration of President Ford was only concerned about the dishonesty of false accounting that hurt the interests of shareholders and eroded public confidence in US corporate governance. The Administration drew much fewer implications from the disclosure programs that revealed activity previously concealed by false accounting — acts of transnational bribery. For the purpose of protecting shareholders and the general public's right to know, the SEC and the Administration of President Ford intended only to ban concealing transnational bribery.[276] It should be noted that the Ford Administration did not overlook the issue of transnational bribery. Instead, it consciously laid aside the issue of transnational bribery out of trade considerations. The historical story of the enactment of the FCPA suggested that

[273] It was revealed that more than 400 companies had paid bribes. The actual amount paid every year exceeded 400 million dollars. See Carrington (2009: 132).

[274] See Rubin (1976).

[275] Also see Chapter V, 2.1.1 (B).

[276] See Koehler (2012: 988).

before the Administration of Ford suggested the draft of Foreign Payments Disclosure Act which merely prohibited false accounting methods in 1976, there was intense controversy on whether to prohibit transnational bribery.[277] For this argument a SEC report (1976) gave us some implications:

"The Commission believes that the question whether there should be a general statutory prohibition against the making of certain kinds of foreign payments presents a broad issue of national policy with important implications for international trade and commerce, the appropriateness of application of United States law to transactions by United States citizens in foreign countries, and the possible impact of such legislation upon the foreign relations of the United States."[278]

However, the Congress advocated a full prohibition of corruption, both at home and abroad, instead of a mere prohibition of false accounting. The reason given was, like Theodore Sorenson stated in a 1976 House hearing:

"The Ford administration…prefer to rely solely upon the offending corporation notifying the Department of Commerce of its misdeed…What a pitifully pallid response to a major moral crisis. Have we learned nothing from the attempted coverup of Watergate? … How could this country continue to preach abroad the virtues of the free competitive market system and continue to call for economic justice and political integrity, how could we hope to avoid unreasonable restrictions and attacks on American corporations abroad, if we are unwilling to specially and directly prohibit and penalize this wasteful, corrosive, shabby practice?"[279]

As a result, the Congress rejected the draft legislation proposed by the Ford Administration in 1976, which had no prohibition of transnational bribery.[280]

Deliberations on the issue of transnational bribery came to a deadlock until in 1977, when the Administration of President Carter took office and showed appreciation of the Congressional proposition.[281] Soon after, legislation was

[277] For a detailed introduction of the attitude of Ford Administration and a systematic discourse of the historical story of the FCPA see Koehler (2012: 961-964).

[278] See Rubin (1976: 627). For a detailed discussion on the SEC's attitude toward the criminalization of transnational bribery see Chapter V, 2.1.1 (B).

[279] *Foreign Payments Disclosure: Hearings before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 2 (1976), 115-116 (statement of Theodore Sorensen), cited in Koehler (2012: 993).

[280] See Koehler (2012: 932-934).

[281] See Koehler (2012: 996).

proposed which not only had stringent accounting requirements but also made transnational bribery criminal offence. The legislation won a unanimous support[282] and now is known as the FCPA. The FCPA prohibits acts of issuers that are "corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to foreign officials (foreign political party or any candidate for foreign political office included),[283] and acts of domestic concerns that "make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to foreign officials (foreign political party or any candidates included).[284]

The enactment of the FCPA was a revolutionary event in the history of global anti-corruption campaign. For the first time in human history, transnational bribery was held to be a criminal behavior leading to sanction. The FCPA also unprecedentedly institutionalized supply-side control of corruption independently of demand-side control by host countries.[285] Besides, by prohibiting US domestic concerns from corrupt behavior both within and beyond US territories, the FCPA routinized extraterritorial application of criminal laws, which used to be an exceptional principle in conventional international law.[286]

When signing the FCPA into law, President Carter explained both the immorality and economic inefficiency of corporate bribery. He stated at signing S. 305 into law that,

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[282] See Koehler (2012: 998).

[283] §78dd-1 (a) of Foreign Corrupt Practices Act of 1977.

[284] §78dd-2 (a) of Foreign Corrupt Practices Act of 1977.

[285] See Chapter I, 2.1.1 & 2.1.2.

[286] See generally Ryngaert (2008). Also see Chapter I, 2.1.1 & 2.1.2.

"During my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. S 305 provides that necessary sanction. I share Congress belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions."[287]

However, President Carter also expressed his concern about the potential consequences of the FCPA on US interests, which was the major consideration that accounted for the Ford Administration's resistance to outlawing transnational bribery.[288] Cater encouraged other nations to make progress on the negotiation of a multilateral anti-corruption treaty, stating that the effort to combat corporate bribery overseas "can only be fully successful… if other countries and business itself take comparable action."[289]

2.1.3 A Consequent Question: the Side-Effect of the FCPA on US Overseas Business (the 1970s)

As noted above, the enactment of the FCPA was a strategy based on US decision-makers' full awareness of the immorality of transnational bribery, and the side-effect of such a unilateral prohibition. The immorality of transnational bribery was almost undisputable, but it was also a widespread consensus among US officials and scholars that a unilateral prohibition of transnational bribery imposed constraints on US corporations that would disadvantage them in competition on overseas markets.[290] The core controversy between the Ford Administration and Congress (as well as the Carter Administration) was not whether the side-effect of a unilateral prohibition of transnational bribery existed. It was all about whether the potential side-effect on exports was a sufficient justification for a continuous laissez-faire attitude of regulators.

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[287] Carter (1977).

[288] See Koehler (2012: 988).

[289] Carter (1977).

[290] See Koehler (2012: 975). Also see Chapter I, 2.1.2 (B).

Although the enactment of the FCPA gave an official negative answer to this question, the concern about the side-effect of the FCPA did not stop. There remained an urgent need for the US to work out remedial measures to reduce the potential side-effect of the FCPA. Therefore, the US government tried to multilateralize the FCPA to other states and establish an anti-bribery collaboration in the years around and after the enactment of the FCPA.

2.1.4 US Efforts and Failures to Multilateralize the FCPA (the 1970s)

2.1.4(A) US Efforts

While promulgating the FCPA to address the issue of transnational bribery, the US also tried multiple approaches to multilateralize the FCPA, so as to reduce the side-effect of a unilateral enforcement of the FCPA on its overseas business. On the one hand, the US government tried to spread the anti-bribery initiative to other governments through trade negotiations.[291] Senate Resolution 265 promulgated on 12 November 1975 resolved that the US should immediately negotiate with other governments to develop proper norms to eliminate the act of transnational bribery on an international scope:

> "[Appropriate governmental officials] initiate at once negotiations within the framework of the current multilateral trade negotiations in Geneva, and in other negotiations of trade agreements pursuant to the Trade Act of 1974, with the intent of developing an appropriate code of conduct and specific trading obligations among governments, together with suitable procedures for dispute settlement, which would result in elimination of such practices on an international, multilateral basis, including suitable sanctions to cope with problems posed by non-participating nations…"[292]

On the other hand, the US also endeavored to draw support from intergovernmental organizations (e.g., the OAS, the UN, the OECD and the ICC) to multilateralize its anti-bribery initiatives. As transnational bribery conflicted with the basic missions of these international organizations, the value of the anti-bribery initiative was soon accepted.

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[291] Also see Chapter II, 3.1.2 (A).

[292] S. Res. 265, 94th Cong. (1975), cited in Keohler (2012: 982).

(1) The OAS: on 10 July 1975, the Organization of American States (OAS) issued a Permanent Council Resolution on the Behavior of Transnational Enterprises (CP/RES. 154 (167/75)). It declared "I. To condemn in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise, any demand for or acceptance of improper payments by any public or private person, as well as any act contrary to ethics and legal procedures; and II. To urge the governments of the member states, insofar as necessary, to clarify their national laws with regard to the aforementioned improper or illegal acts."[293]

(2) The UN: on 15 December 1975, the General Assembly of the United Nations issued Resolution 3514 (XXX) declared to condemn all corrupt practices, including transnational bribery.[294] Resolution 3513(XXX) emphasized that any country was entitled to legislate anti-bribery laws and take actions against corruption.[295]

(3) The OECD: in 1976, *the OECD Guidelines for Multinational Enterprises* ("1976 Guidelines")[296] absorbed provisions against bribery of foreign officials in international trade. In its "General Policies" Section, it clearly stated that enterprises should "not render and they should not be solicited or expected to render any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office".[297]

(4) The ICC: in 1977, the International Chamber of Commerce (ICC) gave a positive response to the FCPA by issuing the *Rules of Conduct to Combat Extortion and Bribery (ICC Rules)*. It called for cooperation by governments, intergovernmental organizations and the business community to combat

[293] OAS (1975: 3).

[294] For information on Resolution 3514 (XXX) see UN (1976b).

[295] See Rubin (1976: 618).

[296] OECD (1976).

[297] OECD (1979).

extortion and bribery in international business transactions.[298]

2.1.4 (B) US Failures and the Possible Reasons

However, the US's efforts to multilateralize the FCPA achieved little concrete success in the 1970s and the 1980s. The lateral or multilateral anti-bribery norms written into trade treaties were virtually unenforceable moral standards.[299] Although the UN considered the US initiative as "generally appreciated and welcome by many delegations",[300] its attempt to introduce a treaty to multilateralize the US anti-bribery initiative failed because of "various disagreements" between countries.[301] At that time, US officials generally believed that it was unrealistic to achieve an agreement in the foreseeable future.[302]

It is possible that there were economic considerations of Europeans to refuse the US's proposal of outlawing transnational bribery. While there were a series of domestic factors in the US that fostered the FCPA's enactment, other industrialized states did not seem to have the same needs. Therefore, there were no incentives for them to change an unproblematic status quo. Besides, as mentioned above, the increase or decrease of overseas business was a critical consideration for both the US and other industrialized countries. The overseas contracts secured by paying bribes were still a dominant component of national

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[298] The Rules were amended at least in 1996, 1999 and 2005. The current edition is available at: http://www.giaccentre.org/documents/ICCRulesofConduct.2005.pdf (last visited: 13 June 2014).

[299] It was out of question that a real fight against transnational bribery rested with the endeavor of governments. For this reason some scholars judged the ICC Rules as "a more or less dead letter." See Pieth (2007: 9).

[300] Rubin (1976: 620).

[301] See Pieth (1999: 2).

[302] Kissinger, a US official noted on 11 August 1975 that, "A multilateral treaty establishing binding rules for multinational corporations does not seem possible in the near future.", cited in Cragg, Wesley A. and William Woof, "The US Foreign Corrupt Practices Act and Its Implications for the Control of Corruption in Political Life", 9, available at: http://iscte.pt/~ansmd/CC-Cragg.pdf (last visited: 13 June 2014).

welfare.[303] When the US, which was superior to many other countries in terms of competitiveness in international markets,[304] chose to be "self-disarmed" by adopting the FCPA, there was no reason for other countries to join in. They preferred to continue to enjoy the competitive advantages brought to them by the FCPA's enactment.[305]

An equally salient hindering factor was ideological obstacles. Though political corruption was criminalized early in the collective history of humanity,[306] a popular (if not dominant) view on corporate bribery at that time was that it was conditionally necessary.[307] Transnational bribery, because of its extraterritorial nature, was even more remote from the concerns of national prosecutors. Besides, the concept of globalization — which was critical for understanding the evil of transnational bribery — had not yet become a commonly understood notion at that time. Moreover, the extraterritoriality of the FCPA was widely questioned by other countries. A popular view among European officials as well as some US officials was that the FCPA was a kind of imperialism or cultural intrusion which disturbed the business atmosphere of host countries.[308] For example, on 5 June 1975, in the hearings before the subcommittee on international economic policy of the committee on international relations, 94th Congress, first session, Mark B. Feldman, a representative of the Department of State indicated that,

"[The enforcement of the FCPA] would involve surveillance of the activities of foreign officials as well as US businessmen and would be widely resented abroad. Extraterritorial

[303] See Salbu (1997: 262).

[304] See OECD (2012a).

[305] See Tarullo (2004: 674).

[306] For example, the US's anti-corruption initiatives can be traced to at least in 18th century. The US's enactment of the False Claims Act of 1982—a law about private enforcement of public law—was in essence an effort to overcome the difficulty in detecting governmental corruption. See Carrington (2010: 149). For detailed discussion on the False Claims Act see Chapter V, 3.2. The United Kingdom's anti-corruption initiatives can be traced to at least 1769. Other European countries also had had anti-bribery laws centuries before their criminalization of transnational bribery. See Schmidt (2009: 1125).

[307] See Abbott & Snidal (2002: 158-160), and Tarullo (2004: 674).

[308] See Salbu (1997: 261-280), and see the contrary view in Nichols (2000).

application of US law — which is what such legislation would entail — has often been viewed by other governments as a sign of US arrogance or even as interference in their internal affairs. US penal laws are normally based on territorial jurisdiction and, with rare exceptions; I believe that is sound policy."[309]

These views all suggested that European governments then held a different opinion from the US on the legitimacy of organizing an anti-bribery collaboration and regulating transnational bribery.[310]

In conclusion, for European states at that time, following the US's lead meant that there would be a large change of existing legal frameworks without promise that the purpose for such change was definitely beneficial. There was no difficulty understanding the Europeans' resistance to the US efforts at persuasion. With no European followers, the enactment of the FCPA became a unilateral anti-bribery action of the US.

2.2 Limits of Standard Accounts of the FCPA

Though there was a public consensus among US citizens on the immorality of transnational bribery, given the considerably detrimental side-effect of unilateral action on US overseas business,[311] US observers held quite divergent opinions on the wisdom of the FCPA. Between the 1970s and the early 2000s, the central attention of scholars was focused on an inquiry of the motives of the US to enact the FCPA and then to explain the Act's wisdom.[312]

Previous works on this subject are summarily based on the political-will assumption and root in the rational-choice tradition. They rest on the binary opposition of morality and self-interest to categorize the US motives (to enact the

[309] "The Activities of American Multinational Corporations Abroad", hearings before the Subcommittee on International Economic Policy of the Committee on International Relations, 94th Congress, 1st Session, 5 June 1975, p.24 (Statement of Mark Feldman). Available at: http://catalog.hathitrust.org/Record/011340574 (last visited: 14 June 2014).

[310] See Salbu (1997: 275-280).

[311] See Koehler (2012: 975).

[312] See Chapter I, 2.1.1 & 2.1.2.

FCPA) as moral-based purposes and self-seeking purposes.

Some scholars highlighted the plausible altruism of the unilateral enforcement of the FCPA — the FCPA seemed to reflect moral values of the US at the cost of overseas business — and thus were convinced that the FCPA was a product of the US moralism or "the triumph of values".[313] Starting from the same ideological stance, they held different opinions on whether the FCPA was wise. A group of scholars believed that the immorality of transnational bribery is sufficient to explain the wisdom of the FCPA; dissenters argued that the immorality of transnational bribery is insufficient to justify the FCPA, and condemned the FCPA as an outcome of "pan-moralism".[314]

Other scholars tended to speculate US motives under the premise that the FCPA was a rational, wise strategy.[315] As history shows that US policymakers had a quite clear conception of the potential adverse consequence of the unilateral enforcement of the FCPA,[316] they summarily believed it unlikely that the FCPA was enacted out of pure altruism or moralism, serving global welfare at the cost of the US. FCPA enactment was not evidence of altruism or self-interest. Instead, the question was how to understand its rationality and wisdom. In other words, it was how to explain the FCPA as being consistent with US national interests.[317]

In general, arguments of this sort were grounded on the fundamental assumption in international relations theory that countries are central actors in international

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[313] See Kaikati & Label (1980: 38-43), Kim (1981:16-21), USGAO (1981), Beck (1989), Klich (1996), Salbu (1997:275-280), Zagaris& Ohri (1999), Davis (2002: 316) and DOJ Press Release, "FCPA and Related Enforcement Actions", pp.10-11, available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited: 7 April 2014).

[314] See Nichols (1997; 1999), German (2002), Johnstone & Brown (2004), Sung (2005), Holmes, (2009), and Baughn *et al.* (2009). Also see Chapter I, 2.1.2 (A).

[315] See Nichols (1999), Abbott & Snidal (2002:162), Pieth (2007: 8), Johnson (2010: 94-98).

[316] As Tarullo states, "Professor Davis's attribution of "moral" motivation to Congress, while reasonable, does not tell the whole story (Davis (2002: 316))… The 95th Congress apparently also believed that overseas bribery by U.S. multinationals adversely affected U.S. economic interests." Tarullo (2004: 673).

[317] See Chapter I, 2.1.2 (B).

politics and act rationally to maximize their own interests.[318] Scholarship of this sort did not revolve around whether the immorality of transnational bribery was a sufficient justification for the FCPA, like what the preceding sort of scholars did. Instead, this strain of scholarship sought to reconcile the necessity to eliminate immoral transnational bribery and the side-effect of unilateral enforcement. Some scholars managed to achieve this by explaining the FCPA as resulting from the US legislators' trading off conflicting national interests. The FCPA was created to protect other national interests capable of being affected by transnational bribery that were more important than short-term business interests in overseas markets capable of being brought by transnational bribery. The specific explanations were multiple: they may have argued that though transnational bribery accelerated overseas business in a short timescale, a laissez-faire policy may lead the US companies to be too dependent on paying bribes and damage their real competitiveness. According to this theory, the US was motivated to prohibit transnational bribery in order to maintain the competitiveness of US companies in the long run.[319] They also argued that the FCPA was enacted to prohibit transnational bribery as an additional business cost,[320] or as interference within the US's foreign policy.[321] It was also argued that the US engaged in such an unprecedented action for the purpose of rebuilding the reputation of the business community.[322] Despite their variety, these theories basically argued that the US enacted the FCPA out of a holistic consideration of national interests. The enactment of the FCPA might have negative impact on US business interests in

[318] See Keohane (1989: 40), and Wendt (1992: 392). Also see Chapter I, 2.1.3.

[319] See Pieth (2007: 8). This viewpoint is also underpinned by US officials. See Johnson (2010: 94-98). For an even more detailed discussion on the economic dimension see Marinaccio (1982: 345-348) and Koehler (2012: 939). Also see Chapter I, 2.1.2 (B).

[320] For example, Davis stated in 2002 that "a payor state has an incentive to deter its nationals from paying bribes for services that foreign officials would provide to those nationals on relatively favorable terms even if they did not pay a bribe." Davis (2002: 320).

[321] See Marinaccio (1982: 345), and Koehler (2012: 939).

[322] See McSorley (2011: 750). For a detailed discussion on the US's concern with the "reputation of business community" see Chapter V, 2.

the short term, but it would benefit the overall interest of the US in the long run.

Compared with the first argument that revolved around whether the immorality of transnational bribery can justify the enactment of the FCPA, the second argument that explained the FCPA as an outcome of trading off conflicting national interests was more instructive. It was not only a good approach to rationalize the FCPA, but also pointed out the limits of the classical criticism of the FCPA, which was limited to the narrow vision of bribery-bought overseas business opportunities. It is advanced by taking into account the complexity of US national interests.

However, this interpretative approach is too speculative to discover and explain new facts in changing circumstances. Academic analysis is path-dependent that it relies on established knowledge to interpret and understand new facts. We need a progressive interpretative approach that does not only apply to the subject matter in a given circumstance, but enables us to make continuous explanations of the subject matter across time and space. With the rise of a series of international anti-bribery agreements in the 1990s, we needed tools to predict the performance of these agreements and to foresee potential enforcement problems. Explaining the FCPA as a consequence of trading off conflicting interests rationalized the FCPA at the cost of accuracy. On the one hand, for interpretative purposes, it oversimplified the complexity of the decision-making procedure to a linear calculation of conflicting interests. Conflicts and compromises between domestic interest groups, which were heavily operative factors in negotiating the FCPA, were obscured. On the other hand, as it is too ambiguous to specify the real-world value preferences of states,[323] it fails to support deterministic conclusions. Therefore, whilst this interpretative approach managed to convince people of the rationality of the FCPA-style approach, it was unable to adapt to variation in the real circumstance and new academic objectives.[324]

[323] See Keohane (1989: 60), and Ahdieh (2010: 599).

[324] See Chapter I, 3.1.

2.3 The FCPA as an Outcome of Coordinating Domestic Demands within the Boundaries of Democratic Values

Other than assuming the optimizing manner of an anthropomorphized country and speculate on its possible, rational motives, an exploration of how policymakers indeed considered and acted in the historical context would be more relevant to understand why the FCPA was 'endogenously' created by the US. In this subsection, I will not assume a motivating value (e.g., moralism) or project a rationality of interacting values/interests (e.g. assuming that values/interests which conflicted and were traded off by legislators within a mathematical calculation of utility). Instead, both the relevance of existing values/interests and the rationale of interactions among them are left open as unknowns to be identified.

To reveal the reasons for interactions of values/interests we should highlight the heterogeneity of value/interest demands of domestic political forces instead of avoiding it, and be open to the 'messy' decision-making mechanism of a democratic society. In a democratic society where general citizenry have a channel to express and realize their own value/interest preferences, legislative activity, especially with a complex structure of stakeholders, is less likely to provide a uniformly applicable rank of value/interest preferences and sacrifice inferior ones to superior ones. Rather, the process will be characterized by an effort to arrive at a high degree of consensus among different stakeholders that coordinates these divergent demands to a largest extent practical.[325] Conflicts take place, of course. However, under many situations the demands of various stakeholders can be technically coordinated on a common ground. Therefore, the final decision does not often reflect any "superior" values/interest so as to maximize an unspecifiable "holistic social welfare". Rather, it is an equilibrium that is reached through negotiations, confrontations and concessions among

[325] See Magnuson (2013: 368). Also see Chapter I, 5.2.1.

various stakeholders, during the process of which rational stakeholders constantly adjust their expectations so as to realize their own preferences to a the largest extent practical.[326]

Then how were the divergent demands of different stakeholders in the aftermath of the Watergate Scandal and the SEC disclosure programs reconciled by the FCPA? The multifaceted nature of transnational bribery meant it had a large group of stakeholders. As the Watergate Scandal and SEC disclosure programs exposed the issue of false accounting that concealed transnational bribery to the general public, all stakeholders of this issue would have a responsive attitude toward it, and their interests were quite heterogeneous. Here is an incomplete list of the divergent stakeholders and their demands: The SEC was committed to improve corporate governance, and spoke for public investors; it was concerned about the dishonesty of false accounting that violated public investors' right-to-know and damaged public confidence in the US business system. The SEC once suggested that legislation embodying a prohibition against the falsification of corporate accounting records was in demand, but "the question of illegal or questionable payments is obviously a matter of national and international concern, and the Commission, therefore, is of the view that limited-purpose legislation in this area is desirable in order to demonstrate clear Congressional policy with respect to a thorny and controversial problem."[327] Accordingly, it only demanded effective disclosure to investors of important foreign payments.[328] The Defense Department was concerned that US companies' corrupt behavior abroad in foreign sales of military equipment would undermine US national security, and thus requested legislative remedies to "keep private sector actors from interfering with US foreign policy and national

[326] See Ahdieh (2010: 579-585), and Magnuson (2013: 366-369).

[327] Rubin (1976: 623).

[328] See Koehler (2012: 961-964).

security interests".[329] The State Department spoke for a more holistic vision of US national interests, and was therefore more ambivalent than others. On the one hand, it was more concerned about the negative consequence of a unilateral criminalization of transnational bribery than were other governmental departments.[330] On the other hand, for example, officials in the State Department were also worried that a laissez-faire attitude of the US followed by a revelation of transnational bribery would embarrass friendly regimes and affect economic and political relations with those countries.[331] Other government agencies, like the Internal Revenue Service, also had an interest in eliminating foreign bribery, for although there was no solid historical record of the activity being damaging, it cut against their general demand for honest accounting.

Thus there was divergence among significant US stakeholders and their demands. Exactly because of the divergence of these opinions, during the period from June 1975 to September 1977, there were repeated exchanges of views among these government agencies and departments, and around 20 draft bills were introduced to address the problem.[332] As the New York City Bar commented, "no single issue of corporate behavior has engendered in recent times as much discussion in the United States—both in the private and public arenas…as payments made abroad by corporations."[333]

In order to adopt appropriate strategies to coordinate these divergent domestic demands, it is critical to identify the "interoperability" — as Professor Ahdieh calls it — of these demands. Professor Ahdieh, in his theory of coordination

[329] See Pieth (2007: 8), and Koehler (2012: 969-971).

[330] See Koehler (2012: 964-969).

[331] See Koehler (2012: 940).

[332] Koehler (2012: 980).

[333] The Association of the Bar of the City of New York Report, *Unlawful Corporate Payments Act of 1977: Hearings before the Subcomm. Of Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Congress 63 (1977), cited in Koehler (2012: 937).

games, defines the term “interoperability” as the compatibility and the reconcilability of different things.[334] In the discourse of this study, it can be understood as the common core of the demands of all stakeholders. Basically, these plausibly divergent demands converged on the need to recover supervisory control by the US government and the investing public over corporate behavior in overseas areas. For this end, it seems that a necessary and also sufficient legislative remedy is a stringent prohibition of false accounting. Once false accounting was prohibited, the US government and US citizenry would be equipped to monitor corporate behavior and take immediate responses to any negative effects. Therefore, the Administration of President Ford only suggested a bill prohibiting false accounting in 1976, but laid aside the highly controversial issue of transnational bribery.[335]

This, then, seemingly was the end of the coordination game of the US’s legislative activity. However, it was not the end of the story. In addition to coordinating divergent domestic demands of stakeholders at an efficient equilibrium, another fundamental function of law is to reflect and safeguard commonly-held social values by way of defining good behavior and orienting citizens toward it. This normative function determines its stringent commitment to moral correctness. A baseline is that any lawmaking cannot actively or inferably go against the constituents’ generally held moral values — if it is allowed to be inactive to organize the latent values of the society.[336]

For the US then, although the immorality of transnational bribery initially remained outside of public opinion, as above noted, the US already declared the “immorality” of transnational bribery as early as 1958 — when it abolished the tax deduction policy for it. Consequently, during the two-year long discussion on specific bills to deal with transnational bribery, the immorality of transnational

[334] See Ahdieh (2010: 590-591).

[335] See Koehler (2012: 988).

[336] Generally see Abbott & Snidal (2002).

bribery became an issue explicitly discussed by both officials and citizens. As a consequence, no matter how the discussion among governmental agencies finally defined the relevance of outlawing transnational bribery to US national interests, the new lawmaking could not expressly or impliedly send signals encouraging or tolerating transnational bribery.

What, then, in the new context turned the continuation of a laissez-faire attitude toward transnational bribery into a signal that the US was encouraging or tolerating the activity? People may argue that since the US declared transnational bribery "immoral" as early as in the 1950s but did not take further action against it for two decades, there was no reason to take the further step of outlawing it in the 1970s. However, the situation changed significantly after the combination of the Watergate Scandal and the SEC disclosure programs revealed the issue of false accounting and transnational bribery for public view. Because of the close tie between the issue of false accounting and the issue of transnational bribery, and the necessity to prohibit false accounting, transnational bribery could no longer enjoy an "uncertain" legal status — as it did prior to the early 1970s. Then, any action or inaction of the US government toward transnational bribery would be an official declaration of the activity's legal status. Senator William Proxmire the chairman of the Senate Committee on Banking, Housing, and Urban Affairs once criticized that the draft law of Ford would grant to multinational firms the US government's tacit approval of overseas bribery practices.[337] This was unacceptable for the US society. Just as Marinaccio puts it, "I do think that we live in a country where there are some things we just cannot do. And if other countries might allow such practices, then we cannot, and should not, compete on that level."[338]The draft law of the Administration of President Ford that only

[337] See Cragg, Wesley A. & William Woof, "The US Foreign Corrupt Practices Act and Its Implications for the Control of Corruption in Political Life", p.8, available at: http://iscte.pt/~ansmd/CC-Cragg.pdf (last visited: 13 June 2014). Also see Abbott & Snidal (2002: 162), and Koehler (2012: 938-950).

[338] Marinaccio (1982: 349).

prohibited false accounting was destined to be rejected by the Congress.[339]

It is noteworthy that an emphasis on the normative function and moral relevance of legislation is not synonymous with the argument of one branch of the standard rational-choice analysis (i.e., that the FCPA resulted from the moralism of the US). A prohibition of both false accounting and transnational bribery was not the original intention of many governmental agencies participating in the discussion, but an unavoidable choice they were brought to in the end. Here was the paradox that although prohibiting transnational bribery was not necessarily good — by contrast, it was predictably bad for overseas business — a failure to prohibit it would bring significant societal costs. During this process the US government did not autonomously sacrifice overseas business interests to moralism or other superior national interests. Its final strategies were simply limited to options existing within the boundaries of the established value system of the society.

In sum, there were three key phases that lead to the consequent creation of the FCPA: first, it was the accidental "Watergate Scandal" and SEC disclosure programs that aroused divergent domestic demands of a variety of stakeholders and the need for legislative remedies to coordinate these demands. Second, the law-making mechanism of the US federal government determined that the initial versions of laws would result from repeated negotiations, confrontations and concessions among different political forces, often coordinating divergent demands around a common ground.[340] Third, the final version of the law was ultimately shaped within the set of legal options as seen within the existing value system of the society at the time the legislation was enacted. This is the basic logical line of the FCPA's endogenous creation.[341]

More profoundly, the FCPA was both a plausible accidental consequence of the

[339] See Koehler (2012: 998).

[340] See generally Ahdieh (2010).

[341] For a summary see Chapter II, 5.2.

Watergate Scandal and the regime change from the Administration of President Ford to the Administration of President Carter and an inevitable product of the economic and regulatory context of the US at that time. The development of a modern corporate system of complex conglomerates and multinational enterprises that existed going into the 1970s required more systemic tools of corporate governance, which placed more aspects of corporate behavior under the public scrutiny of the market. Once this new economic model was operating on a global scale, confirmed by the legal system, its inherent demand for transparency would objectively reduce the dark space in which transnational bribery previously took place surreptitiously. Specifically, when the disclosure of accounting was extensively regulated, acts of transnational bribery by US corporations would be exposed.[342] Therefore, the issue of transnational bribery was brought to light and definitively marginalized by a modern society with stable values and a new form of economic pursuits, and in the US — which was the most advanced economy — the FCPA was just waiting for its time to come out. This is the most fundamental source of the endogenous creation of the FCPA in the US in the 1970s.[343]

3. The OECD Anti-Bribery Convention: A "US-Induced" Institution

This Section analyzes the historical context after the creation of the FCPA in 1977 to explore the central dynamic of the establishment of the OECD Anti-Bribery Convention in 1997. After the US enacted the FCPA but failed to

[342] In 1934, as a response to the economic crisis in 1929, Congress passed the Securities Act of 1934, as a part of New Deal legislation, requiring companies whose shares were traded publicly to disclose important business information to investors. Then there were no provisions about whether it was necessary to disclose information on transnational bribery. It was until the enactment of the FCPA that the Securities Act of 1934 was revised to contain such provisions. See Cragg, Wesley A. and William Woof, "The US Foreign Corrupt Practices Act and Its Implications for the Control of Corruption in Political Life", 7, available at: http://iscte.pt/~ansmd/CC-Cragg.pdf (last visited: 13 June 2014). For a detailed discussion on the correlation between the development of capital markets and the SEC's enforcement against transnational bribery see Chapter V, 2 & 4.

[343] Generally see Marinaccio (1982). For further discussion see Chapter V, 2.1.

multilateralize it, the side-effect of the FCPA on US exports became a salient concern. Beginning in the late 1980s, the US government began a new round of actions to multilateralize the FCPA, and achieved rapid progress since the 1990s, culminating in the formation of the OECD Anti-Bribery Convention.[344]

Different from the endogenous creation of the FCPA in the US, the formation of the Convention was closely associated with US diplomatic strategies. Just as addressing the tension between the necessity to cope with the deleterious effect of transnational bribery and the predictable side-effects of the FCPA on US overseas business is central to our understanding of the creation of the FCPA, so too is identifying the role of the US in the formation of the Convention.

3.1 A Historical Review: the Role of the US in the Formation of the Convention

3.1.1 US Motives to Establish a Convention (since the 1980s)

Beginning in the 1980s, the FCPA was loudly criticized for its side-effect on US economy. A popular view was that the FCPA decreased US business in corrupt countries.[345] Regarding the amount of US business loss, President Clinton suggested in 1998 at the formation of the OECD Anti-Bribery Convention that the unilateral enforcement of the FCPA had led to "losses of international contracts estimated at $30 billion per year.[346] There were also dissidents contending that the FCPA did not really cause a reduction in US exports.[347] However, the complaints indeed concerned US government.[348]

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[344] Generally see Tarullo (2004: 673-680).

[345] See USGAO (1981), Beck & Tschoegl (1991), Hines (1995: 1-2), Ramos (2012: 4), Nadipuram (2013: 636-657).

[346] See Clinton (1998: 2290).

[347] See Richman (1979), Graham (1984), Beck & Tschoegl (1991), and Richardson (1991).

[348] See Chapter V, 3.1.3.

There was also discussion of whether the FCPA should be repealed. Basically, there were two approaches to reduce the side-effect of the FCPA on overseas business transactions: to repeal the FCPA or to popularize it. Given the failure to achieve multilateral cooperation in the 1970s, there were loud domestic voices calling for abolishing the FCPA, or at least amending it.[349]

However, for several reasons it was unrealistic for the US to repeal the FCPA: First, the endogenous creation of the FCPA suggested that the real expectation of the US voters was not to repeal the FCPA, but to popularize it. With a full awareness of the side-effects of the FCPA before enacting it, US policymakers were unlikely to repeal it for those very same reasons. Second, the US could not threaten to repeal the FCPA for strategic purposes. In an international situation where other states were not convinced of the benefit of combating transnational bribery, neither the enactment nor the repeal of the FCPA would alter their strategic choices.[350] Third, repealing the FCPA would be prohibitive for the US because of the "stickiness" of anti-corruption laws.[351] Institutional stickiness means the ability or inability of institutional change to take hold when transplanted.[352] At that time, the FCPA had been enforced for years and had been applied to the investigation of more than a dozen bribery cases.[353] Repealing the FCPA would make dealing with the sticky momentum created by these established decisions very difficult.[354]

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[349] See e.g., USGAO (1981), and Adler (1982). In 1999, even after the formation of the OECD Anti-Bribery Convention, there was still this kind of viewpoints. For example, Copeland suggested that "if no treaty comes into force, we will no longer put our business community at a competitive disadvantage by enforcing the Act…This simply is not a battle which can be fought unilaterally, for we cannot afford to wage a war in which we are the only combatants and, therefore, the only casualties…"Copeland & Scott (1999: 50-51).

[350] See Magnuson (2013: 392).

[351] See Abbott & Snidal (2002: 161).

[352] See Boettke *et al.* (2008: 332).

[353] For filed cases see DOJ Press Release, "FCPA and Related Enforcement Actions", available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited: 7 April 2014).

[354] For filed cases see DOJ Press Release, "FCPA and Related Enforcement Actions",

As repealing was not feasible, the US sought alternatively to soften the side effects of the FCPA on its economy.[355] At this end there were two options: First, it could tone down FCPA enforcement. As FCPA enforcement was at the discretion of the SEC and the Department of Justice ("the DOJ"),[356] they could adjust the level of enforcement so as to reign in its negative economic consequence within an acceptable range.[357] Second, the US could (and did) amend the FCPA and symbolically soften some of its stricter terms. In 1988, the Omnibus Foreign Trade and Competitiveness Act revised conviction standards of the 1977 version. While the 1977 version of the FCPA prohibited payments that a payer knew or had a reason to know served an illegal purpose, the 1988 version prohibited payments only when the payer had actual knowledge. Two affirmative defenses were also added in to the 1988 version that relieved the liability of defendants.[358]

Basically, the Administration of President Reagan (between 1981 and 1988) was marked by policies of relaxing FCPA enforcement, so as to decrease the side-effects of FCPA enforcement on US business.[359] However, softening the side-effects of the FCPA by withholding enforcement had limited effects. Popularizing the FCPA norms remained the best approach for the US to extract

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available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited: 7 April 2014).

[355] See Abbott & Snidal (2002: 176-177).

[356] See Chapter V, 3.1.

[357] See Carrington (2009: 134), McSorley (2011: 751), and DOJ Press Release, "FCPA and Related Enforcement Actions", available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited: 4 July 2014). Also see Chapter V, 3.1.2.

[358] §§ 5001–5003 of the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, Title V, § 5001 (23 August 1988). For detailed information on the content of the 1988 Act see Hall (1994: 297-301).

[359] See Cragg, Wesley A. and William Woof, "The US Foreign Corrupt Practices Act and Its Implications for the Control of Corruption in Political Life", p.17, available at: http://iscte.pt/~ansmd/CC-Cragg.pdf (last visited: 13 June 2014).

itself from the dilemma.[360] For this reason, the 1988 Amendment to the FCPA explicitly urged the president to negotiate with OECD member countries to adopt the FCPA.[361] The central work of the US then was to formulate a new round of strategies to recruit allies.

3.1.2 US Strategies to Establish a Convention (the 1990s)

In 1989, President Bush sought to negotiate an agreement with other countries on the forum of the OECD. However, because of the Bush Administration's emphasis on the US's need for a level playing field, it failed to convince European countries of the necessity of such a Convention.[362] With the Clinton Administration taking office in 1993, the US government began to adopt more aggressive and various foreign policies to multilateralize the FCPA.[363] Existing literature normally classifies the US strategies into a category of interest-based strategies and a category of value-based strategies. Interest-based strategies referred to the US's use of economic leverage to include anti-bribery terms in bilateral or multilateral trade treaties with other countries, or to achieve similar results through other channels. The rationale of this strategy is to impose incentives/disincentives to alter the responsive strategies of other states. Value-based strategies referred to US attempts to use discursive power in international affairs to make arguments for normative persuasion and define "right" and "wrong" to support its proposals.[364] Of course, this distinction that juxtaposes interest and value is employed for analytic clarity. As in international politics interests and values are often interchangeable, no specific strategy is purely interest-based or value-based.[365] In what follows, several major strategies

[360] See Magnuson (2013: 386).

[361] See § 5003(d) of the Omnibus Trade and Competitiveness Act of 1988.

[362] See Abbott & Snidal (2002: 162).

[363] See Abbott & Snidal (2002: 162), and Magnuson (2013: 386).

[364] See generally Abbott & Snidal (2002: 163-173).

[365] See Abbott & Snidal (2002: 142-147).

of the US during this period are discussed.

3.1.2 (A) the Strategy of Imposing Anti-Bribery Terms by Trade Treaties

The US began to consider imposing anti-bribery terms on other states through bilateral or multilateral treaties and industry associations beginning in the 1970s,[366] and achieved some progress.[367] One example of this sort of strategy was the *North American Free Trade Agreement* ("NAFTA"). The NAFTA was established between the US, Canada and Mexico and entered into force on 1 January 1994.[368] As Boris Kozolchyk summarizes, this treaty reflected the requirement of business activities free of bribery: "governmental contracts, grants, concessions or franchises are, on the whole, adjudicated not on the basis of family or friendly connections or bribery, but on the basis of a publicly advertised, lowest-bidder basis."[369] This tool was used even more aggressively in the 1990s. Other governments' refusal to accept anti-bribery terms was considered to be a "trade policy matter" that would incur trade sanctions by the US.[370]

The US tool that sought to exchange trade treaties for anti-bribery cooperation can be understood either as a strategy of side payment, or as one strategy of

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[366] As stated in 2.1.4 (A) of this Chapter, Senate Resolution 265, 94th Congress (1975) suggested the US to popularize FCPA terms through trade negotiations. However, after the passage of Senate Resolution 265, here was controversy on this strategy too at the beginning. For example, Assistant Secretary of Commerce for Domestic and International Business, Travis Reed stated in a 1975 Senate hearing that: "the MTN agenda already includes a large number of complex and difficult negotiating objectives in the tariff and non-tariff barrier areas, and it may not be in our best interest to add yet another major problem to that agenda." Protecting U.S. Trade Abroad (statement of Travis Reed), cited in Koehler (2012: 983). Also see Rubin (1976: 618).

[367] See Salbu (1997: 235-236).

[368] *North American Free Trade Agreement* (1 January 1994).

[369] Kozolchyk, Boris, "NAFTA in the Grand and Small Scheme of Things", 3 May 1994, III, available at: http://www.iatp.org/files/NAFTA_in_the_Grand_and_Small_Scheme_of_Things.htm, (last visited: 16 June 2014).

[370] See Tarullo (2004: 678).

"tit-for-tat". In treaty negotiations, when the expected treaties are likely to benefit some negotiating parties but be unhelpful or even harmful for other negotiating parties, those benefiting can compensate those potentially suffering a disadvantage elsewhere, so as to reach an agreement. The compensation paid by the potential winners is a form of "side payment". The strategy of making side-payment aims to draw ambivalent parties into a coalition.[371] The "tit-for-tat strategy" is also a private relief measure in international relations to retaliate against defectors in cooperation. It means that faithful collaborators take retaliations in the next round of cooperation to offset a defecting collaborator's unjust gains obtained in the previous round so as to protect themselves against damage and guarantee the evolution of the cooperation.[372]

Regardless of the labels, the rationale of this tool was that the US, as the strongest economy, was able to use its leverage in international economic affairs to bestow preferential trade terms to its counterparties in exchange for anti-bribery terms. By this approach the US intended to alter the payoffs of other countries and their strategies on whether to accept FCPA-style norms. This activity follows the basic logic of rational-choice theory, which asserts that variation in payoff structure explains variation in individual strategy.[373]

The US's strategy to spread anti-bribery norms through trade treaties was also a countermeasure to the failure to negotiate a Convention at that time. Because it seemed to be an unrealistic expectation to establish a treaty through the forum of the OECD or the UN,[374] Senator Proxmire suggested that bilateral treaties would be a more successful approach. As he notes, "The Committee [on Banking,

[371] See Harstad (2008). In fact, the subjects who make side-payments are not necessarily potential winners; while the subjects who accept side-payments are not necessarily potential losers. It is more likely an issue of subjective will, which is probably but not necessarily a reflection of the potential benefits in the collective decisions.

[372] See Milinski (1987: 433), and Sheldon (1999: 1245).

[373] See Keohane (1989).

[374] See Chapter II, 2.1.4.

Housing and Urban Affairs] firmly believes…that an American anti-bribery policy must not await the perfection of international agreements, however desirable such arrangements may be… Binding bilateral enforcement agreements will produce more results than voluntary codes."[375]

The US strategy to spread anti-bribery norms through trade treaties was a feasible vehicle, but with limited effects. Out of the multifaceted nature of transnational bribery, a real fight against transnational bribery demands the intervention of national powers, and cooperation of many governmental and non-governmental departments (e.g., prosecutors, trade departments and accounting authorities). The US's economic leverage might be able to impose anti-bribery terms on countries with strong economic interdependence with it, but was unable to bring about high-level and holistic legislative activities at an international level.

3.1.2 (B) the Strategy of "Public Diplomacy"

An equally salient strategy of the US was to use European domestic political forces to press for anti-bribery rules to bind European governments. This strategy was described by Tarullo as a strategy of "public diplomacy",[376] and by Abbott and Snidal as "value tactics" or "political propaganda".[377] There were several instances in which the US made use of a series of corruption scandals in Europe in the 1990s to publicize the damaging effects of corruption to European citizens.[378] Basically, it was a story about how the US awoke and mobilize public hostility toward corruption to overcome European governments' resistance towards legislating against transnational bribery. Though this kind of

[375] US Committee on Banking, Housing and Urban Affairs, *Report No 94-1031* to accompany S.3664, July 2, p.9, cited in in Cragg, Wesley A. and William Woof, "The US Foreign Corrupt Practices Act and Its Implications for the Control of Corruption in Political Life", available at: http://iscte.pt/~ansmd/CC-Cragg.pdf (last visited: 13 June 2014). For more comments of Senator Proxmire see pp.1-9 of the article.

[376] See Tarullo (2004: 679).

[377] See Abbott & Snidal (2002: 163-173).

[378] See Abbott & Snidal (2002: 164), Tarullo (2004: 678), and Magnuson (2013: 387).

"political propaganda" was criticized by some people — as Abbott and Snidal comment, some Europeans saw the tactics of the US to make use of European officials' fear of press and public criticism as "diplomatically inappropriate bullying",[379] — it was indeed effective.

Two basic factors are necessary for this strategy to work. On the one hand, regardless of interest considerations of decision-makers, public opinion often supported the "morally attractive decisions" instead of the "interest-maximizing decisions". The remoteness of the public from the economic relevance of transnational bribery for exporting companies oriented them toward the US claims. As Abbott and Snidal suggest, "principled beliefs have a generalizable quality…if bribery and corruption are wrong in principle, it becomes more difficult (though not impossible) to view them as acceptable in Nigeria but not in Britain, or in export transactions but not in domestic ones."[380] For general citizenry, however, it was indisputable that people may have material interests in one area but not in another area. The economic relevance of transnational bribery probably only concerned the business community. On the other hand, European governments not only act to optimize material interests in international trade, but should also respond to the value demand of their own people. They cannot neglect public sentiments.

In the early 1990s, when several European corruption scandals were revealed, European citizenry began to be increasing hostile toward corruption. The voice of media gradually took the side of the US and advocated adopting stringent measures to control corruption (transnational bribery included). The domestic climate of an increasing hostility toward corruption converged with a rising pressure on European governments. Both external pressure and domestic atmosphere nibbled away at the interested-based resistance of the European governments to the US initiative. As Tarullo suggests, this strategy of "public

[379] See Abbott & Snidal (2002: 164).

[380] Abbott & Snidal (2002: 148).

diplomacy" worked to "shift the positions taken by European governments which, until that point, had been recalcitrant."[381]

3.1.2(C) The Strategy of Normative Persuasion through International Organizations

Apart from imposing direct or indirect pressure on European governments, the US also resorted to international organizations to exercise normative persuasion. As mentioned above, European countries' long-term resistance to the US initiative was not only an interest-based question. There were also ideological obstacles to their understanding of the legitimacy of such an action.[382] Before the mid-1990s, the immorality or inefficiency of commercial corruption was not a popularly held view in Europe, not to mention the issue of transnational bribery, which was made even more complicated by its international relevance. In view of this, while using its economic leverage, the US also used its discursive power in international fora to induce an attitude change toward transnational bribery.

Although the harmful effect of transnational bribery remained an unpopular argument in the early 1990s, the global economic and political context of the early 1990s was already well prepared for a global attitude change in favor of reform. A widely held view is that the crash of the Soviet regime after the Cold War gave an impetus to the expansion of international markets and democratic values.[383] Frequent multilateral transactions made the concept of globalization increasingly popular. In this context, international cooperation (other than conflict) gradually became the dominant approach for countries to maximize their national interests. Inter-governmental organizations and non-governmental organizations that purported to speak for the welfare of the overall international community rose and evolved to more independent and important entities in

[381] Tarullo (2004: 679).

[382] See Chapter II, 2.1.4 (B).

[383] See e.g., Nesbit (1998: 1274-1275), Pieth (1999), and Schmidt (2009: 1126). Also see Chapter I, 2.1.2 (A).

international affairs. Viewed from the prism of global welfare, the immorality and economic inefficiency of commercial corruption became self-evident.[384] Under this background, Transparency International, a civil society organization targeting all types of corruption was established in 1993.[385] Working with a group of experts, it began to issue CPI in 1995 to rank the level of corruption in around 200 countries.[386] The CPI succeeded to draw people's attention to the issue of corruption and convince them of its deleterious effects.[387] Besides, the OECD also made great efforts to convince private sector actors of the significance of corporate ethics and perfect competition in the international marketplace.[388] International Organizations such as the World Bank published stricter lending policies to enhance organizational surveillance over the disbursement of funds to client countries.[389]

Once attitudes toward commercial corruption changed,[390] the evil of transnational bribery would be self-evident. On the one hand, the US initiative to

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[384] See Chapter I, 2.1.2 (A)'s description of globalization.

[385] Given that the founder of Transparency International, Peter Eigen had worked in the World Bank in Washington DC before he went to Germany and established Transparency International, to some extent, Transparency International can be seen as a tool of normative persuasion of the US. See TI press release, "Transparency International Founder Peter Eigen Honored by German Government", available at: http://www.transparency.org/news/pressrelease/20130124_transparency_international_founder_peter_eigen_honoured_by_german (last visited: 14 June 2014). For more information about the work of TI related to the establishment of the OECD Anti-Bribery Convention see Abbott & Snidal (2002: 165).

[386] See TI Press Release, "Corruption Perception Index", available at: http://www.transparency.org/research/cpi/ (last visited: 31 July 2014).

[387] Prior to 1999, Transparency International only issued a CPI (CPI) that ranked almost 200 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys. Since 1999, aware of the prevalence of cross-border bribery, Transparency International began to issue the Bribe Payers Index (BPI) to measure the supply side of bribery. See Transparency International's Bribe Payers Survey 1999, available at: http://www.transparency.org/content/download/2850/17712 (last visited: 2 April 2014).

[388] See Pieth (2007: 6-16).

[389] See World Bank (1997).

[390] See Abbott & Snidal (2002: 158-160).

outlaw transnational bribery was endorsed by IGOs and NGOs. For example, the UN issued Action against Corruption (i.e., General Assembly Resolution 51/59) on 12 December 1996,[391] and United Nations Declaration against Corruption and Bribery in International Commercial Transactions (i.e., General Assembly-Resolution 51/191) on 16 December 1996. [392] General Assembly-Resolution 51/191 required member countries to "take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions."[393] On the other hand, while domestic corruption in host countries was a global concern stressed by intergovernmental organizations, it was logical to declare the regulatory responsibility of those countries that were home to multinational corporations. As Professor Tarullo states, some political leaders of developing countries then criticized European countries for their corporations' acts of bribery that impeded the economic development and political integrity of their countries.[394]

Within a political climate increasingly intolerant of corruption, and in which the regulatory responsibility of home countries was highlighted, European countries could not find a good reason to refuse the US anti-bribery initiative. For many of them then, the negotiations with the US on this issue were no longer a question of whether to outlaw transnational bribery, but a question of how and when.

3.1.3 US Achievements: the OECD Anti-Bribery Convention and Other Agreements (the 1990s)

In this round the US targeted the OECD as the organizer of an anti-bribery collaboration.[395] Professor Mark Pieth summarized several reasons for the US to

[391] UN (1996a).

[392] UN (1996b).

[393] UN (1996b).

[394] Tarullo (2004: 679).

[395] According to Pieth, other organizations, the UN, GATT, and G7 had once been options, but were abandoned by the US for various considerations. See Pieth (2007: 9).

select the OECD as the coordinator. First, as he suggests, the OECD was the best place to eliminate the side-effect of the unilateral enforcement of the FCPA on US business interests. As the OECD comprised major competitors of the US in overseas markets, an anti-bribery collaboration in this arena would oblige all these competitors to regulate transnational bribery. It was the most efficient approach to cancel out the side-effect of the FCPA on US interests. For example, after the establishment of the OECD Anti-Bribery Convention, the US appeared satisfied with the coverage of the Convention and was optimistic about the recruitment of new members in this round — as Clinton states, "our major competitors will be obligated to criminalize…The existing signatories already account for a large percentage of international contracting, but they also plan an active outreach program to encourage other nations to become parties."[396] Second, OECD members were more economically motivated to accept an anti-bribery collaboration than non-member countries. In 1998, most OECD member countries' domestic economies were not only sound, but the total export represented by the OECD members accounted for more than 75% of global export.[397] Corruption in importing countries was more likely to be considered as an impediment to business transactions and an additional expenditure that could be avoided by a collective action among regulatory states.[398] Third, the US also counted on the OECD's peer-review monitoring system to guarantee the enforcement of the Convention.[399]

In 1994, the OECD released *the Recommendation of the Council on Bribery in International Business Transactions* (referred to as "the 1994 Recommendation"). This document officially required member states to criminalize transnational

[396] Clinton (1998: 2290).

[397] See OECD (2012a).

[398] See Pieth (1999: 3).

[399] See Clinton (1998: 2290), and Pieth (2007: 9-10). For the system see Chapter III, 3.3.

bribery.[400] As a working document only applying to OECD member states, the 1994 Recommendation was not legally binding. However, it was the first declaratory statement that a global collective action against transnational bribery was on the way. Soon after, many agencies, like the Committee on Fiscal Affairs (CFA) inside the OECD, published special recommendations to support the 1994 recommendation. In 1996, the OECD published the *Recommendation of the OECD Council on the Tax Deductibility of Bribes for Foreign Public Officials* (referred to as "the 1996 Recommendation).[401] Thus, nearly 40 years after the US's abolishment of tax deduction policy in 1958,[402] tax deductibility of transnational bribery was finally announced illegal on an international scale.[403]

Meanwhile, there was also progress in the EU and OAS. First, on 27 September 1996, the EU issued the first *Protocol to the Convention on the Protection of the European Communities' Financial Interests* which for the first time focused on the issue of transnational bribery in Europe.[404] On 25 June 1997, *Convention against Corruption Involving Officials* was adopted to combat corruption in which officials of member states or the EU are involved.[405] This Convention required member countries to criminalize both paying and accepting bribes and other corrupt behavior. Second, in March 1996, 21 members of the OAS signed the *Inter-American Convention against Corruption*, with the initiative to develop an enforcement regime against transnational corruption, establish a legal framework and develop model laws.[406]

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[400] See OECD (1994: 8).

[401] OECD (1996).

[402] For the US's abolishment of tax deduction policies see Chapter II, 2.1.1.

[403] For information on when and how countries other than the US abolished tax deduction policies for transnational bribery see *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

[404] EU (1996).

[405] EU (1997).

[406] OAS (1996).

The OECD Anti-Bribery Convention was signed in December 1997, and entered into force in February 1999.[407] No later than the early 2000s, all signatories, including 29 OECD member countries and five non-member countries, ratified the Convention and incorporated Convention obligations into national laws.[408] The 34 countries that participated in the OECD anti-bribery Convention in the 1990s became the first generation of signatories (founders) of the OECD Anti-Bribery Convention. The term "the first generation of signatories" here is used in this study as a counterpart to the seven countries which jointed the OECD Anti-Bribery Convention later than that time.[409] The first generation of signatories mainly comprised OECD member countries, which had relatively close relations with the US.

3.2 Limits of Standard Accounts of the Convention

Given the central role of the US in the establishment of the OECD Anti-Bribery Convention, an understanding of US promotion strategies is critical for understanding the dynamic of the establishment of the Convention. Following the same logical line of their explanations of the creation of the FCPA, scholars consider all signatories as free-will, rational actors, and then adopted an interest-based approach or a value-based approach to explain how US strategies lead to a change of attitudes of Europeans toward its anti-bribery initiative.[410]

One popular interest-based argument considers the attitude change of European states as a rational response to external incentives/disincentives provided by the

[407] OECD (1997a).

[408] See OECD Press Release "Status of Ratification", available at: http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf, (last visited: 12 June 2014). Also see *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

[409] See Chapter II, 4.1.

[410] Both the interest-based and the value-based explanations have some followers. In most situations, scholars blended the two approaches together. See Abbott & Snidal (2002), and Tarullo (2004).

US. Fitting under the rational-choice tradition, there are two basic explanations in existing academic and policy literature with respect to such incentives/disincentives for European states to enter the Convention. The first explanation was a story about how the US's threat of trade sanction altered expected payoffs of European states and thereby led to their attitude change toward outlawing transnational bribery. This story considered the concession of European countries as a strategic means for them to escape diplomatic pressure from the US. According to this logic, the fact that European countries agreed to outlaw transnational bribery does not necessarily mean that they indeed wanted to enforce these laws — as Professor Tarullo suggests, "nothing in these explanations (a rational-choices analysis of how countries entered into the agreement) or in game theory suggests that these governments intended the resulting Convention actually to repress overseas bribery."[411] The second explanation told a story about how the US persuasion convinced the European countries of the deleterious effects of transnational bribery on economic development. European countries took the collective action against transnational bribery voluntarily for a common pursuit of perfect competition and clearer international markets. The essence of the anti-bribery collaboration was a "public good game" that would severe "common interests".[412] According to this logic, the motives for signatories to legislate against transnational bribery and the motives for them to enforce against transnational bribery were identical at least when they signed the Convention. Although the two explanatory approaches predicted different prospects of the enforcement of the Convention, they converged on the belief that European states agreed to establish the Convention for self-serving purposes.[413]

The equally widespread value-based story, which is quite similar with the second

[411] Tarullo (2004: 680).

[412] See e.g., Brewster (2010: 310).

[413] Also see Chapter III, 2.2.

explanation discussed above, explains European strategies as resulting from their commitment to an increasingly common value. European governments were convinced of the immorality of transnational bribery and established relevant anti-bribery institutions for moral purposes, instead of for self-interested purposes. With regard to the role of US, this explanation argues that it was the US' normative persuasion instead of its economic leverage that mattered.[414]

Categorizing motives of European governments to change an attitude toward the US anti-bribery initiative into interest-based reasons and value-based reasons helps identify multiple factors that may account for the establishment of the Convention. However, the explanatory power of this distinction is limited because of the ambiguity of the border between interests and values. In international politics, it is indeed difficult to distinguish value-based purposes from interest-based purposes. The value pursuit of state actors, if understood broadly, can be explained as a special manifestation of nonmaterial interests or an indicator of material interests in prospect. For example, the pursuit of fairness in international business competition could be a moral value, and simultaneously an effective market mechanism to pursue long-term economic interests. Abbott & Snidal juxtaposed interests and values to analyze the operation of international legalization for analytic clarity. But they also stressed throughout the article that "value considerations can often be understood in interest terms".[415] One particular example of this subject was the US's strategy of "public diplomacy"—as discussed in 3.1.2 (B) of this Chapter. This "public diplomacy" was not necessarily the triumph of value considerations over interest considerations. European governments' concession to public sentiments against transnational bribery remained in an optimizing manner that can be embraced by a rational choice argument, given that these governments needed to respond to

[414] Abbott & Snidal discussed how interest-based considerations and value-based considerations interacted and affected the establishment of the OECD Convention. See Abbott & Snidal (2002: 163-173).

[415] Abbott & Snidal (2002: 143).

domestic demands. When Abbott & Snidal stressed the role of this "value strategy" by stating that "in the OECD, interest-based resistance to anti-bribery rules on the part of European governments was overcome only after the United States resorted to aggressive value tactics that mobilized domestic political pressure in Europe," they only reconfirmed the difficulty to make a real distinction between interests and values in international affairs.[416] Because of the intertwined relation between the concept of value and the concept of interest, this binary explanation does not really help explain more facts about how US strategies lead to the attitude change of European countries.

The binary explanation once again reflects the centrality of the rational-choice analytical tradition. Explaining European strategies as resulting from an attempt of European countries to escape US diplomatic pressure splits the motives for lawmaking from those for law enforcement. In this formulation, any "ineffectiveness" of law enforcement became predictable because countries never intended to take the relevant laws seriously.[417] Alternatively, explaining European strategies as rationally resulting from their pursuit of a common good (e.g., perfect competition in overseas markets) presumed that they outlawed transnational bribery because they wanted to eliminate transnational bribery. Logically, any unfavorable law enforcement could be a story about "collective action problem", "prisoner's dilemma" and "free riders".[418] Conventional explanations and solutions to the exploitability of individual contributions in cooperation would be available. On the other hand, under the rationality assumption, a pure commitment to moralism or altruism constitutes an irrational strategy that would not go far. Therefore, explaining the attitude change of European countries as resulting from value motivations predicts a dismal for law enforcement, and makes it easy to explain any unfavorable enforcement of the

[416] See Abbott & Snidal (2002: 143).

[417] See Tarullo (2004: 609).

[418] See Chapter III, 2.2.2.

Convention.

Basically, all these arguments are set on the assumption that variation in payoff structures cause variation in strategies. This standard rational-choice account that explains variation in state strategies as resulting from variation in payoff structures assumes that there was a direct cause-effect relation between US strategies and attitude change of European governments. Once again, it simplifies the dynamic interactions between the US and European governments and completely avoids considering the relevance of other international organizations and international political and economic contexts. In particular, the formation of the Convention was characterized by repeated consultations, negotiations and concessions among the US and European countries. This dynamic interaction among parties indicates that rational state actors should not only actively respond to incentives/disincentives in a given informational environment. Rather, they would also be reactively bound by their precedent actions in previous rounds of negotiations. Then the rationale of path-dependence enters into the analysis. From an overall scale, state actors' attempts to maximize their self-interest might be consistent, but their strategies were highly unlikely consistent. On this awareness assuming the existence of a direct cause-effect relation between US strategies and attitude changes of European governments sidetracked the analysis of the real dynamic of the formation of the Convention.

3.3 The Convention as an Outcome of a Chain Reaction Initiated by the US

To understand the role of the US in the negotiations of the Convention, this subsection focuses on two key points. First, the gradual attitude change of European governments in successive episodes of negotiations, and how their optimal strategies in each episode were limited by accessible information and their preceding decisions.

Let us once again contrast the story of the formation of the Convention to that of the enactment of the FCPA. It was the Watergate Scandal and SEC disclosure programs that brought the issue of transnational bribery into public view, and thus aroused divergent interest demands of different domestic groups around this issue. This was the prerequisite of any discussions on legislative remedies.[419] In the case of the formation of the Convention, it was the US that exogenously brought the issue of transnational bribery to international fora. With aggressive political and economic strategies, European governments were recipients of an exogenously "imposed" interest demand on this issue that they needed to respond to, and thus were forced into a dialogue about the legal status of transnational bribery.

What is more, in the case of the FCPA, the US's abolishment of tax deduction policy for transnational bribery in the 1950s,[420] and US governmental agencies' common acknowledgement of the immorality of transnational bribery while they debated on whether to outlaw transnational bribery[421] was a gradual reinforcement and popularization of an unexpressed value of the society — the evil of transnational bribery. Similarly, European governments' acceptance of anti-bribery norms in trade treaties—which is discussed in 3.1.2 (A) of this Chapter, despite the limited political influence and binding force of these terms, was an official endorsement of the illegality of transnational bribery. This sense of value was further self-reinforced in the international ideological atmosphere that was increasingly against corruption. European governments were left with no excuse to give an overall denial of the US anti-bribery initiative. Once they entered into negotiations about how to establish an anti-bribery collaboration, they could by no means retreat.[422] Then there was no longer a question of

[419] See Chapter I, 2.3.

[420] See Chapter I, 2.1.1.

[421] See Chapter I, 3.1.2.

[422] See Boettke *et al.* (2008: 332), and Abbott & Snidal (2002: 167-168).

whether to establish an agreement, but a question of how and when to establish the agreement.

Then the coordination game among all parties began to work. At this point of time, an observation of what European governments intended to achieve but failed to in this historical context was more relevant than what they indeed achieved to an understanding of the dynamic of the formation of the OECD Anti-Bribery Convention. It is noteworthy that European governments once suggested a draft agreement that only criminalized their nationals' acts of paying bribes in member countries of the agreement, but not in nonmember countries.[423] This means, if host countries did not outlaw their own companies' acts of transnational bribery abroad, home countries (i.e., signatories to the Convention) would not prohibit their corporations paying bribes in those non-signatory countries. For example, a German company paying bribes to an official of Canada (a signatory country) would constitute an offense under German law, but such company paying bribes to an official of India (a non-signatory country) would not. Basically, it was a scheme that determined the liability of bribe-paying corporations according to nationalities of bribe payees. The underlying logic implied that in the conception of European governments, transnational bribery was an offense to the welfare of host countries, instead of an offense to the welfare of countries home to bribe payers or countries home to business competitors of bribe payers. Their prohibition of transnational bribery was an altruistic action that would benefit others, and they tended to only offer this advantage in a mutually beneficial manner to those who provided the same advantage to them.

For the European part, this scheme was already sufficient to coordinate the demands of all parties. First, this scheme was expected to level the playing field for overseas business competition, so it could help escape diplomatic pressure that the US was applying to European governments. Second, declaring an

[423] See Abbott & Snidal (2002: 168).

attitude to combat transnational bribery, it was expected to help appease the sentiments of European citizenry against corruption. Third, as it prohibited corporations from paying bribes in member countries, it was expected to cut one channel of "importing" bribes and keep corruption outside their territories. Meanwhile, as it did not prohibit corporations from paying bribes in nonmember states — which were often assumed to be the "more corrupt" developing countries, they did not need to waste judicial resources and risk their business opportunities to fight against the "cultures" of such countries.

However, this draft agreement was quickly rebuffed. As already noted in the story of the enactment of the FCPA, lawmaking is not only supposed to coordinate interest demands of different parties, but also has the normative function to define right and wrong behavior. [424] The baseline that delimits the lawmaking is that it cannot expressly or inferably contradict the public values of the society. For the general public, the criminalization of transnational bribery would signal that it was an action morally wrong and legally forbidden. The draft treaty that conditionally prohibited transnational bribery according to the place of occurrence violated the tenet of a rule of principle-based law. As a consequence, the OECD Anti-Bribery Convention was passed with a complete prohibition of transnational corporate bribery everywhere.[425]

Now it is clear that the formation of the OECD Anti-Bribery Convention was an activity initiated by the US, and participated in by European countries and several other countries. The US was not the just an actor that constructed the Convention and pressed it on other countries. It was more an actor that brought the topic of regulating transnational bribery into the international arenas and also an organizer that mobilized latent values in the well-fermented ideological atmosphere of the early 1990s. Once the tap of value was opened, the pressure

[424] See Chapter II, 2.3.

[425] Abbott and Snidal explained it as an effect of the indivisibility of values. See Abbott & Snidal (2002: 167-168).

caused a domino effect and made it prohibitive for countries in the negotiation to resist adoption. As this process of chain reactions among political forces was initiated by the US but cannot be completely attributed to the US, it was a different model from the endogenous creation of the FCPA. For this reason, I label this dynamic process of the formation of the OECD Anti-Bribery Convention and the anti-bribery collaboration as an exogenously-induced model of institutional establishment.

4. The Post-Convention Era: "OECD-Imposed" Institutions for Non-Collaborators

This Section analyzes the dynamic of the further expansion of the community of collaborators in the Post-Convention era (after the entry into force of the Convention in 1999).[426] Because of the power of existing collaborators and the popularization of the conception of the evil of transnational bribery, the interactive model between existing collaborators and non-collaborators during this period was fairly simple that can be summarily characterized by a rational-choice model.

4.1 An Attempt by Existing Collaborators to Expand the Community (since 1994)

The creation of the OECD Anti-Bribery Convention indicated that 34 countries representing around 3/4 of global exports[427] would criminalize transnational bribery. In order to expand the community of collaborators, the OECD WGB never stopped recruiting new cooperators from nonmembers that represented 1/4 of global export at that time but beyond the arrangement of the OECD Anti-Bribery Convention.

[426] See OECD (1994).

[427] See OECD (2012a).

Article 13 of the Convention provides that the Convention is "open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions."[428] Apart from Article 13, relevant efforts can be traced back to the publication of the 1994 Recommendation, which encouraged member countries to recruit more members. In the 1996 Recommendation, two OECD agencies were required to promote the application of relevant regulatory instruments in the context of contact with non-member countries.

4.2 A Historical Review: OECD Efforts to Expand the Community of Collaborators (since 1999)

4.2.1 OECD Efforts to Recruit New Members into the Convention

There were 29 OECD member countries and five non-member countries (i.e., Slovak Republic, Chile, Argentina, Brazil, and Bulgaria) which signed the OECD Anti-Bribery Convention in the 1990s. By 2014, another seven countries participated in the Convention.[429] The seven countries are Slovenia, Estonia, South Africa, Israel, Russia, Columbia and Latvia. As the timing and motivations of these signatories were different from those of the first generation of signatories, I label the seven countries the second generation of signatories.[430]

A general approach of the OECD was to set the membership of the Convention as a basic condition for the admittance to the OECD for the second generation of signatories. In May 2007, the OECD Council stepped into negotiations with Chile, Estonia, Israel, Russia and Slovenia. Two of these states also had important applications pending to join the EU. Slovenia (which entered the EU in

[428] OECD (1997a: Article 13).

[429] See OECD Press Release "Status of Ratification", available at: http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf, (last visited: 12 June 2014).

[430] For information on the first generation of signatories see Chapter II, 3.1.3.

2004) was the first new signatory country of the Convention in the 2000s. It submitted the application for membership to the OECD WGB in 2000, became a party to the Convention in 2001, and became a full member of the OECD in 2010. Estonia (another 2004 EU entry) was the second new signatory to the Convention, joining the Convention in 2004 and joining the Organization on 7 May 2010. South Africa joined the Convention in 2007. For Israel and Russia which were not signatories to the Convention, the OECD Council suggested that one basic condition for their accession to the OECD was their participation in the Convention. Israel formally applied for membership in the OECD WGB in February 2008, ratified the Convention in 2009, and became a full member of the OECD in September 2010. Russia formally applied for the membership of the OECD WGB in February 2009, became a signatory to the Convention in 2012. Colombia submitted its application for the membership in the OECD Anti-Bribery Convention in 2011, and became a signatory in 2013. Latvia applied to join the OECD WGB in 2000 and finally became a party of the Convention in May 2014.[431]

A rational choice analysis of state behavior can grasp the basic motivation of the second generation of signatories to join in the collective action: most of the second generation of signatories are countries from the EU and Latin America, areas where regional anti-bribery treaties already existed.[432] These countries also have close political and economic interdependence with the first generation of signatories. Because of their frequent interactions and contacts, the first generation of signatories is definitely powerful enough to popularize the Convention terms to those countries. Precisely for this reason, the first and

[431] Information about how all these countries joined the Convention comes from *OECD Country Reports*. Available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 17 July 2014). For information on OECD members and Partners see OECD Press Release, "Members and Partners", available at: http://www.oecd.org/about/membersandpartners/ (last visited: 29 May 2014).

[432] See OAS (1996), and EU (1997).

second generations of signatories are mainly comprised of traditional industrialized countries and some other EU and OAS countries over which they can use their political and economic leverage to press the Convention terms. However, for those countries politically and economically remote and independent from the existing signatories, especially emerging Asian economies, the major method adopted by the OECD WGB is to strengthen contacts with them.

4.2.2 OECD Efforts to Collaborate with Non-Member Countries

The OECD WGB is actively working with non-signatories and seeking to popularize the anti-corruption standards to a wider arena. Specifically, in May 2007, when the OECD Council began to negotiate with Russia and another four countries on their OECD memberships, it organized a program of "enhanced engagement" with China, India, Indonesia, South Africa and Brazil, so as to seeking more cooperation and considering absorb some of these countries (i.e., China, India and Indonesia) into the anti-bribery collaboration.[433]

Because of less economic interdependence, the traditional approach of imposing group pressure through the EU or the OAS could not work. In the alternative, it would not be quite effective to popularize the Convention terms to these countries by imposing trade sanctions. However, with the acceleration of global economic integration, both signatories and non-signatories exist within a large global network. With more and more international organizations starting actions against corruption, the depth and breadth that international cooperation could reach were expanded. It is possible for existing signatories — the stronger power in international economic affairs — to impose "soft pressure" on non-signatories through other for a where the non-signatories has a membership (e.g., G20, UN, and WTO).

One exemplary case of the "soft pressure" has been applied through the G20. The

[433] See OECD (2011: 31; 2012b: 3).

G20 is the premier forum for international cooperation in economic affairs. It consists of the EU and nineteen countries.[434] Most of these countries are full OECD members or have participated in the OECD Anti-Bribery Convention. Therefore, it is possible for them to disseminate the spirit of the OECD Anti-Bribery Convention and exert influence on the non-signatories. In 2010, the G20 adopted an *Anti-Corruption Action Plan* which calls for all G20 countries to adopt and enforce laws and related measures to combat transnational bribery, to keep close contact with the OECD WGB.[435] One consequence of the G20's influence was that China amended its Penal Code and criminalized transnational bribery in 2011 in the Eighth Amendment to Criminal Code of China.[436]

4.3 The Expansion of the Collaboration: Anti-Bribery Institutions Imposed on Non-Collaborators by Current Collaborators

The popularization of the Convention terms in the 2000s and the 2010s more likely result from the powerful political and economic leverage of the first generation of signatories. After the creation of the OECD Anti-Bribery Convention, the first generation of signatories, together with intergovernmental organizations, nongovernmental organizations and international financial organizations, where those signatories are major players as well, have established a large international network which pressure on anti-corruption dissidents, both morally and materially. On the one hand, they use a normative persuasion strategy to make the deleterious effects of transnational bribery an indisputable

[434] G20 Press Release, "G20 Members", available at: https://www.g20.org/about_g20/g20_members (last visited: 31 July 2014).

[435] *G20 Anti-Corruption Action Plan*, available at: http://www.oecd.org/g20/topics/anti-corruption/G20_Anti-Corruption_Action_Plan.pdf (last visited: 17 January 2014).

[436] For an English version of the Eighth Amendment to P.R.C. Penal Code see http://www.lawinfochina.com/display.aspx?lib=law&id=8568&CGid= (last visited: 17 January 2014).

principled belief. The value of the collective de-legitimization of transnational bribery has gradually become accepted as common sense. On the other hand, the existing signatories to the OECD Anti-Bribery Convention, together with intergovernmental organizations, nongovernmental organizations, and international financial organizations have powerful economic leverage in international affairs. They can easily and less costly alter the payoff structure of non-collaborators and press the Convention terms on them — in particular for those with close economic ties with existing collaboration elsewhere. Although at present many emerging economies representing an increasingly large share of exports still stand outside of the Convention, we have a reason to believe that the coverage of the OECD Anti-Bribery Convention will continue to increase.

Meanwhile, for non-signatory countries, their participation in the OECD Anti-Bribery Convention or acceptance of the Convention norms is in no sense because of indigenous needs, but rather an approach they must follow to be in dialogue with other players in the international arena. More poorly equipped to control corruption and less active in the international marketplace, they would be less sensitive to the deleterious effects of transnational bribery than traditional industrialized countries which have accumulated effective anticorruption techniques and have played a significant role in international markets for over a century. Their acceptance of the Convention norms is more likely a result of diplomatic considerations.

Compared with the endogenous creation of the FCPA in the US in 1977, and the exogenously-induced formation of the Convention by the first generation of signatories in the 1990s, the expansion of the community of collaborators was completely exogenously imposed. Basically, a rational choice account can characterize the phase appropriately.

5. Institutionalizing the Collaboration: An Evolutionary Event Defined by Path Dependence

Preceding sections have sketched out three phases of institutional development of OECD anti-bribery collaboration. Basically, the dynamics of the institutionalization process can be categorized in three modes: the endogenously-created mode — which characterizes the enactment of the FCPA by the US in a context where there were no precedents or external interventions in the 1970s, the exogenously-induced mode — which characterizes the formation of the OECD Anti-Bribery Convention in the 1990s, and the exogenously-imposed mode – which characterized the expansion of the community of collaborators in the Post-Convention era. Like any other descriptions, the possible inaccuracy of this categorizing is self-evident. It is probable that some founders of the Convention (i.e., the first generation of signatories) in the 1990s were completely exogenously motivated to participate in the collaboration. Nevertheless, we can broadly view the institutional development of OECD anti-bribery collaboration as being primarily the product of endogenous or exogenous factors in each of the three phases.

Now we are in a position to address the central puzzle of this Chapter — to extract the fundamental rationale that define the dynamic process of the institutionalization of OECD anti-bribery collaboration from the enactment of the FCPA to the further expansion of the community in the Post-Convention era. As specified at the beginning of this Chapter, the objective of this review of the dynamic of the institutionalization process of OECD anti-bribery collaboration is not to tell a detailed story of how each signatory was motivated to participate in the collaboration, but to allow a progressive manner of understanding a very current topic — the actual enforcement of the Convention. Standard accounts in previous works that employed rational-choice theory to explain the motives of countries to participate in OECD anti-bribery collaboration have followed this

tradition to make assumptions on and give explanations of signatories' collective enforcement of the Convention at the present stage.[437] In preceding sections, I have pointed out that this standard approach was inherently ill-equipped to fully explain why a given country chose to outlaw transnational bribery. However, as this interpretative logic is so deeply embedded in the thinking of scholars, practitioners and other observers, we cannot legitimately take a different approach without penetrating deeply into the fundamental rationale behind the standard account and lying bare its limits. Therefore, in the following subsections I will extract the fundamental rationale behind the arguments of this Chapter, and then contrast it with that behind the standard account.

5.1 The Relevance of Path Dependence to the Whole Story

In contrast to the standard account that is an ahistorical approach that emphasizes the relevance of economic rationality of state actors to the institutionalization of the collaboration, the argument of this Chapter is a historical approach that emphasizes the relevance of institutional path-dependence. Basically, path-dependence implies that "history matters". Specifically, it affirms that the conventionality of existing institutional settings of a community "lock in" the range and trajectory of new institutional arrangements. [438] If the standard account can be broadly interpreted as a story of how state actors seek self-interest maximization in a given informational environment, this argument tells a story of how state actors are constrained by the institutional path defined by the past in an evolutionary context when they seek self-interest maximization.

[437] See Chapter I, 2.4.

[438] See Boettke *et al.* (2008: 331). Also see Chapter II, 5.2.2.

5.2 Key Operative Factors of the Establishment of Central Institutions of the Collaboration

While the principle of path dependence defines the basic trajectory of interactions among different actors throughout the whole story, there are a set of operative factors that define the content and rationale of their interactions in each episode of the evolutionary event. The following subsection outlines how these operative actors performed their functions in each phase of the institutionalization process.

5.2.1 An Initiator of the Discussion

A Logical prerequisite for an official discussion on the disposal of the issue of transnational bribery is that something brings the subject matter to the conference table. Such event could arise independently of any political agenda or conscious arrangement — for example, the discussion on whether to enact the FCPA in the US was initiated by the Watergate Scandal and Post-Watergate SEC disclosure programs.[439] Certain political forces could also consciously pursue it — for example, the international discussion on whether to establish the Convention was actively initiated by the US government.[440]

Regardless of how the story begins, once the subject matter is brought into public discussion, it becomes locked in a trajectory defined by existing institutional settings of the community. For the issue of transnational bribery, once it was open to public discussion, its incompatibility with democratic values and natural notions of fairness became self-evident. This conception would have intensified and taken hold during the process in which different stakeholder groups expressed their own expectations around the issue. Consequently, the immorality of transnational bribery was transformed from a latent value of the society into

[439] See Chapter II, 2.1.2.

[440] See Chapter II, 3.1.2.

an express one.[441] A similar story took place in the formation of the Convention. It was the US that consciously brought the issue of transnational bribery into international fora. Despite the unpopularity of condemning transnational bribery at the very beginning, the conventional condemnation of corruption generally and newer conceptions of globalization served to determine that the conception of the evil of transnational bribery would be transformed from a US value to a universal one.[442] The Post-Convention story was even more straightforward. The OECD WGB, as the coordinator of OECD anti-bribery collaboration and the representative of existing collaborators, became the initiator of a discussion with non-collaborators on the proposal of outlawing transnational bribery in relevant countries.

5.2.2 The Divergence of Interest Demands & the Coordination Function of Countries

Once there is a discussion on whether to legislate against transnational bribery, all stakeholders would have an interest demand around this event and try to achieve it to the largest extent. From this arises a need to coordinate the preferences of different political forces to eventually reach a position.

As above noted, one key operative factor of the creation of the FCPA and the formation of the Convention was an attempt to coordinate the demands of different groups of stakeholders at an optimal equilibrium—which distinguishes the argument of this Chapter clearly from that of the standard account. Under the rubric of *state anthropomorphization*, the standard explanation assumes that different interest demands around the event have constant values across the community and anthropomorphized state actors can work out an optimal strategy by trading off conflicting interests. In contrast, as discussed above, different policymakers and forces, such as the SEC, the Defense Department, the State

[441] See Chapter II, 2.3.

[442] See Chapter II, 3.3.

Department, and Internal Revenue Service, had their own interest demands around transnational bribery regulation. Because the values of different interest demands vary across the community, the coordinator cannot trade them off, but must try to encourage negotiations and concessions and then coordinate these divergent demands around an optimal equilibrium.[443] Thus I do not deny that trading off conflicting interest is relevant. On the contrary, it precisely fits the story of the Post-Convention era. I show, rather that tradeoff only in situations where the interest demands of stakeholders are homogeneous and the coordinator has full control over the event. For this reason, trading off conflicting interests only characterized a subdominant part of the story presented in this Chapter.

Besides, the coordination theory can explain long stories with a set of episodes of interactions among political forces better than can the rational-choice account. The application of the rational-choice account is limited to a given informational environment. With accessible information and the optimizing manner of individual actors controlled, the optimal strategy for the actors is deterministic. However, across a long story with successive episodes of interactions, accessible information, and payoff structure changes therewith. Individual actors' intention to optimize their strategy continues, but their periodical optimal choices are profoundly discontinuous. Consequently, the equilibrium position is changing. One example is the specific process of the negotiation of the Convention. As discussed in 3.3 of this Chapter, the negotiations between the US and European governments failed in 1970s and in the 1980s. However, in the 1990s, new economic pursuits, domestic public opinion and an increasingly popular conception of the evil of transnational bribery were gradually introduced, altered their informational environments, and reshaped their optimal choices in each episode of negotiations. Accordingly, the attitudes of European governments toward the idea of establishing an anti-bribery collaboration gradually

[443] See Chapter II, 2.3.

changed.[444]

5.2.3 The Normative Function of Law that Delimits the Moral Boundaries of the Institutions

Another operative factor is the normative function of law which delimits the moral boundaries of legislative activities. Law, as the most important form of institution shaping our social life, also performs the task of defining and encouraging morally correct behavior. Therefore, lawmaking is bound up with moral correctness. It can never explicitly or implicitly encourage violations of established values of the society. Therefore, the original versions that reflect the optimal coordination equilibrium of interest demands made by stakeholders should be amenable to this moral boundary. The moral boundary of law shapes the final version of the outcome of coordination in successive episodes of the institutionalization of the global anti-bribery collaboration.

It is now clear that the dynamic of the institutionalization of OECD anti-bribery collaboration, as an evolutionary event from the FCPA to the expansion of the community of collaborators in the Post-Convention era was basically defined by the constraining forces of established institutions and the inherent functions of laws. According to this logic, regular interactions between political forces which perform in a strictly optimizing manner may result in altruistic consequence across the negotiating positions in an evolutionary context. The standard argument that this process is defined by an unchanging optimizing process in the "minds" of states as actors and a course of tradeoffs among conflicting interests, completely overlooks the divergence of interest demands of independent parties in negotiations, and how variation in the informational environment reshapes the optimal choices of parties across negotiations.

[444] See Chapter II, 3.3.

6. Conclusion

A simple conclusion of my story in this Chapter is that the dynamic process of the institutionalization of OECD anti-bribery collaboration cannot be well understood without paying close attention to the intertwined interactions among political forces in the concrete historical context. It reveals that an ahistorical economic approach cannot give an accurate explanation of an evolutionary event. There is a constant need for us to liberate our thinking from a static perspective so as to enable a progressive manner of understanding the operation of the anti-bribery collaboration at successive stages.[445] At the macro level, it is ability of the historical context to detect both evolution and continuity, without reducing this to a rigid utility function of state behavior that provides a full nexus of factors for academic analysis of the anti-bribery collaboration at successive stages.

[445] See Chapter I, 3.2 & 5.3.

Chapter III: A Causal Attribution Model for General Compliance with the Convention

1. Introduction

As already defined in Chapter I and II, transnational bribery used to be a legal business activity that enjoyed tax deductibility. It is the enactment of the FCPA by the US in 1977 and the establishment of the OECD Anti-Bribery Convention by 34 countries in 1997 that criminalized transnational bribery globally. As of May 2014, the OECD Anti-Bribery Convention has had 41 signatories.[446] Academic attention in the 1980s and the 1990s mainly focused on the wisdom of regulating transnational bribery. After the Convention created a political atmosphere supportive of transnational bribery regulation, scholarly works began to analyze signatories' compliance with the OECD Anti-Bribery Convention.[447]

What I call "Convention compliance" or "Convention enforcement" in this Chapter refers to signatories' collective enforcement of the Convention, terms of which have been incorporated into their domestic legal systems soon after the ratification of the Convention in 1999.[448] Signatories' incorporation of treaty obligations under the OECD Anti-Bribery Convention into domestic legal systems, the main round of which took place in the 2000s,[449] is treated as a

[446] Prior to 2012, the Convention had 38 member countries. Russia ratified the Convention in February 2012, Colombia ratified the Convention in November 2012, and Latvia ratified the Convention in March 2014. In OECD Press Release, "Bribery in International Business", available at: http://www.oecd.org/corruption/anti-bribery/ (last visited: 17 June 2014). For the formation of the Convention see Chapter II, 3.1.

[447] See Chapter I, 1.1 and Chapter II, 1.

[448] For information on how Convention obligations have been incorporated into domestic legal frameworks of signatories see Phase 1 reports of all signatories. Available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 23 June 2014).

[449] For detailed information on the incorporation of Convention into domestic legal frameworks see *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-bribe

factual part of the institutionalization process, not a topic to be discussed in detail here.[450] The topic of the dynamic of general compliance with the Convention in this Chapter is limited to post-legislation activities. It is all about how signatories, as a systemic level, prevent, investigate and prosecute transnational bribery offences pursuant to their national anti-bribery laws established under the OECD Anti-Bribery Convention.

This Chapter seeks to build a causal attribution model to explain the dynamic of signatories' collective enforcement of the OECD Anti-Bribery Convention. Given the existing institutional framework of OECD anti-bribery collaboration, which is comprised of national anti-bribery laws established under the OECD Anti-Bribery Convention and some supporting documents,[451] this Chapter seeks to explore causal factors in this institutional framework that account for the current level of signatories' domestic enforcement of the OECD Anti-Bribery Convention. This work will lay a theoretical foundation for the next step — the formulation of policy recommendations for even higher-level Convention enforcement.

In framing the research question of this Chapter there are three caveats: First, because existing literature has given sufficient explanation of the wisdom of the anti-bribery scheme of the FCPA and the OECD Anti-Bribery Convention, and the necessity of such an anti-corruption initiative has become a worldwide public belief,[452] this Chapter considers the wisdom of combating transnational bribery as a given premise and builds arguments on this basis. To fully grasp the path dependence of Convention scholarship, this Chapter will revisit early debates on the wisdom of the FCPA-style approach. However, such review only serves the

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ryconvention.htm (last visited: 24 June 2014).

[450] I did not give detailed discussion of this topic in Chapter II too because it was a natural consequence of signatories' signing the OECD Anti-Bribery Convention.

[451] Supporting documents include but not limited to the series of recommendations issued by the OECD. See OECD (1997b; 1998; 1999; 2003; 2008; and 2009).

[452] See Chapter I, 2.2.

causal analysis of Convention enforcement in this Chapter.[453] Second, the argument of this Chapter remains limited to a systemic analysis instead of an *ad hoc* analysis of any single jurisdiction. It continues to focus on general compliance of all signatories with the Convention.[454] Third, causal attributions drawn in this Chapter are oriented to the next step of policy recommendations.[455] This Chapter stresses the causal power of factors that permit institutional betterment, but does not survey such factors in world politics generally.

This Chapter develops its argument by presenting the major theoretical results of current literature on transnational bribery regulation in a logically coherent way, and lays bare its theoretical defects. As discussed in Chapter I, given that the number of allegations against parties involved in transnational bribery brought by most signatories is rather small,[456] current anti-corruption literature has formulated the status quo of the enforcement of the Convention as a problem of "ineffective enforcement", and was basically an effort to causally attribute the problem of "ineffective enforcement" of the Convention as well as prescribe solutions. Technically, it considers signatories as free-willed rational actors whose behavior accounts for the level of Convention enforcement, and explains

[453] See Chapter I, 2.1.

[454] As noted in Chapter I, 1.1, this operation is out of two considerations: on the one hand, transnational bribery regulation is inherently of international relevance, and cannot be understood deeply until being understood systemically. On the other hand, though the FCPA has been enforced for over 37 years and the Convention has been enforced for over 15 years (by 2014), given the revolutionary nature of such regulatory efforts, both practice and theory on this topic remain in a primary state so that the systemic analysis tends to set a baseline for future work on ad hoc cases.

[455] See Chapter IV.

[456] The OECD *2010 Working Group on Bribery Annual Report* suggests that the prosecution records of foreign bribery cases in most signatories to the Convention were poor. Between 1999 and 2010, there were in total 164 convictions imposed on individuals and 59 convictions imposed on entities for the offence of foreign bribery and for failures to prevent a proven case in 38 signatories to the Convention (by then Russia and Columbia had not participated). Another 87 cases were brought as administrative and civil proceedings. A closer observation of the data suggests a surprisingly unbalanced distribution of the decided cases. 139 of the 164 convictions imposed on individuals were brought by 5 countries; 45 of the 59 convictions imposed on entities were brought by 3 countries. Another 8 countries brought a very small number of convictions imposed on both individuals and entities. The remaining 25 signatories, however, did not bring any foreign bribery cases during this period. See OECD (2011: 17).

the dynamic of general compliance with the Convention as a question of why most signatories defect.[457] By metaphorically applying collective action theories contributed by economists and political scholars, current literature has posited a wide range of disincentives that account for the "ineffective enforcement".[458]

Despite the theoretical contribution of the standard *problem-solving* approach to current literature[459] in identifying disincentives in the anti-bribery system and prescribing solutions, it has left two analytic gaps.

The first is a "technical omission"—the *problem-solving* approach applied by current literature fails to differentiate between root causes and peripheral causes. I call it a "technical omission" because current literature could have avoided this issue without altering its own logic, but unfortunately has not done so. As a result, current causal analyses only presented a rich but chaotic landscape of causal attributions. As we know, the causal chains of multifaceted phenomena, including the anti-bribery collaboration, are complex with multiple intermediate links and offshoots. The most effective way to cure any undesirable phenomena and prevent recurrence is by eliminating root causes of a "problem" — the fundamental factors which initiate the causal chains, not mere "indications" or "resultant effects" of root causes (i.e., peripheral causes).[460] Therefore, a distinction between root causes and peripheral causes is often necessary for the purpose of curing such problems. However, current rational-choice account of signatories' collective enforcement of the Convention fails to do this work. Current literature has presented a wide range of causal attributions of the "ineffective-enforcement" of the Convention, from domestic factors (e.g. a

[457] See Chapter I, 4.1

[458] See Chapter I, 4.1.

[459] In Chapter I, I have labelled this *problem-solving* approach widely applied by current literature as an "old" *problem-solving* model that has strong interpretative power but is weak in prescribing successful solutions. See Chapter I, Section 4.

[460] For practical considerations, whether a causal factor permits institutional betterment is also a critical concern. See Dettmer (2007: 13).

signatory's lack of anti-corruption techniques), to systemic factors (e.g. the weak coercive power of international law).[461] There is no systematic discourse on the underlying logic of these causal factors (e.g., whether any two causal factors are accidentally juxtaposed or in a cause-effect relationship). Besides, current literature did not give a clear distinction between causal factors that allow institutional betterment (e.g. the lack of anti-corruption techniques) and those that should be treated as pure objective reality (e.g. the weak coercive power of international law).[462] Consequently, current causal analyses did not lay a thorough theoretical foundation for next-step's prescription of policy recommendations.

The second is a methodological limitation. As discussed in Chapter I, the *problem-solving* paradigm has methodological limitation so that it can only explain the "ineffective enforcement" of the Convention, but cannot explain the developing reality in leading jurisdictions surrounding such "ineffectiveness".[463] In fact, the term "ineffective-enforcement" is a value assessment that cannot exist unless an observer attaches such label within a constructed scale of effectiveness.[464] Empirical data on the enforcement of the Convention (e.g. the number of prosecutions) exists objectively, waiting to be interpreted by scholars. The *problem-solving* paradigm, which believes that the unilateral enforcement against transnational bribery would disadvantage the interest of a country,[465] formulates a signatory's unilateral regulatory action against transnational bribery as an "anti-rational" activity where harder work does not lead to higher payoff

[461] See Chapter I, 4.1.

[462] See e.g., Tarullo (2004), and Magnuson (2013).

[463] See Chapter I, 4.3. As the *problem-solving* paradigm completely avoids discussing the developmental reality in leading jurisdictions, current problem-solving analyses did virtually no causal analyses of this phenomenon. Thus the term "methodological limitation" of current literature here equals the term "an inherent limitation" of the *problem-solving* paradigm discussed in Chapter I, 4.3.

[464] See Chapter I, 2.3, 2.4.

[465] See Chapter I, 2.1.2. Also see e.g., Wallace (2002: 1130-1131).

but to higher loss. This approach is good at explaining the question of why the performance of the Convention should fall below expectation, and the question of why signatories are enthusiastic in controlling domestic corruption but are impassive about controlling transnational bribery. Given the rich wisdom of game theory, and the part of international relations theory that builds on game theory, this *problem-solving* approach also offers a promising prospect for prescribing policy recommendations to correct the "ineffective-enforcement" of the Convention. However, this *problem-solving* approach cannot well explain the developmental reality in leading jurisdictions, such as the US's aggressive enforcement of the FCPA and the slow but growing enforcement of anti-bribery laws by some European countries (e.g. Germany and UK).[466] The *problem-solving* paradigm, which badly relies on the political-will assumption and rational-choice theory,[467] has to explain all the different patterns of compliance across signatories as resulting from different environmental incentives for these signatories.[468] This assertion itself conflicts with the fundamental assertion of much *problem-solving* literature that a signatory's unilateral enforcement of the Convention disadvantages its overseas business and therefore constitutes an "irrational" choice.[469] This means the *problem-solving* approach is inherently unable to give a coherent explanation of why some signatories indeed enforce the OECD Anti-Bribery Convention rather than shirk their obligations. This is a methodological limitation that cannot be avoided unless an alternative methodology is adopted. For this reason, an alternative interpretative device is necessary to supplement the rational-choice account and

[466] In its progress reports about the enforcement of the OECD Anti-Bribery Convention, Transparency International classified signatories into three categories: "active enforcement", "moderate enforcement", and "little or no enforcement" pursuant to the number of enforcement actions. The domestic enforcement of the Convention by the US and several other signatories (i.e., Denmark, Germany, Italy, Norway, Switzerland, and United Kingdom) was labelled as "active enforcement". See Heimann & Dell (2010: 8). Also see Chapter I, 4.2.

[467] See Chapter I, 2.4.

[468] See Chapter I, 3.

[469] See Chapter I, 2.3.

explain the developmental reality in leading jurisdictions.

This Chapter seeks to fill the two analytical gaps. First of all, this Chapter follows the logic of the standard *problem-solving* approach in current literature that asserts that variation in incentives for signatories explains variation in their actual strategies on treaty compliance, and gives a systematic explanation of the causal chain of the "ineffective-enforcement" of the Convention. This interpretative framework would incorporate major arguments of existing causal analyses, and organize them in a logically coherent manner, from the most intuitive, peripheral causes to the most fundamental, central causes. Then, in order to amend the methodological limitation of the *problem-solving* paradigm, this study discusses how could the alternative paradigm suggested in Chapter I[470] be applied to causally attribute the developmental reality in leading jurisdictions. Specifically, it gives a brief discussion about the possibility of conducting an institutional analysis of the US's increasingly aggressive enforcement of the FCPA and draw inspirations for policymakers' formulation of policy recommendations for Convention enforcement.

The structure of this Chapter is as following: Sections 1-3 develop arguments under the rubric of the *problem-solving* paradigm. Section 1 begins with an introduction of the behavioral logic taken as a given by current literature, and then presents how OECD anti-bribery collaboration, by its very nature, has destabilizing factors that discourage signatories' faithful fulfilment of Convention obligations. On this basis, Section 2 rests on another popular argument of rationalism that well-crafted institutions can mollify destabilizing factors endogenously in international collaborations, and then analyzes why the current infrastructure of the anti-bribery collaboration fails to fulfill this mission. Section 3 attributes the failure of the OECD central monitoring framework to the fact that the exploitability of national regulatory efforts — a conventional problem for collective action, and the unquantifiability of national

[470] See Chapter I, 5.

anti-corruption efforts — a conventional problem for anti-corruption, have amalgamated into a complex situation that escape the conventional basket of solutions for collective action problem and the problem of corruption. There is a need to restructure the current *problem-solving* approach so as to resolve the problem identified. Section 4 suggests that for the purpose of a full understanding of the dynamic of signatories' collective enforcement of the Convention, scholars need to causally attribute the developmental reality of Convention enforcement in leading jurisdictions, and frame a general contextual approach to analyze the US's increasingly aggressive enforcement of the FCPA.

2. Destabilizing Factors Indigenous to the Collaboration that Encourage Defection

This Section introduces how OECD anti-bribery collaboration, by its very nature, has destabilizing factors that discourage faithful enforcement of the Convention and even encourages defection of signatories from the collaboration. The standard *problem-solving* approach, explicitly or implicitly, starts with a predefinition of the behavioral logic of signatories in OECD anti-bribery collaboration: incentives in the regulatory environment explains signatories' choices on whether to faithfully enforce the Convention. The first half of this Section explains the theoretical origins of this behavioral logic. Given this behavioral logic, the second half of this Section specifies how the inherent characteristics of OECD anti-bribery collaboration discourage faithful fulfilment of the Convention and rather incentivize defection.

2.1 A Predefined Behavioral Logic of Signatories

Major arguments of current anti-corruption scholarship are built on a general assumption that variation in incentives in the regulatory environment explains variation in signatories' strategies on whether and how to enforce the Convention;

and Convention enforcement results from rational behaviroal interactions of signatories.[471]

On a deeper level, this general assumption can find its theoretical origin in two basic assumptions in international relations theory that define this assumed behavioral logic of signatories:

(1) The *political-will* assumption. As introduced in Chapter I, the *political-will* assumption (though not phrased as such in existing literature) is one that anthropomorphizes countries as unitary actors in world politics, and attributes to them properities of natrual persons (e.g., intentions, moral senses and rationality).[472]

(2) The *rationality* assumption. The *rationality* assumption is a ramification of the *political-will* assumption. It is the application of rational-choice theory to define signatories' strategies with regard to Convention enforecment. This assumption emphasizes the interest-driven rationality of signatories' strategies, and assumes that signatories perform in a stringent optimizing manner when they make choices on whether to enforce the Convention so as to seek self-interest maximization.[473]

Thus the behavioral logic of signatories in OECD anti-bribery collaboration is that signatories are free-will, unitary actors which have full control over whether to comply with the Convention; they have an inclination to compare the utility of alternative courses of actions (e.g. compliance or defection) and choose the most efficient strategy; and they would stick to the strategy of faithful compliance when the payoff is satisfactory and then choose to defect when they have optimal payoff

[471] See generally Chapter I, 2.1.3 & 2.4.

[472] For more detailed introduction see Chapter I, 2.1.3.

[473] According to Felix E. Oppenheim's description of rationality, for human beings, that A's action X is in his or her self-interest entails that it is rational for A to do X with respect to his or her own welfare. For governments, "foreign policy X is in A's national interest" implies that it is rational for government A to adopt X in view of its national interest. Oppenheim (1987: 371). For information on the application of rationalism in international relations theory see Keohane (1988: 381) and Wendt (1992: 391). Also see Chapter I, 2.1.3.

elsewhere.[474]

With this behavioral logic at heart, signatories would do a cost-benefit analysis of alternative strategies on whether to enforce the Convention before they make a choice. A cost-benefit analysis is frequently used by policymakers to evaluate the desirability of a given strategy. By doing this, policymakers assess whether the payoff of a strategy would outweigh its cost, and compare alternative strategies. With regard to the enforcement of the Convention, any negative impact of a signatory's domestic enforcement of the Convention on this signatory's national interests is "cost" while any positive impact is "benefit". Of course, given that it is impossible to quantify either "negative impact" and/or "positive impact" of a signatory's domestic enforcement of the Convention, the outcome of this cost-benefit calculation is conceptual, but not representational.[475] Specifically, given that there are two general strategies available for signatories to the Convention — a strategy of faithful enforcement against transnational bribery and a strategy of shirking their treaty obligations, in the formulation of a rational-choice account, a signatory would compare the payoffs of two strategies, and stick to the strategy of faithful enforcement as long as it yields higher payoff than the strategy of shirking.

Then factors affecting the result of cost-benefit analysis is the central concern of causal analyses. As noted, the "cost-benefit analysis" of a signatory is heuristic but not representational because it is impossible to specify fungible interests that concern signatories in the heterogeity of world politics.[476] However, we can generally understand that payoffs of faithful enforcement against transnational

[474] Defection is a word originally used to define one's abandoning a person, cause or doctrine to which one is bound by some tie, as of allegiance or duty. It is adopted in international relations to define one's abandoning a partner or an association to which one has obligations or duties, and is applied in this thesis to define the behavior of a country that signed an agreement on cooperation but does not faithfully fulfill its obligations. See e.g., Mulford & Berejihian (2002) and Nye & Keohane (2004: 184-185).

[475] See generally Cellini & Kee (2010).

[476] For supports for this argument see e.g., Keohane (1989: 60), and Ahdieh (2010: 599).

bribery for signatories include but are not limited to, benefits that they could get from fairer, clearer international markets and better corporate ethics, as well as good reputation for sticking to the commitments they made when establishing the Convention. For example, perfect competition free from corruption would bring companies exporting high-quality, low-price products more business opportunities. Costs of faithful enforcement against transnational bribery, of course, includes, but are not limited to, operational costs (e.g., forensic and prosecution costs) and opportunity costs like the loss of business opportunities that a country's companies could have obtained by paying bribes. As the net payoff for a given signatory can be expressed by an equation that: *net payoff = total benefit - total cost*, signatories can maximize their net payoffs through working hard to increase the total benefit, or through cutting down the total cost of regulating transnational bribery. The anti-bribery collaboration succeeds when signatories work to increase the total benefit but fails when they avoid cost.[477]

2.2 Destabilizing Factors in the Collaboration that Encourage Defection

The empirical data on Convention enforcement between 1999 and 2014 convinces many scholars that most signatories have adopted a strategy of defection. By 2014, the OECD Anti-Bribery Convention had been in force for 15 years. However, the level of enforcement seems to have been below people's general expectation. Many signatories (i.e., Argentina, Australia, Belgium, Brazil, Chile, Czech Republic, Denmark, Estonia, Finland, Greece, Iceland, Ireland, Israel, Luxembourg, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia,

[477] As Magnuson summarizes, "this kind of cooperation (e.g., OECD anti-bribery collaboration) is possible as long as (1) the states expect to continue to interact over a sufficiently long time period, (2) the states have adequately low discount rates, in that they care enough about future payoffs to sacrifice some amount of present payoffs, and **(3)** the payoffs from defection are not so high relative to the payoffs from cooperation that changes in circumstances could derail cooperation." Magnuson (2013: 375).

South Africa, and Spain) still keep no records of enforcement actions against transnational bribery. The number of investigations and prosecutions is also very small in most of signatories that do keep records (i.e., Bulgaria, Canada, France, Italy, Japan, Netherlands, Norway, Sweden, Switzerland, Turkey, and UK). Only a few signatories (i.e., Germany, Hungary, Korea, and US) have brought enforcement actions in the double or triple digits.[478] Although some scholars have questioned that the number of enforcement actions is the right indicator of the level of Convention enforcement,[479] mainstream scholars affirm the ineffectiveness of the enforcement of the Convention.

Accordingly, current literature has paid attention to the causal effects of some structural characteristics of the anti-bribery collaboration on the general "ineffective-enforcement" of the Convention. In particular, scholars are concerned about how these structural factors of OECD anti-bribery collaboration have negatively affected the result of cost-benefit calculation of the strategy of faithful compliance or have increased uncertainty (or risk) for faithful collaborators. Because these structural factors which have a potential to undermine the collaboration are indigenous to the OECD anti-bribery collaboration, I call them "destabilizing factors" in the discourse of this Chapter.

2.2.1 Factors that Lead to Unsatisfactory Cost-Benefit Calculation

There are two popular presuppositions in current academic and policy literature: first, OECD anti-bribery collaboration produces a common good for all participant countries, and signatories would benefit from the regulatory outcome as long as all signatories adhere to their treaty obligations. Second, all signatories were motivated by an aspiration for the common good to participate in the collaboration. The theoretical sources of the two assumptions can be traced to

[478] For the data see OECD (2013: 13).

[479] For articles taking the number of enforcement actions as the indicator of enforcement level see e.g., Black (2012: 1108), Tarullo (2004: 683), and Krever (2007: 93). For articles questioning the number of enforcement actions as an indicator of enforcement level see e.g., Burger & Holland (2006: 47), and Tarullo (2004: 689). Also see Chapter I, 2.3.2 (B).

earlier arguments on the immorality and economic inefficiency of transnational bribery.[480] It is also adopted by the OECD Anti-Bribery Convention. As the preamble of the OECD Anti-Bribery Convention states, "bribery [of foreign public officials] is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;" and "all countries share a responsibility to combat bribery in international business transactions."[481] In other words, signatories were convinced that they would be better off as long as the collaboration succeeds; the result of cost-benefit calculation of the strategy of faithful enforcement of the Convention would be satisfactory, and all signatories had an intrinsic political will to enforce the OECD Anti-Bribery Convention at least at the moment they signed it.[482]

Despite the unanimous conviction in current literature that the global collective action against transnational bribery produces a common good benefiting the whole human community, there is no evidence suggesting that this conviction applies to all signatories to the Convention. Neither is there any evidence suggesting that all signatories participated in the OECD Anti-Bribery Convention for the purpose of seeking this common good. On the contrary, scholars have argued that some signatories participated in the Convention and outlawed transnational bribery so as to obtain relief from the diplomatic pressure being applied by the US in the 1990s.[483]

2.2.1(A) Poor Expected Benefits but High Costs

International relations scholars have pointed out how the unequal power of countries, in addition to reciprocity, might affect the establishment of international

[480] See Chapter I, 2.1.2 (A).

[481] See OECD (1997a: Preamble).

[482] See Chapter II, 3.2.

[483] See Hathaway (2002), Tarullo (2004: 680), and Magnuson (2013: 388).

agreements. As Nye & Keohane argue, the rise of globalism in the 20th century did not make countries more equal, but gaps in economic and political leverage in international affairs among countries.[484] Powerful countries are inclined to manipulate constraints and press agreements on others so as to achieve their own economic or political goals. As Nye puts it,

"We do not regard the involvement of international organizations in transnational and trans-governmental coalitions as necessarily contributing to global welfare or equity…In some cases it might even lead to the pursuit of the interests of well-placed groups at the expense of the interests of less fortunate but larger sectors of the population."[485]

Obviously, OECD anti-bribery collaboration would be more favorable for advanced economies whose companies produce and export high-quality, high-ticket products purchased by governments. For less developed countries whose companies are less competitive in international markets, they expect much less welfare improvement from the cooperative outcome of the collaboration — clearer international markets. Given the public belief that human beings normally reject arrangements which will victimize them,[486] it is possible that countries which have low expectations from OECD anti-bribery collaboration but economically or politically depend on powerful actors, tend to participate in agreements for strategic purposes, and are of two minds when dealing with their treaty obligations thereafter.[487]

Given that it was the US that led the creation of the OECD Anti-Bribery Convention by using aggressive economic sanctions, campaigns to the public and diplomatic pressure in the 1990s, [488] people have reason to suspect that some signatories entered into the Convention for the purpose of getting the US off their

[484] See Nye & Keohane (2004:191-192).

[485] Nye & Keohane (2004:186-188).

[486] See Bastiat (1998: 7-8).

[487] See Tarullo (2004: 680-690).

[488] See Chapter II, 3.1.2.

back.[489] As Tarullo summarizes, "nothing in these explanations (of why states participated in the Convention) suggested that these governments intended the resulting Convention actually to repress overseas bribery." [490] If this argument holds, signatories that expected little welfare improvement from the collaboration did not intend to enforce the Convention from the very beginning.

The high operational costs of regulating transnational bribery may also impede faithful compliance with the Convention. Scholars have argued about how the transnational nature makes it more difficult for prosecutors to detect corrupt behavior. Regulating transnational bribery means extraterritorial application of domestic laws. The transnational bribery nature of transnational bribery incurs higher costs of investigation, evidence collection, and prosecution than those in domestic corruption control. [491] As German suggests, "The investigation and prosecution of foreign corruption cases will, by their nature, be both resource and time intensive. Such cases tend not to be favorites of police or prosecutors, and are not perceived to be priorities within the criminal justice system, which increasingly targets its resources against violent crime and other crimes against persons."[492]

Besides, given that government law enforcement are divided into multiple domestic agencies with competing priorities, as Burger & Holland point out, it was natural for national regulators to allocate resources to issue areas which are more urgent and important than transnational bribery regulation.[493] Rational prosecutors are thus disinterested in allocating resources to such cases, but would rather allocate resources to more urgent needs or "continue to allocate their time

[489] See Tarullo (2004: 677-680).

[490] Tarullo (2004: 680).

[491] Also see Chapter I, 4.1.1.

[492] German (2002: 256).

[493] See Burger & Holland (2006: 47).

and energies pretty much as before" following the "inertia" of law enforcement.[494]

This means, even if all countries have a wish to repress transnational bribery, some of them would choose to shirk because of the high costs of transnational bribery regulation. Following this logic, in order to increase the willingness of national regulators to enforce against transnational bribery, policymakers need to formulate anti-corruption techniques that can decrease the operational costs of transnational bribery regulation. For example, Burger & Holland advocate the role of private sector actors in fighting transnational bribery.[495]

2.2.1(B) A Large Group of Outsiders that Exist as "Legal Defectors"

Another destabilizing factor indigenous to OECD anti-bribery collaboration is the existence of a large group of outsiders. According to whether a country is a signatory to the Convention, we can categorize countries into a group of collaborators and a group of outsiders. The two groups are logically contradictory. A decrease in the size of either one leads to an increase in the size of the other. The group size of collaborators is not only a function of the number of signatories to the Convention, but also a function of the total share of export represented by these signatories.[496] Here I borrow the term "group size" from Mancur Olson's theory of collective action to characterize the balance of power between the group of collaborators and the group of outsiders. Mancur Olson mainly took group size as a variable whose variation causes marginal costs and thus influence players' behavior. He stressed internal relations and the cohesion of a cooperating group. In this context, however, the term of group size defines the interrelations between signatories and outsiders and highlights the balance of power between the two groups.[497]

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[494] Tarullo (2004:688).

[495] See Burger & Holland (2006: 47). Also see Chapter IV, 3.

[496] The total economic leverage of the group of signatories is taken as an indicator of progress made by the OECD Working Group on Bribery. See e.g., OECD (2011: 12).

[497] See Olson (1971:8).

Group size is a variable that has evident impact on the political will of collaborators to comply with the Convention. OECD anti-bribery collaboration is an international public affair affecting the welfare of all exporting countries. When one country pays a price to regulate transnational bribery, it increases the competitive position of companies from all other countries in international markets. However, because not all exporting countries are members of the collaboration, OECD anti-bribery collaboration is a non-closed system that could not exclude outsiders' consumption of the regulatory outcomes of the group of collaborators. Not constrained by treaty obligations but having free access to the regulatory outcome of signatories, these outsider countries exist as a group of "legal defectors" that discourage signatories to comply with the OECD Anti-Bribery Convention.

Because a satisfactory group size of collaborators is the guarantee of satisfactory state of compliance, it concerns both policymakers and practitioners. On the one hand, the indicator of group size was treated as the precondition for the OECD Anti-Bribery Convention's entry into force in 1999. Article 15 provides that the Convention would only enter into force under the condition that "five of the ten countries which have the ten largest export shares…and…represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification."[498] On the other hand, signatories keep trying various means to recruit new allies.[499] During the period from 1999 to 2014, the number of signatories has climbed from 34 to 41.[500]

Despite the increase in the number of signatories, however, the economic leverage

[498] OECD (1997a: Article 15).

[499] See Chapter II, 4.

[500] When the OECD Anti-Bribery Convention was signed and ratified in the 1990s, it had 34 signatories—all the 29 OECD full members and five non-members. By June 2014, the number of signatories has increased to 41. See OECD Press Release, "Status of Ratification", available at: http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last visited: 31 July 2014).

of the group of signatories in fact has been decreasing. OECD Data suggests that during the same period, the total share of export represented by OECD members declined from 75% to 57.6%, and that represented by non-members increased from 25% to 42.4%.[501] With a group of outsiders representing more than 40% of the total global export, the group size seems to be far less than satisfactory — which, in practice, has become an impediment to high-level Convention enforcement. As Lucinda A. Low states, "some key capital exporting states are currently not parties to the OECD Anti-Bribery Convention while other states of less significance in such terms, primarily in Central and Eastern Europe, are Parties."[502] Nichols also considers this issue as an important reason for the failure of multilateral efforts by stating that, "The first failure is inherent to any organization that does not have global membership. Other than the United Nations and possibly the International Chamber of Commerce, none of the organizations described above has a truly global membership. Yet even with global membership."[503]

2.2.2 Factors that Create Uncertainty

The essence of the argument in 2.2.1 which explains how low expected benefits and high costs of enforcing the Convention might discourage some signatories to comply with the Convention, is calling into question the presuppositions that the Convention produces a "common good" for all signatories, and that all signatories was motivated by their pursuit for this common good when signing the Convention. By discussing how signatories' lack of expected benefits from and high costs of regulating transnational bribery might decrease their political will to comply with the Convention, this category of explanation denies that the anti-bribery collaboration produces a common good for all signatories, or that all

[501] See OECD (2012a).

[502] Low (2007: 513). For a detailed discussion on the impact of non-signatories on the actual effect of the OECD Anti-Bribery Convention see Nadipuram (2013: 637).

[503] Nichols (1997: 360).

signatories were motivated by their aspiration for this common good when joining the collaboration. It explains the logic of defection of signatories from the collaboration at an individual level, independently of the strategies of other member states. In other words, regardless of the choice of other signatories, a signatory may choose to defect (or not to defect) because of its own rational calculation.

Here I want to stress that even assuming that OECD anti-bribery collaboration indeed produced a common good for all signatories, and that all signatories were motivated by pursuing this common good, signatories still have motives to defect because of the uncertainty of collective action. In doing this, my discussion comes to grips with interrelations among signatories, the worry of free riding in public-goods game, and the prisoner's dilemma. The dynamic of signatories' Convention enforcement becomes a story at a group level about how uncertainties inside OECD anti-bribery collaboration decrease signatories' political will to comply with the Convention.

The problem of uncertainty is a conventional issue that concerns economists and international relations scholars. When individuals (either persons or countries) work independently, their rewards are approximately a utility function of their efforts, even if at the sub-country level the calculation of rewards will not be as clean. Members have full control over their rewards as long as they have full control over their efforts. In multilateral cooperation, however, members do not work toward their private accounts and receive rewards on the basis of their efforts. They need to contribute to a public account and receive rewards through a process of redistribution. During this process, the fruit of labor of members is merged together and redistributed according to certain rules (e.g. contracts, or agreements). In a scheme of this type, harder work does not necessarily lead to better rewards. The type of relationship between efforts and rewards in multilateral collaborations decrease members' control over the rewards generated by efforts.

Members' loss of control over their own rewards creates uncertainty inside the collaboration. This uncertainty should be understood as a category of risk for members who undertake to participate in a collective action. As Keohane puts it, "in world politics, governments frequently find themselves comparing the risks they would run from lack of regulation of particular issue-areas (i.e., the absence of international regimes) with the risks of entering into such regimes."[504] Then the problem of defection arises.[505] The less control members have over their rewards, the higher the risk is, and the higher the probability of defection. The existence of defectors would burden others, create a corrupt knock-on effect and then accelerate the stagnation of cooperation.

The nature of OECD anti-bribery collaboration determines that members have little control over their rewards in the collaboration. Therefore, they have great incentives to defect. The standard account conceives of OECD anti-bribery collaboration as a public-good game, in which members cannot delimit consumers of the collective good.[506] As a public good by definition can be consumed by additional consumer at no additional cost,[507] it is non-excludable for all members of the public. Therefore, a public-goods game indicates that members lose control over consumers of outcomes. In a game not producing a public good, for instance, when *Country A* and *Country B* reach an agreement on implementing a reciprocal tariff reduction, *Country A* could not only decide whether to implement the preferential tariff, but ensure that the preferential terms are exclusively enjoyed by *Country B* instead of by *Country C* as well. In turn, *Country B* would provide equivalent good for *Country A*, or else *Country A* may stop providing the good in return. In a public-goods game, however, once the good is produced, no one has control over who can benefit from it. Even if one member country contributes

[504] See Keohane (2004：123-124).

[505] See Bennett & Naumann (2005:118).

[506] See Brewster (2010: 309).

[507] See Holcombe (1997: 1).

nothing, others are still incapable of preventing it from consuming the fruit of their labor.

A public-goods game indicates a structural tension between one's zeal for the public good and the potential risk that one's investment would be exploited by others. Then the worry of free riding arises. The problem of free riding refers to situations where an individual is able to obtain unjust enrichment from the group without contributing a fair share of costs.[508] This phenomenon derives from the rationalist assumption that people have a fatal tendency to seek self-benefit at the expense of others. Even if they can satisfy their wants only by labor, they tend to resort to taking from others if consuming the products of others is easier than working.[509] A corollary of the argument is that people have a tendency to act to outwit others and gain relative advantages.[510] It follows from this theory that consumers of a public good would choose to free ride on the efforts of others provided that they are assured that they will gain from others' contribution when they contribute less than they should have.[511] Therefore, members of a public-goods game are always trapped between a temptation to free ride on others and a fear of being exploited by others.[512] This is our understanding of the inherent logic of a public-goods game, and the anthropomorphism of countries projects this theory onto the decision-making of signatories to the Convention.

OECD anti-bribery collaboration has the core characteristics of a public-goods game. First, OECD anti-bribery collaboration is established on the basis of all signatories' promise to regulate transnational bribery.[513] Given that transnational bribery is widely-acknowledged as a "global evil" that undermines the welfare of

[508] See Bennett & Naumann (2004:118).

[509] See Bastiat (1998: 5-7).

[510] See Nye & Keohane (2004: 194).

[511] See Miceli (2011: 107).

[512] See e.g., Mulford & Berejihian (2002:209-210), and Brewster (2010: 304-311).

[513] See OECD (1997a), and Pieth (2007: 15-18).

the whole human community,[514] OECD anti-bribery collaboration in fact produces a public good for all countries (including both signatories and non-signatories) rather than merely for any single country. Second, signatories to the OECD Anti-Bribery Convention cannot determine consumers of their regulatory outcome. As already noted, OECD anti-bribery collaboration is an international public affair affecting the welfare of all exporting countries. When one signatory pays a price to regulate transnational bribery, it increases the competitive position of companies from all other countries in international markets. This "good" for all other countries is non-excludable. No one could specify consumers of its regulatory outcomes but exclude the consumption of others.[515] In other words, any country, no matter whether it contributes or not, has free access to the "good" produced by faithful members. OECD anti-bribery collaboration therefore cannot get rid of the conventional worry of free riders in a public-good game. Further, some scholars define signatories' compliance with the Convention as following the logic of the "prisoners' dilemma",[516] which offers reasons why individuals would defect even if all of them could be better off through cooperating with each other.[517]

What is even worse in OECD anti-bribery collaboration than in a normal public-good-producing collaboration is that members of OECD anti-bribery collaboration not only lose control over other countries consuming the fruit of their labor, but also have no control over their own rewards because they are obligated to produce an "altruistic good." In a normal public-goods game, such as collaboration that addresses air pollution, when one country fulfills their treaty

[514] See Glynn (1997:7-27), Heidenheimer & Johnston (1989: 685-700), Rose-Ackerman (1999), and Almond & Syfert (1997).

[515] Abhay M. Nadipuram has an elaborate discussion on how this effect takes place. See Nadipuram (2013: 637).

[516] See e.g., Tarullo (2004), Schmidt (2009), Brewster (2010), Nadipuram (2013), and Magnuson (2013:379).

[517] For a description of the application of "prisoner's dilemma" in international affairs regulation see Ahdieh (2010: 600). For articles who formulate the collective action against transnational bribery as a "prisoner's dilemma" see e.g. Tarullo (2004).

obligations (e.g. paying a price to prevent pollution), it enjoys a share of others' labor. Meanwhile, this contributing country is also one consumer of the benefit deriving from its own labor. However, in OECD anti-bribery collaboration, members are required to contribute toward the international, public account by way of contributing toward the accounts of others in the first place — one country's prohibition of outbound bribery improves the competitive position of others at the cost of one's own companies. The contributing country is not a consumer of the fruit of its own labor, but actually disadvantages itself to improve the position of free riders (in a market where fewer competitors bribe, the bribes become cheaper). This troublesome feature aggregates the sense of insecurity of being exploited by others. In situations with free riding incentives, people seldom passively accept the free riding of others but would like to take counterattack strategies. Insecure state actors tend to adopt self-defense strategies (e.g. shirking) so as to guard against free riders — one common strategy is to stop contributing (i.e., to become reactive free-riding defectors).[518]

2.2.3 Interim Summary: A Collective Action not Self-Sufficient to Survive

The preceding argument has showed that the anti-bribery collaboration, like many other forms of multilateral collaboration, has some structural characteristics that would make members fall prey to the incentives to defect. This means the anti-collaboration is not self-sufficient to survive in the absence of appropriate regulatory intervention.

Solutions to two destabilizing factors — the existence of a big outsider group and high costs of compliance — are quite straightforward at least in theory. For one thing, OECD anti-bribery collaboration can address the problem of outsiders by recruiting new collaborators, which is what the OECD WGB is doing.[519] Of course, given the turbulence of world politics, the expansion of the community of

[518] See Boyd & Richerson (1992:172).

[519] See Chapter II, 4.

collaborators is a political issue characterized by positions of relative power among nations, geopolitical trends and economic interest, the combined effect of which cannot be accurately predicted. However, such expansion is a long-term project that cannot succeed without both the efforts of existing collaborators and the support of international organizations. OECD anti-bribery collaboration can also be promoted by reducing the high costs of Convention enforcement through creating and sharing more effective anti-bribery devices (e.g., disclosure systems and investigating skills) to reduce operational costs of regulating transnational bribery. To this end, previous works on the issue have suggested to make use of private entities (e.g. competing companies of the bribe payer and whistle blowers) as alternatives tools to expose transnational bribery, so as to free public resources from the burden of collecting information and evidence on acts of transnational bribery.[520] The central attention of current literature[521] is on a more general question of how to address the problem of free riding in the anti-bribery collaboration.

3. The Current Institutional Design Fails to Prevent Defection

3.1 The Importance of a Coordinating Mechanism

The two most influential approaches in international relations theory, liberalism and realism,[522] discuss the possibility of establishing institutions to increase compliance in international collaboration. As Mulford & Berejihian suggest, generally, international relations scholars can be recognized as liberals or realists pursuant to their stance on the extent to which state actors are motivated by absolute advantages and relative advantages, and their different predictions for

[520] See e.g. German (2002:256), and Burger & Holland (2006).

[521] See e.g., Tarullo (2004), Brewster (2010), and Magnuson (2013).

[522] Liberals and realists share the rationality assumption on state behavior. See Keohane (1988: 381), and Wendt (1992: 391).

the prospect of establishing institutions to safeguard cooperation.[523]

Liberals regard countries as maximizers of absolute payoffs, assume that countries focus primarily on material benefits they get from interactions with others, but care less about the gains of others. In this view, countries choose to cooperate or defect according to whether cooperation brings them wealth and power.[524] Basically, liberals stress that the collective welfare of collaborators and individual welfare are conditionally consistent. It is possible to reconcile interests of individuals and collective interests of all members together through establishing a well-designed mechanism to coordinate acts of all collaborators.[525] Therefore, liberals place central attention on how to design effective coordinating mechanisms to guarantee high-level individual contribution.[526]

Realists, on the other hand, assume that countries are principally concerned with their relative power vis-à-vis other countries. Given that the international struggle for wealth and power is a recurring process, collaborators not only care about their material payoffs in one international forum, but also care about whether the consequence of cooperation creates advantages or disadvantages for competition among them in other international fora. From this point of view, the ultimate goal of countries in international interactions is to achieve a relative

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[523] As Mulford & Berejihian put it, "liberal scholars are generally more optimistic than realists about the prospects for meaningful cooperation between states under conditions of social dilemma. This differences in outlook is primarily due to a difference in the two approaches' assumptions about states' utility functions. Liberals see states' utility functions as traditional rational choice theories depict individuals'. That is, states are defined as rational egoists and are consequently modelled as absolute gains maximizers, pursing wealth and power while remaining largely indifferent to the circumstances of other states…Realists, in contrast, are pessimistic about the prospects for international cooperation generally, and even more so under conditions of social dilemma." Mulford & Berejihian (2002: 209-210).

524 See Powell (1991:1317), and Mulford & Berejihian (2002:210).

525 See Mulford & Berejihian (2002:210).

[526] As Mulford & Berejihian put it, "(for liberals) Where no such institutions exist, or where they are poorly crafted, cooperation is more likely to collapse as states fall prey to the incentives to defect. The blame for failed international cooperation is therefore often laid at the doorstep of faulty or anaemic institutions that are unable to adequately co-ordinate behavior under anarchy. Design the institutions correctly and you create the conditions for international cooperation." Mulford & Berejihian (2002:210).

advantage, or prevent others from achieving relative advantage in international interactions.[527] Realists emphasize that multinational cooperation is an asymmetric one that produces collective good more valuable to some players but less valuable to others. Given that members of an international collaboration have a tendency to cut into the payoff of others, international collaborations are unlikely to run well.

The main implication of this debate between liberals and realists lies in their different perspectives to discuss the hurdles to high-level compliance in multinational collaborations, but does not lie in their different predictions on the prospect of multinational collaborations.[528] Despite the controversy between liberals and realists, it is a publicly-accepted idea across current literature that well-crafted institutions using the power of its collective force can shape expectations of countries, restructure individual interactions, and therefore compensate the adverse effects of destabilizing factors in the community of collaborators.[529]

Previous literature has suggested two major types of institutions to solve the problem of free riding in OECD anti-bribery collaboration: credible sanctions and effective monitoring.[530] The advocate of credible sanction tends to increase the cost of free riding by way of imposing sanctions over free riders.[531] The utility of a sanction mechanism to prevent defection is an orthodox idea of

[527] As Mulford & Berejihian put it, "In place of the liberal concern over the lack of co-ordinating mechanisms, anarchy's chief consequence for realists is that it requires states to provide for their own security… the fundamental goal of states is to prevent others from achieving relative advantage." Mulford & Berejihian (2002: 211).

[528] As Mulford & Berejihian put it, "The enduring legacy of the gains debate is that we have two very different views describing the hurdles to cooperation between states…One reasonable conclusion is that both realism and liberalism may be right, but that some crucial contextual variable is missing from current models." Mulford & Berejihian (2002: 211).

[529] See Veszteg & Narhetali (2010: 661).

[530] See Chapter I, 4.1.2.

[531] See e.g., Nichols (1997: 360), Antony (2008), O'Connell (2008), and Magnuson (2013: 388).

collective action theory. In theory, an effective sanction mechanism is one that is able to cancel out the unearned income that defectors would obtain through shirking; and technically, an effective sanction mechanism is not necessarily one that provides harsh punishment, but one that provides a high probability of punishment for defecting. It is also argued that the more participants can observe and punish free riders, the higher the total contribution level will be.[532] The advocate of effective monitoring, or effective information flows, tends to increase mutual control between collaborators and decrease uncertainties in the collaboration.[533] Logically, current causal analysis further attributes the problem of the "ineffective-enforcement" of the Convention to the absence of credible sanction and effective monitoring.

3.2 Two General Causal Attributions: the Absence of Credible Sanction and the Absence of Effective Monitoring

Scholars have recounted that credible sanctions can prod reluctant countries toward compliance.[534] As Nichols states, "One theory suggests that the basis of enforcement of international law is reciprocity. Countries respect the internationally prescribed rights of others so that others will do the same for them. Others suggest that the desire to avoid sanctions is the primary motivation to adhere to international law. Some suggest a more complicated form of self-interest, involving reciprocity and reputational concerns, fear of consequences, and fear of military reprisals. A very appealing theory argues that international law is obeyed because it is law."[535] Assuming this is true, it seems that the "ineffective enforcement" of the OECD Anti-Bribery Convention results from the

[532] See Boyd & Richerson (1992), Fehr & Gächter (2000), and Veszteg & Narhetali (2010:668).

[533] See Keohane (1989:64).

[534] See e.g., Mendes & McDonald (2001), and Veszteg & Narhetali (2010: 668).

[535] Nichols (1997: 361).

absence of credible sanction for non-compliance.[536] More fundamentally, the "ineffective enforcement" of the OECD Anti-Bribery Convention can be attributed to the limited coercive power of the OECD Anti-Bribery Convention.[537]

However, although this argument about the absence of credible sanction makes sense, it captures only one objective property of the anti-bribery collaboration that does not permit institutional betterment. Given the decentralization of world politics, the conditions for establishing a central sanction mechanism are often very stringent, and should be supported by the whole community of collaborators.[538] Therefore, the idea of establishing central sanctions for non-compliance is politically difficult. As Louis Sohn suggests, "it is difficult to persuade governments…to agree on enforcement against themselves in the events that they violate international law."[539] Admittedly, in some cases autonomous countries would commit a certain amount of sovereign power to establishing a central sanction mechanism to guarantee long-term and stable interactions with others — of which the dispute settlement mechanism in the WTO is a good example[540] — the applicability of central sanction is often limited to cases with reciprocity and the possibility of retaliation. In public-goods-producing collaborations, the absence of central sanction and mutual sanction is predicted to be an unchangeable reality other than an institutional flaw that allows betterment.

More pragmatic scholars focus on how sufficient information flows in the collaboration promote compliance.[541] While uncertainty in collaborations

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[536] See e.g., Tarullo (2004: 687), and Magnuson (2013: 391-393).

[537] For discussion on the coercive power of international law see e.g., Anthony (2008); O'Connell (2008); Magnuson (2013: 388).

[538] See Keohane's comments on the conditions for an effective control-oriented regime. Keohane (1989: 123).

[539] Sohn (1982: 13).

[540] See WTO Press Release, "Dispute settlement", available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited: 19 March 2013).

[541] See e.g., Tarullo (2004: 689), and Heimann & Dell (2006). Generally see Chapter I, 4.1.2.

discourages compliance, sufficient information flows help increase transparency about each other's behavior. With sufficient information about others' choices, members can monitor others. Then their worry of being exploited by others decreases. Besides, it has been proved that forces other than sanctions can also promote compliance.[542] For example, potential free riders may be concerned about their reputation,[543] as well as for the criticism and retaliation of others. The real experience has showed that some public-goods agreements can yield considerable products even in the absence of sanction mechanisms. This is why policymakers, practitioners and scholars count on an effective monitoring mechanism to provide information for member countries of OECD anti-bribery collaboration, and then attributed the "ineffective-enforcement" of the Convention to the absence of effective monitoring in the anti-bribery system.[544]

3.3 The Underperformance of the OECD Monitoring System

Highlighting the effect of monitoring in supporting compliance leads academic attention to the OECD monitoring system — which functions to provide information on signatories' enforcement of the Convention to all signatories as well as urge lagging signatories.

The OECD established a peer-review monitoring system as soon as it proclaimed war against transnational bribery in 1994. This monitoring system was expected to make an accurate evaluation of signatories' fulfillment of treaty obligations, evaluate their achievements in controlling transnational bribery, and figure out the inadequacies of their national anti-bribery frameworks.[545] Politicians and general

[542] See Keohane (1989:30-31), and Goldsmith & Posner (2003:113).

[543] For detailed discussion on the impact of members' concern about reputation in group see McIntosh *et al.* (2012).

[544] See Heimann & Dell (2006), and Tarullo (2004: 695).

[545] See OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014).

citizenry used to place high hope on the effect of the OECD peer-review monitoring system in guaranteeing Convention compliance. The OECD peer-review monitoring system was even an important factor that motivated the US government to choose the OECD as the platform for establishing an international anti-bribery agreement. As Pieth suggests, "it (the G-7) asked the OECD to supply secretariat services, in particular because it was hoping to make use of the OECD's well-established 'peer-review' and 'soft law' procedures."[546] After the establishment of the OECD Anti-Bribery Convention, President Clinton also stated that "The United States intends to work diligently, through the monitoring-process to be established under the OECD, to ensure that the Convention is widely ratified and fully implemented."[547]

In OECD anti-bribery collaboration, it is the OECD WGB — a special agency of the OECD which is in charge of the enforcement of the Convention — that coordinates the whole peer-review work.[548] This peer-review monitoring program, according to the scheme of the OECD, reviews signatories' compliance with the Convention individually and takes place in three phases. Considering the variety of national conditions, this three-phase review is periodically conducted in each signatory, but does not take place in the same time period. For example, the US is the first country which went through all the three phases' reviews as early as 2010. Russia, which entered the Convention in 2012, finished its Phase 1 review in 2013.[549]

Phase 1 evaluates the adequacy of a signatory's national legislation to implement

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[546] Pieth (2007: 10).

[547] Clinton (1998: 2290).

[548] See OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/briberyininternationalbusiness/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 23 November 2012).

[549] See US Phase 3 Report (2010), and Russia Phase 1 Report (2012). Available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

the Convention by reviewing written laws and documents.[550] In the Phase 1 review of the US, for example, the OECD WGB evaluated how the Convention terms were incorporated into US national laws, examined how the offence of bribery of foreign public officials is defined under the FCPA, and evaluated the responsibility of legal persons, sanctions, jurisdiction, enforcement, statute of limitations, money laundering rules, accounting, mutual legal assistance, extradition, and responsible authorities, the counterparts of which can be found in the Convention.[551] Phase 1 also evaluated how the supporting documents of the OECD, for example, the 1996 recommendation was incorporated by the US anti-bribery laws.[552] Phase 1 review of most signatories took place between 1999 and 2003, except countries that joined the Convention later than the first generation of signatories.[553] The results of evaluation are published in the form of country reports. In the US's Phase 1 country report, the working group gave general remarks on the extent to which the FCPA implements the standards set by the Convention; it also listed specific problems detected by the OECD WGB. For example, the OECD WGB suggested that the discrepancy between the maximum imprisonment for paying bribes to domestic officials (15 years) and foreign officials (5 years) is improper.[554]

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[550] As the OECD puts it, "Phase 1 evaluates the adequacy of a country's legislation to impellent the Convention." OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014).

[551] Article 2 of the Convention is about responsibility of legal persons; Article 3 is about sanctions, Article 4 is about jurisdiction; Article 5 is about enforcement; Article 6 is about Statute of limitations; Article 7 is about money laundering; Article 8 is about accounting; Article 9 is about mutual legal assistance; Article 10 is about extradition; and Article 11 is about responsible authorities. See OECD (1997a).

[552] See US Phase 1 Report (1999: 20). Available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

[553] For example, Russia and Columbia joined the Convention in 2012, so the Phase 1 review of Russia and Columbia took place very recently. See OECD *Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

[554] See US Phase 1 Report (1999: 21-22). Available at:

Phase 2 evaluates whether signatories have applied the implemented legislation in an effective way.[555] When a Phase 2 review starts, the OECD WGB organizes a team to do an on-site visit to the signatory. There are examiners from peer countries and from the OECD Secretariat in this examining team.[556] They meet relevant officials of the examined signatory, and evaluate the country's enforcement of the anti-bribery laws.[557] In March 2002, the US became the second country to enter into a Phase 2 review.[558] The examining team especially focused on whether the US mechanisms against foreign bribery were effective. For example, it examined whether the US has effective instruments to prevent and discover cases of foreign bribery, and whether the US has effective mechanisms to prosecute foreign bribery offences. After the peer review, the monitoring results were reflected in the US's Phase 2 report. Different from Phase 1 review, which mainly examines laws-on-the-books, the Phase 2 review undertakes to give a reasoned opinion on the actual effectiveness of the anti-bribery mechanisms of signatories, together with recommendations from the examining team for the examined country to enhance the performance of their anti-bribery mechanisms. As of January 2013, Phase 2 review in all signatories to the Convention (except Russia and Columbia) was completed.[559]

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http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 27 July 2014).

[555] As the OECD puts it, "Phase 2 assesses whether a country is applying the legislation effectively." OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014).

[556] For information on the members of the OECD monitoring teams see *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 20 September 2014).

[557] See Burger & Holland (2006: 55).

[558] See US Phase 2 Report (2002: 4). Finland was the first country that entered into Phase 2 review in September 2001. See Finland Phase 2 Report (2002). Available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 27 July 2014).

[559] See OECD *Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-bribe

Phase 3 focuses on the enforcement of the regulatory documents of the OECD and implementation of the tailored recommendations from Phase 2.[560] Different from Phase 1 and 2 reviews, which evaluate a signatory's national anti-bribery laws and domestic enforcement from an overall perspective, Phase 3 focuses on individualized, detailed issues. In 2010, the US became the first country entering into Phase 3 review. By July 2014, Phase 3 review of signatories was still in progress. Nine countries — Argentina, Portugal, Russia, Brazil, Israel, Chile, Colombia, Turkey and Latvia — have not yet completed Phase 3 review.[561]

Despite the achievements of the peer-review monitoring during the past 15 years, however, scholars began to form the opinion that the function of this monitoring system is limited to the phase of signatories' incorporating Convention obligations into national legal systems (i.e., Phase 1). When the anti-bribery campaign stepped into the phase of enforcing those incorporated treaty obligations (i.e., Phase 2 and Phase 3), the performance of the peer-review monitoring system was below expectation.[562]

The peer-review monitoring went on well and provided signatories with sufficient information about how others had incorporated treaty obligations into national legal systems. After the ratification of the Convention in 1999, academic and policy literature was mainly concerned with how signatories had incorporated the Convention obligations to their own legal systems. Given the heterogeneity of legal systems and forms of government, how the Convention provisions could be equally incorporated into the unique logic of different jurisdictions used to be a

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ryconvention.htm (last visited: 27 July 2014).

[560] As the OECD puts it, "Phase 3 focuses on enforcement of the Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2." OECD Press Release, "Country monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/briberyininternationalbusiness/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 3 December 2012).

[561] See OECD *Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2013).

[562] See Tarullo (2004: 685), Pieth (2007:30), and Heimann & Dell (2006: 3).

challenge. Signatories foresaw this technical issue and addressed it by adopting a principle of "functional equivalence", which requires member states to adopt measures of which the "overall legal effects" but not the literal provisions meet the requirements of the Convention.[563] The OECD WGB started Phase 1 review on state compliance with the Convention in 1999, and has achieved satisfactory results.[564] Academic and policy literature has virtually no dispute on the significant achievement in this initial stage of signatories' incorporating treaty obligations into national legal frameworks.

However, when the peer-review monitoring entered into Phase 2 to evaluate the enforcement of national anti-bribery laws, it encountered problems. At this stage, signatories' Convention compliance shifts from a question of lawmaking to one of law enforcement. It is no longer possible to establish concrete criteria to observe compliance and evaluate achievements. Signatories frequently refused the recommendations of the OECD WGB with an explanation that these recommendations were unnecessary according to their enforcement experience. For example, in US Phase 2 Report, the examiner gave 14 recommendations on the anti-foreign-bribery approaches of the US, at least seven of which were not addressed when the OECD did their follow-up jobs.[565] The general forms of explanation are "the United States has carefully considered this recommendation and presently believes that the level of deterrence provided by the FCPA is generally reasonable. We do not presently intend to expand the coverage of the books and records provisions of the FCPA to non-issuers;…The United States believes that existing internal controls, legislative requirements, Congressional

[563] For a detailed introduction of the principle of "functional equivalence" see Pieth (2007: 27). Also see Chapter I, 2.3.1.

[564] See OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014).

[565] See US Follow-Up on Phase 2 Report (2005: 9-12), available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

oversight, and scrutiny by civil society presently provide adequate mechanisms to review and evaluate FCPA;…The United States has reviewed this recommendation and based on our enforcement experience, does not believe that specific guidance, beyond that afforded by the Opinion Procedure, is appropriate or necessary." [566] These explanations might be sincere. However, when "enforcement experience" becomes a reasonable excuse to rebuff external scrutiny, as Tarullo notes, "It may not be an easy matter to distinguish instances of good faith non-prosecution from instances where prosecutors have ignored overseas bribery in order to boost the competitive position of their country's firms." [567] Besides, the peer review which measures law enforcement by collecting and publishing data on investigations and prosecutions in member states, is argued to have no direct correlation with the actual level of enforcement.[568] The weakness of the OECD peer-review monitoring system in assessing the enforcement level of the Convention has been recounted by scholars and practitioners.[569]

4. A Nonroutine Problem that Defies Routine Solution

While current academic and policy literature has considered the absence of effective monitoring as a major reason for the "ineffective-enforcement" of the Convention, it does not realize that the problem of the absence of effective monitoring, in fact, lies in the very nature of transnational bribery regulation. The surreptitious nature of transnational bribery and the immeasurability of anti-bribery efforts of national regulators have made it almost impossible to

[566] US Follow-Up on Phase 2 Report (2005: 9-12), available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 4 May 2014).

[567] Tarullo (2004: 689).

[568] See e.g., Burger & Holland (2006: 47), and Trace (2011:1). Also see Chapter I, 2.3.2 (B).

[569] See e.g., Tarullo (2004: 685), Pieth (2007:30), and Heimann & Dell (2006: 3).

monitor how the Convention has been enforced by signatories.[570]

4.1 Unquantifiable Individual Efforts in OECD Anti-Bribery Collaboration

Transnational bribery, as one type of corruption, secretively takes place in the dark side of business activities. Prosecutors can never have an accurate understanding of the number or amount of transgressions.[571] Scholars also have realized that the number of investigations and prosecutions over transnational bribery offences is not an accurate indicator of the level of bribery or anti-bribery achievement, given that there is a huge immeasurable "impunity gap" in every kind of anti-corruption efforts.[572]

Therefore, though the OECD WGB has been trying to compare efforts and achievements of signatories in their domestic enforcement of the Convention by publishing the number of enforcement actions against transnational bribery,[573] it can hardly convince people that the number reflects the real degree of corruption or the achievement in combating corruption. After all, as Burger & Holland state, "without knowing the number of transgressions, an increase of official investigations does not guarantee that a higher percentage of wrongful acts is being detected and punished."[574]

The tentative steps of Transparency International,[575] are also not practically convincing, in a strict sense. TI has created multiple tools to monitor and quantify

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[570] See Chapter I, 4.1.2.

[571] See Burger & Holland (2006: 47), and Magnuson (2013: 388). Also see Chapter I, 4.1.2.

[572] See Burger & Holland (2006: 47), and Magnuson (2013: 388).

[573] See e.g., OECD (2011).

[574] Burger & Holland (2006: 47).

[575] See TI Press Release, "Mission, Vision and Values", available at: http://www.transparency.org/whoweare/organisation/mission_vision_and_values (last visited: 5 March 2014).

corruption. Among all its techniques, Bribe Payers Index (BPI) is most relevant to our topic.[576] First issued in 1999, BPI measures the relative propensity of companies from leading exporting countries to pay bribes in foreign countries. The data sources mainly come from interviews with businessmen in emerging economies. However, this methodology has an inherent limitation too: it is compiled on the basis of data from interested and biased human beings with bounded perspectives, so that their rankings reflect only a subjective evaluation rather than objective reality; and another imperfection of the rankings probably leading to misapplication is the artificially-defined 0-10 scoring system, where the scores themselves are meaningless unless being used for comparison. Consequently, although academia is long thirsty for quantitative data on corruption, the methodological reliability and the usage of the BPI are in constant dispute.[577]

Besides, as the legal system of each signatory has its own logic, it is also impossible to set out identical criteria for measuring the efforts of signatories on enforcing the Convention.[578] A given signatory's specific anti-bribery approach is bound up to its legal and judicial tradition, economic reality and cultural factors. There are habits of resources allocation and political structure which serve to define the coordination between domestic enforcing agencies, and their abilities to extraterritorially enforce anti-bribery laws, and these factors vary dramatically. Moreover, the investment of different signatories in transnational bribery regulation, which includes costs of investigation, evidence collection, and litigation, is not measurable. As a result, it is impossible to have a mathematically accurate understanding of the extent to which foreign bribery is controlled by a signatory. It is also impossible to specify the "price" that a signatory has paid for

[576] See TI Press Release "Bribe Payers Index", available at: http://archive.transparency.org/policy_research/surveys_indices/bpi, (last visited: 3 August 2012).

[577] See e.g., Chaikin & Sharman (2009: 12-13).

[578] See Pieth (2007: 27).

transnational bribery regulation.

4.2 A Nonroutine Problem that Fails Central Monitoring

For the reasons noted above, scholars have realized how difficult it is to monitor signatories' compliance with the OECD Anti-Bribery Convention, and that this monitoring difficulty can be attributed to both the surreptitious nature of bribery and unquantifiability of anti-bribery efforts.

As Tarullo notes,

> "By its very nature, most corruption is practiced surreptitiously. Unlike so many other economic phenomena, bribery is not systematically reported to government or private data collectors. This characteristic of the problem complicated the campaign for the OECD Convention. It also complicates evaluation of the Convention's effects…The OECD Convention is more difficult to monitor than most economic agreements. Unlike, say, a trade agreement forbidding signatories from increasing tariffs, a potential 'violation' of the OECD Convention is not easy to discern."[579]

Trace Global Enforcement Report 2011 endorses this concern by stating that,

> "Research on global anti-bribery enforcement is complicated by the secrecy surrounding international law enforcement, as well as by the desire of international companies to obscure public knowledge about their bribery allegations, investigations, convictions or penalties. This means it is difficult to accurately estimate how many enforcement actions are unknown and thus not yet in the Compendium or the GER 2011."[580]

In fact, the flexible, general mandates for members in the text of the Convention, which were established in 1997, have aggravated the difficulty in monitoring signatories' Convention compliance.

Assigning rigid and individualized mandates to members greatly facilitates central monitoring and good compliance. This is first because, as social comparison theory suggests, individuals in a community hope to have some idea of others' behavior so as to learn about their own circumstance, and then participate in the

[579] Tarullo (2004: 683 & 689).

[580] Trace (2011:1). Also see Chapter I, 4.2.

community in the cheapest way.[581] Rigid mandates are necessary to provide members with specific behavior guidance and assure them that the quality and quantity of the outcome is favorable. Meanwhile, in practice, the value of membership of the collaboration often varies across members. Individualized treatment of members is also important to set a fair "price" for each member. However, the surreptitious nature of transnational bribery and the unquantifiability of national regulatory efforts determined that it was impossible to set rigid and individualized obligations for signatories when they established the anti-bribery collaboration.

A comparison of the provisions of the OECD Anti-Bribery Convention to the provisions of the Montreal Protocol [582] reveals how OECD anti-bribery collaboration has failed to allocate rigid and individualized obligations to signatories. The Montreal Protocol is a treaty seeking to end world-wide production and utilization of chlorofluorocarbons (CFCs), a family of chemical substances widely used in refrigeration industry in the 20th century but identified to damage the ozone layer. In the Montreal Protocol, every signatory's investment to the collaboration is reflected in its reducing the production and consumption of ozone-depleting substances. Scientific research results made it possible to list the substances which deplete ozone layer, and it was also possible to specify and evaluate the amount of production and consumption of ozone-depleting substances by technical means. Considering that banning different ozone-depleting substances would have different influence on different signatories, the Montreal Protocol categorized ozone-depleting substances and made different arrangement for phasing them out. Considering that banning ozone-depleting substances would affect the industrialization of developing countries, developing countries which met certain criteria were given a grace period to seek alternatives, and were offered "side-payments" such technical support provided by developed

[581] See generally Festinger (1954).

[582] UNEP (1989).

countries.[583]

These obligations provide specific requirements for each signatory to reduce production and/or consumption of ozone-depleting substances. For example, Article 5 (1) of the Montreal Protocol is an example which gives individualized treatment to developing countries: "Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter until 1 January 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures set out in Articles 2A to 2E…"[584] According to this provision, qualified developing countries could buy time to seek alternatives to the products of the controlled substances, so as to protect their processes of industrialization from being negatively affected by fulfilling treaty obligations. Another example is Article 2A of the Montreal Protocol, which makes individualized schemes for banning substances that have different influence on the ozone layer: "each Party shall ensure that…its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed its calculated level of consumption in 1986. By the end of the same period, each party producing one or more of these substances shall ensure that its calculated level of production of the substances does not exceed its calculated level of production in 1986, except that such level may have increased by no more than ten per cent based on the 1986 level."[585]

These obligations are rigid terms with no flexible space for members to make different interpretations. In its Annexes, the Montreal Protocol explicitly lists ozone-destroying substances that should be phased out. In the main body of the Montreal Protocol, it defined the amount and deadline for a signatory of a specific

[583] Generally see Hashim (2009).

[584] UNEP (1999: Article 5).

[585] UNEP (1999: Article 2A).

group to ban production and/or consumption of a specific substance that destroys ozone layer, and defines the specific means to evaluate these data. Take Article 2 (6) and Article 3 as examples. Article 2(6) clearly provides the obligations for a signatory of a specific group to ban production of substances of a specific type: "Any Party not operating under Article 5, that has facilities for the production of Annex A or Annex B controlled substances under construction, or contracted for, prior to 16 September 1987, and provided for in national legislation prior to 1 January 1987, may add the production from such facilities to its 1986 production of such substances for the purposes of determining its calculated level of production for 1986, provided that such facilities are completed by 31 December 1990 and that such production does not raise that Party's annual calculated level of consumption of the controlled substances above 0.5 kilograms per capita."[586] For another example, Article 3 defines how to determine the amount of production: "For the purposes of Articles 2, 2A to 2I and 5, each Party shall, for each group of substances in Annex A, Annex B, Annex C or Annex E determine its calculated levels of: (a) Production by: (i) multiplying its annual production of each controlled substance by the ozone depleting potential specified in respect of it in Annex A, Annex B, Annex C or Annex E; (ii) adding together, for each such Group, the resulting figures;…"[587]

In contrast, in OECD anti-bribery collaboration, both the surreptitiousness of transnational bribery and the immeasurability of regulatory efforts determined that the OECD Anti-Bribery Convention can only allocate unified, flexible obligations to signatories. In fact, throughout its 17 articles, there is no arrangement for making individualized treatments to signatories. The Convention also did not provide explicit behavior norms for signatories at the phase of enforcing their national anti-bribery laws. Signatories' obligations under the Convention are limited to the level of incorporating treaty terms into national legal frameworks.

[586] UNEP (1999: Article 2.6).

[587] UNEP (1999: Article 3).

In the absence of rigid and individualized obligations for signatories, the failure of central monitoring in the collaboration is not surprising. In fact, in the collective history of humanity, corruption has periodically been prohibited to varying degrees, but has never been accurately measured or monitored. Whilst science now allows us to perceive the existence of otherwise invisible emissions that deplete the ozone layer, no comparable advance has taken place for shady dealings. This inherent characteristic of corruption control has distinguished OECD anti-bribery collaboration from other international public-good agreements and thus failed conventional solutions to collective action problems.

Despite the rich landscape of causal attributions and solutions in current literature prescribed from conventional wisdom on multilateral cooperation and corruption control, most of these solutions are not sufficient to solve the issues identified. On the one hand, the collective action problem in OECD anti-bribery collaboration should be described within the many realities of international relations, such as the decentralization of world politics and the absence of a central power to sanction, as Geertz has explained in his discourse on the relation of human behavior to culture.[588] This reality makes a search for powerful exogenous restraints quixotic. On the other hand, scholars who have taken into account the realities of world politics and have highlighted effective monitoring, find it difficult to formulate successful monitoring instruments. For example, Tarullo applies game theory to analyze the payoff structure of member states before and after the ratification of the Convention, and then claimed that the Convention is ineffective because of an institutional failure of the monitoring system in changing the payoff structure of member states, which had roots in the surreptitious nature of transnational bribery. According to this logic, the surreptitious nature of transnational bribery is an anomalistic characteristic of the anti-bribery collaboration that escapes the conventional basket of tools used against collective action problems. In this vein, the central work of scholars is to

[588] See Geertz (1973: 14).

empower central monitoring to overcome the surreptitiousness of transnational bribery. However, these attempts can hardly succeed, given that while corruption has been effectively "controlled" in many contexts throughout history, it has never been really "monitored".[589]

On the other hand, the idea of harnessing the self-interest of competitors by encouraging private actors to file civil lawsuits so as to overcome the institutional difficulty of detecting transnational bribery — the essence of which is a scheme of decentralized monitoring to substitute central monitoring — has been found in practice to perform below expectation.[590] Given the private actors' weak power in collective evidence, the high cost of extraterritorial lawsuits, and potential protectionism of individual countries, civil lawsuits could be expensive and difficult. Then the discussion returns to the dilemma of international collective actions in the context of anarchic world politics.[591]

4.3 A Nonroutine Problem that Demands an Innovative Solution

Given the realities of world politics, formulating solutions to the "ineffective enforcement" of the OECD Anti-Bribery Convention has to take into account both the exploitability of national regulatory efforts in collective actions, and the unquantifiability of national anti-bribery efforts.

Current literature fails to prescribe successful solution to the problem of "ineffective monitoring" because it fails to realize this point. In current literature, many scholars have realized that OECD anti-bribery collaboration has both the characteristic of a public-good-producing collaboration, and the characteristic of an anti-corruption campaign. Accordingly, they have realized that the exploitability of individual efforts — a conventional collective action problem,

[589] See Tarullo (2004: 683-689).

[590] See Chapter II, 2.2.1 (A).

[591] See Young (2009: 152-153), Carrington (2009: 148), and Schmidt (2009: 1134-1135). For detailed discussion see Chapter IV, 4.1.

and the surreptitious nature of transnational bribery — a conventional anti-corruption problem, are two major impediments to high-level enforcement of the Convention. Accordingly, they try to prescribe solutions from conventional collective action theories and anti-corruption literature.[592]

However, what is missing in current literature is an awareness of how the two separately solvable characteristics have amalgamated into a complex situation that defies conventional solutions for either. The collective action problem in OECD anti-bribery collaboration woven by the exploitability and unquantifiability of national regulatory efforts is not a *routine* problem, but a *nonroutine* one. A *routine* problem, as Semyon D. Savranshy defines the term, is one permitting repetitive solutions which people have known; and a *nonroutine* problem is one for which some critical steps for solving problem is unknown insofar as people's experience allows. It requires innovative solutions.[593] Compared with a conventional conception of multinational collective actions or anti-corruption initiatives, the collective action problem in OECD anti-bribery collaboration is an issue more novel than people had expected. The dilemma woven by the exploitability and unquantifiability of national strategies is a strongly *nonroutine* problem that cannot be solved by a linear, step-by-step recipe. It is a structurally new one demanding a holistic solution model.[594] Without an awareness of this point, previous efforts to solve the problem have been quite unsuccessful.

As a result, the central unsolved puzzle for the next-step prescriptive analysis of signatories' Convention compliance following the *problem-solving* paradigm is to work out innovative solutions to the dilemma woven by the exploitability and

[592] For attempts to prescribe solutions from conventional international collective action theory see e.g. Tarullo (2004), and for attempts to prescribe solutions from anti-corruption literature see e.g., Burger & Holland (2006).

[593] See Savranshy (2000: 4).

[594] Raustiala gives a specific argument about why "analysts should pay more attention to the complex architecture of international agreements and treat agreement design holistically." Raustiala (2005: 582).

the unquantifiability of national anti-bribery efforts.[595] There is a need to improve the current *problem-solving* approach so as to serve this purpose.

5. Beyond Explaining the Problem of "Ineffective Enforcement"

5.1 A Few Signatories' "Zealous Enforcement" of the Convention Is Unexplained

15 years' practice has proved that signatories' collective enforcement of the OECD Anti-Bribery Convention is not only characterized by most signatories' "ineffective enforcement" of the Convention — which is what *problem-solving* analyses assert, but is also characterized by a few signatories' increasingly zealous enforcement: According to TI's 2011 progress report, the performance seven signatories (i.e. Denmark, Germany, Italy, Norway, Switzerland, United Kingdom and Untied States) is labeled as "active enforcement".[596] Among the seven countries, the US and Germany have had a very large number of enforcement actions.[597] We need not only to explain the "ineffective enforcement" of most signatories but also the "zealous enforcement" of a few leading jurisdictions for either practical or theoretical purposes.[598]

5.2 The *Problem-Solving* Paradigm Cannot Explain This Developmental Reality

However, the standard *problem-solving* paradigm cannot give a full explanation of the developmental trend in signatories with such a label of "active

[595] See Chapter IV.

[596] TI classifies signatories into a category of "active enforcement", a category of "moderate enforcement" and a category of "little or no enforcement" on the basis of the number and influence of prosecutions. See Heimann & Dell (2011: 4-5).

[597] Germany had 110 cases to end 2008, 117 cases to end 2009, and 135 cased to end 2010. The US had 120 cases to end 2008, 168 cases to end 2009, and 227 cases to end 2010. See Heimann & Dell (2010: 11; 2011: 8).

[598] See Chapter I, 4.4.

enforcement".[599] As noted, the *problem-solving* paradigm portrays signatories' collective enforcement of the Convention as "ineffective" because free-will, rational signatories see their optimal interest realized in a strategy of defection.[600] It argues that OECD anti-bribery collaboration has inherent destabilizing factors that encourage defection, and the current institutional setting of OECD anti-bribery collaboration fails to mitigate the adverse effects of these destabilizing factors.[601] Logically, any solution to the problem of "ineffective enforcement" of the Convention should be an attempt to increase disincentives (or reduce incentives) for defection so as to encourage signatories otherwise would defect to cooperate. Given that economists and political scholars have made significant contributions to the theory on solving collective action problems,[602] this interpretative approach allows scholars to explain the gap between the status quo and general expectation in a persuasive way and prescribe solutions. For this reason, current *problem-solving* literature revolves around how to establish central institutional constraints so as to prevent signatories from the temptation of countervailing material interests.[603]

However, the *problem-solving* paradigm fails to explain the zealous enforcement of the Convention by leading jurisdictions (e.g. the US). Because the paradigm has the behavioral logic of signatories controlled as given and excessively relies on the causal relationship between variation in incentives for signatories in the regulatory environment and variation in signatories' choices, it has a tendency to explain signatories' choice uniformly, but cannot well explain the divergence of signatories' choices.[604] For this reason, an alternative paradigm which takes into account domestic politics of signatories and explain the divergence of signatories'

[599] See Chapter I, 4.2.

[600] See Chapter III, 2.1.

[601] See Chapter III, 2 & 3.

[602] See Chapter I, 4.2.

[603] See Chapter I, 4.2.

[604] See Chapter I, 4.3.

choices is necessary.[605]

5.3 A Contextual Approach to Analyze the Case of the US's FCPA Enforcement

5.3.1 A Contextual Approach

I have argued generally in Chapter I that a contextual approach which stresses internal dynamics of a process' historicity can help explain the developmental reality in leading jurisdictions.[606] This contextual approach discards the *political-will* assumption and starts with an awareness that a signatory's creation and enforcement of anti-bribery laws result from multiple domestic forces (e.g., government officials, and enforcing agencies)' efforts to realize their own preferences or fulfill their own official duties.[607] This formulation is based on the facts that transnational bribery is a multifaceted phenomenon and the regulation of it is carried out by multiple domestic agencies (e.g. prosecutors, securities regulatory authorities, and auditing agencies) and these domestic enforcing agencies are primarily driven by their own official missions.[608] After treaty obligations are incorporated into the domestic legal framework of a signatory, law enforcement does not result from unitary "political will" or "behavior" of the signatory, but results from different domestic agencies' collective performance of their own official duties. It is also likely that the behavior of a given agency will vary depending of the relevant directors, budget, and the context of the agency's overall agenda. Driven by their specific assortment of official duties and constraints, the combined effect of choices of

[605] See Chapter I, 5.

[606] See Chapter I, 5.4.

[607] For example, the FCPA of the US authorized the SEC and the DOJ to collectively enforce the FCPA. See §78 dd-1 of Foreign Corrupt Practices Act of 1977 (i.e., § 30A of the Securities Exchange Act of 1934).

[608] See Rachlinski & Farina (2002: 563-571), and Black (2012: 1113).

these agencies are unlikely to follow the behavioral logic of anthropomorphized countries defined by the current *problem-solving* approach.[609]

Second, in the dynamic mentioned above between newly-incorporated treaty obligations and existing institutional frameworks, the latter have significantly more historical weight. For this reason, the suggested contextual approach also stresses that the preexisting institutional context shapes the choice set for domestic agencies at a specific moment of time. Specific to the case of the enforcement of the OECD Anti-Bribery Convention, treaty obligations, once being incorporate into the national legal framework of a signatory, domestic enforcing agencies involved have a potential to interpret the law pursuant to its own agenda, practices and duties predetermined by the existing institutional context (e.g., social value system). For this reason, the choice set for a specific domestic enforcing agency in a given institutional context is limited.[610] Whether incorporated treaty obligations could be faithfully enforced is not only a function of domestic enforcing agencies' free-will, rational choice, but is also a function of what kind of choices domestic enforcing agencies have.[611]

In addition, the contextual approach suggests that the correlation between the incorporated treaty obligations and the preexisting institutional context of a signatory in which domestic enforcing agencies interact and make choices is incrementally changing.[612] According to the theory of Boettke *et al.* and Gutterman, the performance of new institutions in a preexisting institutional context is a function of the extent to which newly-established institutions have

[609] Chapter I, 5.2.1 and Chapter II, 5.2.

[610] In such case, the force of the legislator's initial intention for the law is not that of a foundation for an edifice, which largely predicts the attributes of what is built above it. Rather, it becomes to more resemble that of a seed, which even though it determines many characteristics of the plant, does not control how the plant will grow. Once the plant sprouts, it is redefined by the environment, which shapes the ultimate dimensions of its innate characteristics. For discussion on how domestic agencies' choices set is shaped by existing institutions see Chapter I, 5.3 and also Chapter II, 5.2.

[611] See North (1990). Also see Chapter I, 5.3.

[612] See Chapter I, 5.4.

been woven into the habitual behavior of domestic enforcing agencies as, say, prosecutors or auditing agencies, pursuing their own official duties.[613] In reality, this "extent" is not a given, but changes incrementally during the interaction of the new institutions and the preexisting institutional context.[614] The newly-established institutions have an ability to develop themselves by linking up with existing institutions, including laws and social values.[615] There is a process of mutual acceptance, of symbiosis, between the new legislation and the existing legal framework and social norms. The part consistent with the existing framework is likely to be accepted and reinforced. This process is very similar to that of a botanical branch-grafting, in which different plants rely on their callus parts to accept each other. During this process, the relation between the newly-established anti-bribery laws and the preexisting institutional context is changing.[616]

In general, the contextual approach suggested here comes to grips with internal dynamics of a signatory's domestic enforcement of the Convention, constraints of preexisting institutions on the choices of domestic agencies of a given signatory, and correlation between variation in the institutional context and

[613] See Chapter I, 5.3. Specifically for Boettke *et al.*'s theory of "institutional stickiness" see Boettke *et al.* (2008: 340), and for Gutterman's theory about how preexisting institutional context affects the incorporation of treaty obligations into national legal frameworks see Gutterman (2005).

[614] See North (1990).

[615] See Keohane (1988).

[616] One example of this kind is the development of private rights against transnational bribery in the US. The FCPA had provisions on civil actions at the moment it was created. However, the original version of civil proceedings was a counterpart to a criminal procedure that was to be undertaken by the DOJ and SEC, not indicating any private rights of damaged business competitors. However, after the FCPA criminalized transnational bribery, the private rights of business competitors of bribe-paying companies became a logical conclusion according to the spirit of the US Tort Law, which expanded the channels of information on acts of transnational bribery and channels for stakeholders to express their demands. This means the existing legal framework defined the tort nature of transnational bribery which was not stipulated by the FCPA. The circumstance has an ability to modify, supplement or enrich the connotation of a new institutional arrangement. See Young (2009: 146).

variation in choices of domestic agencies during a period of time.[617]

Despite the outline of the contextual approach discussed above, it remains a heuristic device. A more representational one is necessary to serve the academic objective of this study. Given that a historical approach advocates an analysis of domestic politics — the interaction among and independent performance of domestic agencies of a signatory — case study is unavoidable. Of course, as I have restated in previous chapters, even though case study highlights domestic factors of individual signatories, the academic objective is to help understand the dynamic of Convention enforcement systematically but not broaden our knowledge of transnational bribery regulation of a single jurisdiction.

5.3.2 A Case Study of the US's Increasingly Aggressive Enforcement of the FCPA

The US's domestic enforcement of the OECD Anti-Bribery Convention — which is embodied in the US's enforcement of the FCPA, is most appropriate for case study. There are several reasons: First, as the first country outlawing transnational bribery, the most active advocate of the OECD Anti-Bribery Convention,[618] as well as the country which has brought the largest number of enforcement actions,[619] the US is the most appropriate representative of leading jurisdictions which are enforcing the Convention zealously. Second, by 2014, the US has enforced against transnational bribery for 37 years, much longer than other signatories' 15 years.[620] It provides a relatively long history of law enforcement for academic analysis. Third, previous work on FCPA enforcement has suggested that the past 37 years has witnessed an increase in the US's

[617] See Chapter I, 5.4.

[618] See Chapter II, 2 & 3.

[619] See Heimann & Dell (2006; 2010; 2011), and Trace (2011).

[620] The US began to enforce the FCPA in 1977. See Chapter II, 2.1. The OECD Anti-Bribery Convention were not incorporated into domestic legal frameworks of the first generation of signatories until 1999. See OECD Press Release, "Status of Ratification", available at: http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf, (last visited: 12 June 2014).

enforcement efforts.[621] This developmental trajectory provides good resource for analyzing how variation in domestic institutional factors account for variation in enforcement efforts. Forth, the FCPA authorized the SEC and the DOJ to collectively enforce the FCPA,[622] which provides a good perspective for analyzing how the independent performance and interaction of domestic enforcing agencies (i.e., the SEC and the DOJ) accounts for the whole landscape of the US's increasingly aggressive enforcement of the FCPA.

5.3.3 Expected Finding

A contextual analysis of the US's increasingly aggressive enforcement is expected to provide us with another theoretical model to explain Convention enforcement and formulate institutions to improve the collective enforcement of the Convention.[623] When national anti-bribery laws can be enforced independently of the political will of policymakers, it is possible to improve signatories' collective enforcement of the OECD Anti-Bribery Convention by improving the incorporation of treaty obligations into national institutional frameworks.[624] Given the complexity of national conditions, this job cannot be any easier than an attempt to develop control-oriented institutions to improve Convention enforcement.[625] However, because this approach does not impose

[621] For example, Cortney C. Thomas states that "the (Foreign Corrupt Practices) Act had little to no effect in its first twenty-five years of existence. Then, in the early twenty-first century, the Department of Justice and Securities Exchange Commission ("SEC") began an exponential increase in the Act's enforcement." Thomas (2010: 439-440). Barbara Black states that "the SEC demonstrated little interest little interest in enforcing the anti-bribery provision and never asserted that it was related to the SEC's mission (prior to the 2000s)… Although the SEC did not signal any change in enforcement policy, the SEC began to enforce the FCPA in earnest in the early 2000s…and an SEC press release in October 2008 described FCPA cases as a 'growth' area." (Black: 2012: 1095, 1108-1109).

[622] See §78dd-1 and §78dd-2 of Foreign Corrupt Practices Act of 1977.

[623] For a discussion on the importance of applying an alternative model to explain the developmental reality in leading jurisdictions about the enforcement of the Convention see Chapter I, 4.4.

[624] See Gutterman (2005).

[625] For a discussion on the difficulty in developing control-oriented institutions see Nichols (1997: 360). Also see Chapter I, 4.1.1, and Chapter III, 3.2.

direct pressure on signatories, signatories are more likely to accept it. In fact, many of the existing work of the OECD WGB can be categorized as this type of approach. For example, the OECD makes recommendations on how to construct a domestic environment which is incompatible to acts of transnational bribery. In the past years, many OECD agencies — the Committee on International Investment and Multinational Enterprises, the Committee on Fiscal Affairs, the Development Assistance Committee, the Public Governance Committee and the Working Party on Export Credits and Credit Guarantees ("ECG") — have been engaged in this activity.[626] In 2000, ECG published the *Action Statement on Bribery and Officially Supported Export Credits*, to instruct its member countries to take measures to deter transnational bribery benefiting from official export credit support. This document was updated in 2006.[627]

6. Conclusion

The analysis offered in this Chapter can be summarized under two headings: first, current causal analyses of signatories' collective enforcement of the OECD Anti-Bribery Convention mainly follow a *problem-solving* logic. However, this category of causal analyses has a technical mission: it does not specify the root course of the "ineffective-enforcement" of the Convention. With a purpose to fill this gap, this Chapter follows the interpretative logic of current *problem-solving* literature, and labels the current level of Convention enforcement as "ineffective

[626] The anti-bribery instruments proposed by the *1997 Anti-Bribery Convention* were refined by a series of supporting documents: OECD (1998; 2003; 2008; 2009). Apart from these documents, the OECD's efforts to utilize official export credits systems to deter transnational bribery are worth mentioning. The Working Party on Export Credits and Credit Guarantees (ECG), an OECD body focusing on the formulation of export credit policies, was involved. All OECD countries, with the exception of Chile and Iceland, are Members of the ECG. See OECD Press Release, "The Export Credit Group", available at: http://www.oecd.org/document/15/0,3746,en_2649_34169_1844760_1_1_1_1,00.html (last visited 14 July 2014).

[627] See OECD (2000).

enforcement". Then this Chapter attributes the problem of "ineffective enforcement" to the existence of destabilizing factors in OECD anti-bribery collaboration in the first place, and the absence of an effective monitoring system in OECD anti-bribery collaboration to mitigate those destabilizing factors in the second place. Finally, this Chapter suggests that this monitoring problem will remain insoluble unless the institutional design of Convention implementation is understood in a holistic way to overcome the exploitability of national regulatory efforts and the unquantifiability of national regulatory efforts.[628]

Second, current literature has virtually not explained why a few signatories have enforced the OECD Anti-Bribery Convention zealously. Given that a *problem-solving* logic is inherently limited to fulfill this task, this Chapter discusses a specific approach to fill this gap. Based on the methodology proposed in Chapter I,[629] a case study of the historical trajectory of the US's increasingly aggressive enforcement of the FCPA can fill this gap.[630]

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[628] See Chapter IV.

[629] See Chapter I, 5.

[630] For articles that describe the increasingly aggressive enforcement of the FCPA by the US see e.g., Hansberry (2012), Blume & McConkie (2007), and Thomas (2010: 439). See Chapter V.

Chapter IV: A Solution Model for the Problem of "Ineffective-Enforcement"

1. Introduction

1.1 Collective Action and Collective Action Problems

Collective action, whether among natural persons or among countries, is a matter of self-interest and interdependence. Rationalism assumes that human beings have a hardwired tendency to seek self-preservation and self-enhancement, and thus always act to maximize their own interests.[631] Interdependence among people in social life makes cooperation an effective way for each person to maximize his or her own welfare.[632] Thus individuals also have a tendency to negotiate a common code of conduct so as to coordinate the behavior of others for personal benefit.

However, the establishment of a common code of conduct does not necessarily lead to better personal benefit or common welfare. In addition to the human nature of self-preservation and self-enhancement, as Bastiat argues, human beings also have a fatal tendency to self-enhance at the expense of others. Even if they can satisfy their wants by diligent labor, they tend to resort to plundering others if gaining unjust enrichment from others is easier than producing their

[631] It is generally believed by economists and political scholars that the pursuit of self-preservation and self-enhancement is the starting point of any choices of individuals, countries, or other political collectives of human beings. This is the motivation for human beings to make ceaseless progress. See Bastiat (1998: 5-7).

[632] According to Felix E. Oppenheim, it is defined as rational for human beings (or governments) to adopt a strategy that is in his or her self-interest (or national interest). See Oppenheim (1987: 371). Admitting the rationality of human beings (or governments) does not reject cooperation. In fact, the pursuit of self-development and a belief that others' self-interest "encapsulates" one's own interest lead individuals to build mutually beneficial relationships with others. See Rathbun (2012: 13). For a discussion on the necessity of international collective actions see Barrett (2007).

own.[633]This means a collective action not only indicates an opportunity to self-enhance, but also brings new risks for collaborators: if some collaborators keep their commitments but others fail to keep theirs, faithful collaborators may suffer even more than before they entered into a collective action.[634] For this reason, individuals have to always compare the harmful externalities of uncoordinated actions and the risk of being exploited by others within a collective action agreement.[635] Economists and political scholars have developed various theories (e.g. public goods game[636]and "race to the bottom" in regulatory competition[637]) to characterize this basic fact that behavioral interactions among rational collaborators would result in the failure of the cooperation agreement.

Therefore, some coercion is necessary to restructure incentives for individuals and then shape behavior in collective actions toward a favorable direction.[638] With coercive power, policymakers can establish "control-oriented" institutions to achieve this goal. The term of "control-oriented" institutions denotes a kind of

[633] See Bastiat (1998: 5-7). Generally see Olson (1971).

[634] Olson further pointed out that rational and self-interested would not voluntarily act to realize the common interest of the group even if all members would gain if all members act to achieve the collective good. See Olson (1971: 1-2).

[635] One individual may change its own strategy contingent on changes in strategies of others. This tendency of individuals to change their own strategies contingent on strategies of others is a kind of "policy interdependence". For more description of policy interdependence see Wang (1998).

[636] See Holcombe (1997).

[637] "Race to the bottom" refers to a result of policy competition among members in a group. The term of policy competition is about decentralization and policy-interdependence. It initially refers to the phenomenon that local authorities compete to attract residents by offering favorable policies, and thereafter widely applies to other areas. See Tiebout (1956: 416). A basic idea is that policy competition among individuals (either among persons or jurisdictions) would cause "race-to-the-bottom", which means, as Schram explains, a phenomenon that "states compete with each other as each tries to underbid the others in lowering taxes, spending, regulation... so as to make itself more attractive to outside financial interests or unattractive to unwanted outsiders." Schram (2000: 91). Also see Meisel (2004: 41).

[638] As Olson states, "If the members of a large group rationally seek to maximize their personal welfare, they will not act to advance their common or group objectives unless there is coercion to force them to do so, or unless some separate incentive, distinct from the achievement of the common or group interest, is offered to the members of the group individually on the condition that they help bear the costs or burdens involved in the achievement of the group objectives." Olson (1971: 2).

institutional arrangement that enables faithful collaborators to use the power of collective force to make the plunder of others more painful than working diligently.[639] On the one hand, this kind of institution is expected to control free riding by imposing institutional constraints on potential free riders. On the other hand, it is expected to decrease uncertainty and risk for faithful collaborators who, as a result, are therefore more likely to stick to their commitments.[640]

1.2 The Utility of a Monitoring System for Solving Collective Action Problems

Previous literature has prescribed two general types of control-oriented institutions — credible punishment and effective monitoring — as solutions to collective action problems.[641] Punishment often attracts more academic interests than monitoring because it puts pressure on free riders in a more ambitious and aggressive way. As a result, it can prevent defection in a more effective way.[642] Of course, the importance of effective monitoring is also emphasized by these scholars as a precondition for executing punishment on defectors.[643]

Other scholars, instead, have noted that effective monitoring can be an independent deterrent to defectors, and not merely a supporting role in a

[639] See Chapter I, 2.4 & 3.2.3.

[640] The terminology of control-oriented solutions is borrowed from Keohane's description of control-oriented regimes. See Keohane (198: 122-124). Also see Chapter I, 2.4 & 3.2.3. Control-oriented solutions are counterposed to endogenous solutions proposed by Constructivism, another branch of sociology or international relations theory which is juxtaposed to rationalistic theory and stresses impersonal social forces (e.g. cultures, mores and conventions). Constructivism (or reflective theory) is a way of thinking applied in international relations theory. It stresses endogenous solutions instead of control-oriented solutions which seeks to alter individuals' payoff structures. For the theory of Wendt see Wendt (1992), and for the theory of Keohane see Keohane (1988). Also see Chapter I, 5.2.2.

[641] See e.g., Kosfeld & Riedl (2004: 1-3).

[642] See Chapter I, 4.1.1, and Chapter III, 3.2.

[643] Academic scholarship across behavioral science (e.g. criminal law) has adopted in-depth analysis to compare whether increasing the probability or the severity of punishment is a more effective deterrent for violators. See e.g., Mendes & McDonald (2001), Piquero *et al.* (2012), and Murata *et al*. (2012).

punishment mechanism.[644] Basically, these arguments were built on the fact that it is often unrealistic to establish an effective punishment mechanism in practice, and/or the fact that in practice effective monitoring can also ensure the success of a collective action in many cases. Despite the theoretical utility of credible sanction, one precondition for any community to introduce control-oriented institutions is members' willingness to enter into an agreement on such issue.[645] Given the decentralization of world politics and the weak coercive power of international law, it is often difficult to negotiate a punishment mechanism among countries to safeguard cooperation.[646] As Nichols puts it,

"Indeed, of all the multinational efforts to proscribe transnational bribery, only one is mandatory. The remainder are voluntary codes or guidelines…Even the one proscription that purports to be mandatory — the Inter-American Convention against Bribery — contains no means of forcing a reluctant country to act, and allows countries to reserve those parts of the treaty with which they do not care to comply."[647]

Therefore, scholars seldom resort to the establishment of a punishment system to solve collective action problems among countries. Pragmatic scholars often argued instead about the utility of an effective monitoring system.[648] They assert that with an effective monitoring system to collect and provide information about others' behavior potential free riders may cooperate because of their concern about reputational damage, as well as the criticism and retaliation of others, and members intending to be faithful to the agreement may then choose to cooperate

[644] See Chapter I, 4.1.1, and Chapter III, 3.2.

[645] The agreement could be in its real sense, for example, the power of the WTO to sanction violators is based on concrete agreements among members—see WTO, "About WTO", available at: http://www.wto.org/english/thewto_e/thewto_e.htm (last visited: May 3, 2013); or in a constructive sense, such as Rousseau's theory of "Social Contract". See Rousseau ([1762] 1968). In any sense, there should be a broad consensus across members in a given issue-area.

[646] See Chapter III, 3.2.

[647] Nichols (1997: 361).

[648] See e.g., Tarullo (2004) and Heimann & Dell (2006: 3). Also see Chapter III, 3.2.

because they will be able to monitor others and thereby reduce the risk of being exploited by others.[649]

More fundamentally, the arguments about the utility of sanction and monitoring reflect the basic need of members in collective actions for "effective control" over others' strategies. Here the phrase "effective control" refers to a situation in which members are able to (a) identify free riders accurately and promptly; and (b) then take proper retaliatory measures which are stringent enough to deprive free riders of their illegal gains. Here the concept of retaliatory measures should be broadly interpreted as any responsive action of others (e.g. censure or monetary penalties) that could impose a countervailing pressure on defectors which outweighs the value of misbehavior. From this point of view, the utility of sanction or the utility of monitoring is in essence a function of the extent to which the probability of exposing free riders and imposing available retaliatory measures can encourage cooperation and deter defection.

1.3 The "Under-Performance" of the OECD Monitoring System

Keeping in mind individuals' need of "effective control" helps us to understand the monitoring problem in the OECD anti-bribery system. As noted in Chapter III, much of the contemporary literature has labeled the current enforcement of the OECD Anti-Bribery Convention as suffering a problem of "ineffective enforcement", and has attributed this problem to the "under-performance" of the OECD monitoring system.[650] These arguments in current literature can be summarized under three major headings:

First of all, there is a commitment to realism in previous analysis of the collective

[649] Numerous academic papers have argued about mechanisms by which international law can be enforced. See e.g. Goldsmith & Posner (2003). For arguments on the effects of reputation in public goods game see e.g., McIntosh *et al.* (2012).

[650] See Chapter III, 2.2 & 3.2.

action problem in the OECD anti-bribery collaboration.[651] As already noted, most previous analyses of the enforcement of the OECD Anti-Bribery Convention are developed on the assumption that signatories are free-will actors in world politics whose strategies on whether to enforce the Convention can be explained rationally as a result of their cost-benefit calculation against their regulatory environment.[652] Given that transnational bribery regulation requires collective efforts of all governments and that unilateral effort would only burden the complying country,[653] scholars consider the collective enforcement of the Convention as a voluntary public-goods game in which individual incentives and the maximization of the common weal are at odds. Thus control-oriented institutions are in demand to restructure incentives for signatories so as to make faithful enforcement of the Convention consistent with individual welfare. In this logical line of rationalism, signatories are allocated with unchanging identities and a fixed behavioral logic.[654] Variation in signatories' compliance with the Convention is explained as solely resulting from variation in external incentives for individual signatories.

Second, current literature has recounted that, though not always explicitly, effective monitoring is central to solving the problem of the "ineffective-enforcement" of the OECD Anti-Bribery Convention. Previous work has emphasized that the enforcement of the OECD Anti-Bribery Convention (from 1999 to 2014) is below expectation.[655] When explaining this dilemma and prescribing cures, scholars highlight the importance of establishing credible sanction or effective monitoring. As it seems unrealistic to establish a punishment mechanism,[656] previous discussion mainly revolves around the utility of the

[651] For more information on the employment of rationalism in international relations theory see Keohane (1989). Also see Chapter III, 2.1.

[652] For a detailed introduction of rationality see March & Simon (1994: 158-163).

[653] See e.g., Brewster (2010: 309). Also see Chapter III, 2.2.2.

[654] See Chapter I, 2.1.3, and Chapter III, 2.1.

[655] A number of articles have endorsed this viewpoint. See e.g., Tarullo (2004), Carrington (2009), Heimann & Dell (2006: 3), and Magnuson (2013).

[656] See Chapter III, 3.2.

OECD monitoring system. In practice, the OECD established a peer-review monitoring system to monitor signatories' enforcement actions against transnational bribery as soon as it proclaimed war against transnational bribery in 1994.[657] This monitoring system was carried out in three phases and expected to make accurate evaluation of member states' fulfillment, or lack thereof, of treaty obligations.[658] National policymakers used to have high hopes for the function of the OECD monitoring system.[659]

Third, there is also a broad consensus that the performance of the OECD monitoring system is well below what was expected of it. The utility of this monitoring system is limited to the phase of guiding signatories to incorporate treaty obligations into national legal frameworks, which mainly took place between 1999 and the early 2000s.[660] When the anti-bribery campaign stepped deeper into the phase of ensuring that the treaty obligations had been incorporated into enforcement actions under national legal frameworks, the OECD monitoring system could no longer provide an accurate picture of national regulatory efforts. Given the immeasurability of national anti-bribery efforts,[661] signatories can easily cloud the assessment results and refuse to implement the policy recommendations from the monitoring teams, with the excuse that the assessment results and recommendations were inaccurate and unnecessary

[657] See OECD (1994).

[658] See OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014). Also see Chapter III, 3.3.

[659] Pieth suggests that the OECD monitoring mechanism was a tempting factor that motivated the US to choose OECD as the platform of the Anti-Bribery Convention. See Pieth (2007: 9-10). In 1998, after the formation of the OECD Anti-Bribery Convention, Clinton claimed in the *Statement of the President* that "the United States intends to work diligently, through the monitoring-process to be established under the OECD, to ensure that the Convention is widely ratified and fully implemented." Clinton (1998: 2290).

[660] For information on how Convention obligations have been incorporated into domestic legal frameworks of signatories see Phase 1 reports of all signatories. Available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 23 June 2014).

[661] See Chapter III, 4.1.

according to their own enforcement practice.[662] When a jurisdiction's own enforcement practice becomes a reasonable defense to rebuff external scrutiny, it signals the functional failure of the monitoring system.[663] As a Transparency International 2006 report points out, "OECD must continue a stronger follow-up monitoring programme…Unless this is done, there is serious danger that the Convention could fail."[664]

1.4 An Unexplained Question: Institutional Flaws Accounting for the Monitoring Problem

Despite the above-mentioned consensus, one important item that is missing in the current literature is a reflection on the structural flaws of the monitoring system and possible remedies. The current literature has done a good job of telling us empirically that the monitoring system underperforms, and has also realized that the surreptitious nature of corrupt behavior — a conventional anti-corruption problem – accounts for this monitoring problem.[665] Yet current literature tells us virtually nothing about the institutional flaws accounting for the OECD monitoring system. In other words, it has no discourse on where the monitoring problem of the OECD anti-bribery system can be solved by institutional betterment. Without specifying the kind of information necessary for signatories to maintain effective mutual control in the collaboration, and why the current institutional design of the OECD monitoring system fails to achieve this goal, current literature cannot lay a solid theoretical basis for next-step formulation of institutional remedies.

This Chapter aims to take us down the road towards filling this analytical gap.

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[662] See Chapter III, 3.3.

[663] See e.g. Tarullo (2004: 685), and Pieth (2007: 30). For detailed discussion of the ineffectiveness of the OECD monitoring system see Chapter III, 3.3.

[664] Heimann & Dell (2006: 3).

[665] For detailed discussion see Chapter III, 4.

Methodologically, the content of this Chapter emphasizes the causal relationship between the organizational structure of the OECD monitoring system and the level of information flows provided for national regulators to make choices on whether to regulate transnational bribery, and admits the failure of the current design of the OECD monitoring system in collecting and providing necessary information that enables “effective mutual control” among signatories. On this basis, it provides a general theoretical framework which formulates the path for a large change in the structure of the monitoring system.

1.5 Outline of the Chapter

This Chapter is organized as follows: Section 2 examines the information flow structured by the current structure of the OECD monitoring system, and explains why the current arrangement, which merely takes interactions among national regulators of signatories into account but ignores the private sector, fails to provide the information necessary for signatories to maintain “effective control” among signatories. Section 3 discusses the possibility of utilizing private forces (e.g., competing companies, or employees of bribe-paying companies) that have personal knowledge of instances of transnational bribery to increase inflow of information into the monitoring system. Given the limited role of private sector actors in collecting solid evidence, Section 4 suggests to incorporate the advantage of private sector actors in providing original clues and the advantage of public forces in collecting solid evidence in a holistic monitoring system. Given the potential regulatory competition among national regulators of different signatories, Section 5 suggests to activate the role of home countries of exporters victimized by bribe exchanges in order to monitor how national regulators of bribe-paying companies process information on transnational bribery collected from private sector actors. The Chapter Conclusion summarizes the central argument of this Chapter.

2. Structural Flaws of the OECD Monitoring System

Scholars from other branches of social science have analyzed the causal effects of structural characteristics of a community (e.g., group size[666]) on the quality of cooperation. A basic idea is that structural characteristics, which define how collaborators are connected to each other affect the ease with which individual behavior can be monitored.[667]However, little work in current literature on the enforcement of the OECD Anti-Bribery Convention has analyzed how the institutional structure of the OECD anti-bribery system accounts for the monitoring problem. This Section seeks the answer.

2.1 The Organizational Structure of the OECD Monitoring System

In the context of this Chapter, organizational structure of the OECD Monitoring System refers to the institutional arrangement according to which signatories' anti-bribery efforts and achievements are monitored. This organizational structure defines how information on national anti-bribery efforts is collected and transmitted to all members in the collaboration.

2.1.1 The OECD Monitoring System: Three Phases of Peer Review

As noted in Chapter III, the OECD established a peer-review monitoring system as soon as it proclaimed war against transnational bribery in 1994. As Article VIII of the 1994 Recommendation states, the OECD:

"Instructs the Committee on International Investment and Multinational Enterprises to monitor implementation and follow-up of this Recommendation. For this purpose, the Committee is invited to establish a Working Group on Bribery in International Business Transactions and in particular: i) to carry out regular reviews of steps taken by member countries to implement this Recommendation, and to make proposals as appropriate to assist Member countries in its implementation; ii) to examine specific issues relating to bribery in

[666] For an argument of how group size affects cooperation see Olson (1971: 53-65).

[667] See Brass (1981), James & Jones (1976), and Oldham & Hackman (1981).

international business transactions; iii) to provide a forum for consultations; iv) to explore the possibility of associating non-Members with this work; and v) in close co-operation with the Committee on Fiscal Affairs, to examine the fiscal treatment of bribery, including the issue of the deductibility of bribes."[668]

In the same year, the OECD WGB was established and made responsible for monitoring the enforcement of OECD anti-bribery documents.[669]

After the OECD Anti-Bribery Convention was signed in 1997, its Article 12 states that,

"The Parties shall co-operate in carrying out a program of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body."[670]

The enactment of the OECD Anti-Bribery Convention and subsequent documents (such as the 2009 Recommendation)[671] enriched the mission of the OECD WGB. At present, the peer-review monitoring system is missioned to make accurate evaluation of signatories' fulfillment of treaty obligations and relevant recommendations, assess their efforts and achievements, and discover any inadequacies of their regulatory instruments. By this approach, it was expected to impose pressure on lagging members and provide information for the reference of other members.[672]

Technically, the OECD peer-review monitoring system is carried out in three

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[668] OECD (1994: Article VIII).

[669] See OECD Press Release, "OECD Working Group on Bribery in International Business Transactions", available at: http://www.oecd.org/daf/anti-bribery/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm (last visited: 20 April 2014).

[670] OECD (1997a: Article 12).

[671] See OECD (1997a; 2009).

[672] See OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014). Also see Chapter III, 3.3.

phases.[673] Phase 1 Review evaluates whether the Convention obligations have been adequately incorporated into signatories' domestic legal systems by way of reviewing written documents. Phase 1 also evaluated how the 1996 Recommendation was incorporated by the US anti-bribery laws.[674] Phase 1 review of most of the first generation of signatories took place between 1999 and 2003, and the evaluation results were published by the OECD in the form of country reports. If there are any treaty obligations not appropriately incorporated into national legal systems of signatories, the OECD monitoring team also makes recommendations in the country reports.[675]

Phase 2 Review evaluates the extent to which a signatory is applying the incorporated treaty obligations effectively.[676] The OECD WGB organizes a team of examiners to do on-site visit to examined signatories. The examiners include both staff of the OECD Secretariat and officials from other signatories. The monitoring team meets officials of the examined country, evaluates whether the examined country has established robust anti-bribery mechanisms to fulfill treaty obligations, and assesses whether the examined country has enforced incorporated treaty obligations in an effective way.

Phase 3 Review focuses on the performance of signatories' anti-bribery tools and whether signatories have implemented tailored recommendations from Phase 2.[677]

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[673] Here I only refers to information relevant to the topic of this Chapter. For a more detailed introduction see Chapter III, 3.3.

[674] As the OECD puts it, "Phase 1 evaluates the adequacy of a country's legislation to impellent the Convention." OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014).

[675] The OECD WGB adopts a criterion of "functional equivalence" for Phase 1 review. For a discussion on this criterion see Chapter I, 2.3. For a more detailed discussion on the OECD WGB's Phase 1 review see Chapter III, 3.3.

[676] As the OECD puts it, "Phase 2 assesses whether a country is applying the legislation effectively." OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014).

[677] As the OECD puts it, "Phase 3 focuses on enforcement of the Convention, the 2009

Different from previous two phases of review, which assesses signatories' creation and implementation of anti-bribery laws on an overall scale, Phase 3 focuses central attention on whether signatories have well addressed loopholes of signatories' domestic anti-bribery systems identified through Phase 1 review and Phase 2 review. The OECD WGB has announced in its schedule that this job in most signatories (expect Israel, Russia, Columbia and Latvia) is expected to be completed by 2014.[678]

2.1.2 The OECD Monitoring System: A Centralized Structure

Current political and economic literature groups architectures of monitoring systems into two general categories: a centralized approach and a decentralized approach. A centralized approach refers to a situation in which members are under the monitoring of a central supervisor. It often results from members' delegation of power to a central authority to perform the duty of assessing individual performance and identifying (and sometimes punish) defectors. This approach was appreciated by many scholars. The Hobbesian model "Leviathan",[679] and the "government" suggested by David Hume, [680] are all manifestations of central institutions. In contrast, a decentralized approach means mutual monitoring between members laterally. Members do not necessarily delegate power to a central authority, but evaluate others' behavior, identify free riders and punish them by themselves.[681] When a game among collaborators is

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Anti-Bribery Recommendation, and outstanding recommendations from Phase 2." OECD Press Release, "Country monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/briberyininternationalbusiness/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 3 December 2012).

[678] See *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/RevisedPhase3Schedule_ENdoc.pdf (last visited: 28 July 2014).

[679] See Hobbes ([1651] 1968).

[680] David Hume suggested that a government "easily remedies…these inconveniences [i.e., collective action problems]". Hume ([1739] 1978: 538), cited in Schwartz & Tomz (1997: 685).

[681] See e.g., Boyd & Richerson (1992).

repeated, members can take a "tit-for-tat" strategy[682] or other retaliatory measures to punish free riders effectively.[683] Given that sometimes central institutions are unavailable or prohibitive, though they are effective, some other scholars suggest that pure interactions among members can lead to successful collective actions too provided that interactions among members are repeated and targeted retaliation is possible.[684]

The OECD monitoring system satisfies the characteristics of a centralized mode. As noted, this monitoring system is coordinated by a special agency — the OECD WGB. When the OECD WGB evaluates the enforcement of treaty obligations in their national legal systems, it organizes monitoring teams to do on-site visits to examined countries. These monitoring teams are comprised of examiners from OECD and examiners from peer countries. Examiners from peer countries do not perform their duties in the name of their own countries, but review regulatory efforts of examined countries and give recommendations to them in the name of the OECD WGB.[685] Besides, the OECD WGB does not give out public information regarding the nationalities of the examiners. More importantly, inside the OECD monitoring system, information on individual

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[682] Milinski considers a "tit-for-tat" strategy as effective in guaranteeing cooperation and defines the "tit-for-tat" strategy as that "the player cooperates on the first move and thereafter does whatever the opponent did on the previous move." Milinski (1987: 433). Also see Chapter I, 3.1.2 (A).

[683] Based on the work of some political scholars and economists, Schwartz & Tomz suggest that, "When a prisoner's dilemma is repeated indefinitely, individual can adopt conditional (trigger) strategies designed to reward cooperation and punish defection. In the context of trigger strategies, an individual who behaves opportunistically today must forego the fruits of cooperation in subsequent periods. Provided that actors do not discount the future too heavily, there exists an appropriate trigger strategy that will sustain cooperation perpetually. By this logic, individuals can surmount the prisoner's dilemma in a completely decentralized setting." Schwartz & Tomz (1997: 685).

[684] See e.g., Kosfeld & Riedl (2004: 5), and Schwartz & Tomz (1997: 685).

[685] For information on the members of the OECD monitoring teams see *OECD Country Reports*, available at: http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited: 20 September 2014).

performance is collected by the OECD WGB from signatories and then signatories acquire information on other signatories' performance from the OECD WGB monitoring reports. The nature of the information flows inside the monitoring programme means that the essence of the OECD monitoring system is a centralized system coordinated by a special agency, rather than a decentralized monitoring system launched by peer countries.

However, the centralized architecture is not necessarily superior. It is an objective truth that a number of papers across social science have stressed broadly the advantages of a centralized approach.[686] For example, some argue that decentralized monitoring does not apply to collective action with large group size,[687] that decentralized groups may be not well equipped to identify free riders and punish them,[688] that the cost of decentralized punishment is too high,[689]and that "interest groups with centralized structures will become more talented over time as authorities expel the untalented shirkers."[690] However, this comparison is in essence a discussion on the operational costs of monitoring under the premise that information on individual performance is accessible for both a centralized supervisor and decentralized members. It avoids discussing whether it is objectively possible for a supervisor or peers to acquire information on individual behavior, which is a prerequisite capacity, but ships to focus

[686] For academic work that compares the effects of centralized and decentralized monitoring methods see e.g., Bendor & Mookherjee (1987), and Kosfeld & Riedl (2004). In previous literature, political scholars and economists have compared the two modes of monitoring, attempting to specify the conditions under which either a centralized approach or a decentralized approach performs more efficiently. See Gorman *et al*. (2009), Veszteg & Narhetali (2010), and Schwartz & Tomz (1997).

[687] Schwartz & Tomz (1997: 693).

[688] See e.g., Kosfeld & Riedl (2004).

[689] See Veszteg & Narhetali (2010: 668). Of course, there are also scholars suggesting that decentralized members are willing to punish defectors even if the cost of exerting punishment is high. See Fehr & Gächter (2000).

[690] See e.g., Bendor & Mookherjee (1987: 136-140). For a detailed discussion on how group size affects individual contribution see Olson (1971: 53).

exclusively on the extent to which a supervisor and peers can acquire information on individual behavior efficiently and cheaply.

In OECD anti-bribery collaboration, as noted, transnational bribery is a secretive enterprise. Signatories also have their own logic to enforce anti-bribery laws. Outsiders, regardless of a central supervisor or peers, can hardly access specific information on signatories' regulatory efforts and achievements in terms of transnational bribery regulation. The key determinant of the utility of any monitoring approach is not a simple question of how information can be collective and transmitted efficiently and cheaply. It is primarily a question of how information necessary for signatories to maintain "effective control" over each other could be collected and channeled to all signatories. Ultimately, the organizational structure of the OECD monitoring system should be tested against the extent to which it makes information collection and information flows among all signatories possible.

2.2 Information Flow in the OECD Monitoring System

The OECD monitoring system can only be effective when it is able to collect necessary information for signatories to maintain effective control over each other, and then transmit relevant information to signatories. For this reason, what kind of information can be acquired by the centralized supervisor under the current structure of the OECD monitoring system, and how relevant information is channeled to all signatories becomes the central concern.

Figure 1 presents a multilevel structure of major stakeholders in the OECD anti-bribery system, which has defined the way in which the central supervisor collects and transmits information on individual performance.

There are players at four vertical levels:

(1) On the top level is the central supervisor of the OECD monitoring program — the OECD WGB. In the monitoring system, the OECD WGB is charged

with collecting information on individual performance from signatories, and then sharing relevant information with all other signatories.

(2) On the second level are signatories coordinated by the OECD WGB. Signatories are also regulators of business activities of their domestic companies in overseas markets. In Figure 1, Signatories are marked as *Country A* and *Country B*.

(3) On the third level are companies that carry out business activities in foreign markets. They are potential bribe payers and also potential victims of their counterparts' acts of paying bribes in international markets. Under the OECD Anti-Bribery Convention, their acts of paying bribes to foreign officials (if any) are mainly regulated by their own home countries.[691] TNCs are marked as *Company A* and *Company B* in Figure 1.

It is worth mentioning that according to customary international law, business activities of companies are not only regulated by national regulators of their home countries based on active personality jurisdiction — which means, as Ryngaert puts it, "a State is entitled to exercise jurisdiction over its nationals, even when they are found outside the territory, and even when the perpetrator is no longer a national or has only become a national after committing the crime", [692] — but also regulated by jurisdictions where they do business based on the territoriality principle — which means, as Ryngaert puts it, "jurisdiction obtains over acts that have been committed within the territory",[693] or even regulated by jurisdictions where they are publicly listed on a stock exchange.[694] For example, the UK healthcare company GlaxoSmithKline (GSK)'s acts of paying

[691] For discussion on the supply-side control approach see Chapter I, 2.1.2 (A).

[692] Ryngaert (2008: 88).

[693] Ryngaert also suggests: "The territoriality principle is the most basic principle of jurisdiction in international law." Ryngaert (2008: 42).

[694] The FCPA declares jurisdiction over all issuers that report to the SEC. See§78dd-1 of Foreign Corrupt Practices Act of 1977 or § 30 A of the Securities Exchange Act of 1934. Also see USDOJ& SEC (2012: 4).

bribes to Chinese officials are under the jurisdiction of China,[695] the US[696] and UK[697] because the company does business in the territory of China, is publicly listed in US and is incorporated and headquartered in UK. However, as the whole OECD anti-bribery system is established on the basis of active personality jurisdiction, which stresses the regulatory responsibility of home countries,[698] the central focus of this Chapter is on the regulatory relationship between home countries and the multinational corporations incorporated in those countries and conducting business abroad.

(4) On the bottom level are the potential bribe payees — foreign officials in international markets. Bribe-accepting foreign officials can be nationals of either signatories to the OECD Anti-Bribery Convention or non-signatory countries. The nationality of bribe payees is not the central focus of the OECD Anti-Bribery Convention. Neither is it the focus of this Chapter.

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[695] See Reuters, "China Says GSK-Linked Trail Being Handled according to Law", available at: http://www.reuters.com/article/2014/07/08/us-china-gsk-idUSKBN0FD0S420140708 (last visited: 28 July 2014).

[696] See Reuters, "Exclusive: U.S. Prosecutors Add China Bribe Allegations to GSK Probe", available at: http://www.reuters.com/article/2013/09/06/us-gsk-bribery-doj-idUSBRE98511R20130906 (last visited: 28 July 2014).

[697] See BBC, "GlaxoSmithKline to Be Investigated by UK Fraud Body", available at: http://www.bbc.com/news/business-27597312 (last visited: 28 July 2014)

[698] See Chapter I, 2.1.1.

Figure 1:

Stakeholders Structure in the OECD Anti-Bribery System

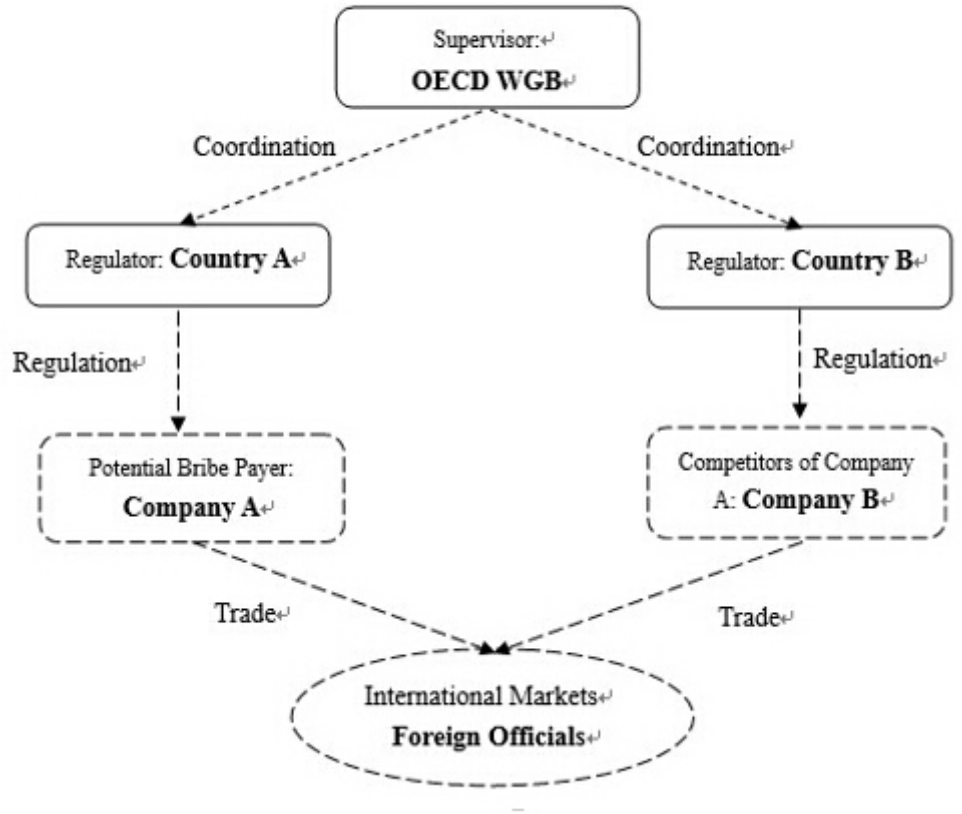
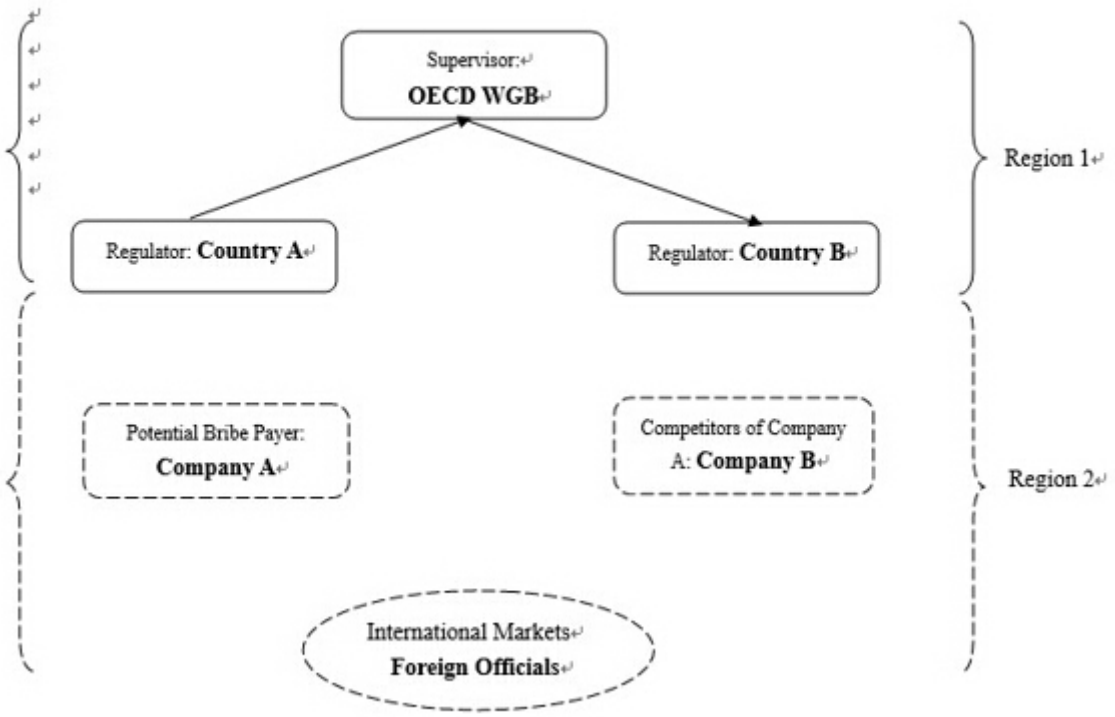


Figure 2 illustrates how the OECD WGB collects information on national regulatory efforts and transmits it to all signatories. As depicted, the OECD mainly carries out the monitoring activity in Region 1, directly from national regulators (*Country A*), and then transmits the collected information to all other national regulators (*Country B*).

Figure 2:

Information Channels under the OECD Monitoring System



The monitoring activity of the OECD WGB is completely isolated from Region 2, where transnational bribery deals between companies and foreign officials really take place. This means that the current structure of the OECD monitoring system has merely structured direct contacts between the OECD WGB and national regulators of signatories. The central supervisor remains divorced from information regarding what is going on in international markets.

Then what information is acquirable through this structure? As noted, the OECD WGB collects information on signatories' compliance with the Convention from signatories by way of reviewing their written laws, interviewing relevant officials and other agencies, but not from companies or foreign officials who are direct participants of foreign bribe exchanges in international markets. As a result, the OECD WGB does not collect and transmit first-hand information on instances of transnational bribery violations, but rather documentary evidence from laws-on-the-book and anecdotal evidence provided by the administrators of

national law in signatories, which only gives a nonrepresentational description of signatories' national anti-bribery efforts.

Take the US as an example. The US enacted the FCPA in 1977, and amended it in 1998 after the signature of the OECD Anti-Bribery Convention.[699] In the Phase 1 review in 1999, the OECD WGB mainly reviewed the extent to which the amended FCPA is consistent with requirements of the OECD Anti-Bribery Convention. The result of Phase 1 review was recorded in the Phase 1 report, which gave a detailed description of how the spirit of the Convention had been properly incorporated in the US's legal system.[700] In 2002, the OECD WGB organized a monitoring team for an on-site visit to the US. During this visit, the monitoring team assessed how the FCPA, in which Convention obligations was incorporated, had been implemented by the US. The monitoring team mainly focused on two questions: (a) whether the US had adopted effective measures to prevent and detect transnational bribery? (b) Whether the US had appropriate mechanisms to prosecute transnational bribery offense? The major tool of the monitoring team to obtain relevant information is doing questionnaire, consulting US officials, and reviewing legislations and case law. The subsequent Phase 2 report gave a detailed description of what national enforcing agencies were engaged in the prevention, detection and prosecution process, and how they did their job.[701] In 2010, the OECD WGB organized a Phase 3 review, which assessed how the US had addressed problems after the Phase 2 review, and any new trends affecting US enforcement of the FCPA. The major approach for the OECD WGB to obtain information was interviewing representatives of the US

[699] Foreign Corrupt Practices Act of 1977 was amended by International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998). For a discussion on the 1998 amendment see Chapter V, 3.2.2.

[700] See US Phase 1 Report, available at: http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf (last visited: 4 May 2014).

[701] See US Phase 2 Report, available at: http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/1962084.pdf (last visited: 4 May 2014).

government.[702] Across all the three phases of the peer review, the monitoring team depended on laws-on-the-book and the voluntary disclosure of national regulators to assess the US's efforts on the enforcement of the FCPA.

After the OECD WGB collected information on national anti-bribery efforts from national regulators of signatories, the OECD WGB has the discretionary power to process the information and censure offending signatories in the country reports. These country reports are accessible for all signatories and non-signatories. During this process, signatories are not connected directly with each other and share first-hand information. The information obtained by signatories is second-hand information collected and processed by the intermediary — the OECD WGB.

2.3 Inaccurate, Second-Hand Information that Cannot Maintain "Effective Control" among Signatories

The monitoring program organized by the OECD WGB has its merits, of course. First, as it is carried out in a standard way in all signatories, and gives evaluation of signatories' compliance with the Convention in a uniform format. It thus enables signatories to compare their anti-bribery tools and share the successful anti-bribery methods and experience of leading signatories with lagging ones. This is also the initial intention of the OECD WGB: when the OECD WGB was introduced, the peer-review monitoring system was expected to offer signatories an opportunity to "compare experiences and examine best practices".[703] Second, as the OECD monitoring program monitors the work of national regulators of all signatories periodically and exposes the unfulfilled duties of each signatory, it is

[702] See US Phase 3 Report, available at: http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf (last visited: 4 May 2013).

[703] See OECD Press Release, "Country Monitoring of the OECD Anti-Bribery Convention", available at: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited: 28 July 2014).

able to impose a certain degree of political pressure on lagging signatories. Third, the OECD WGB, as the central supervisor in charge of the whole process of peer review, can gain an overall understanding of the general compliance with the Convention and then develop proper responsive measures.

Yet the structure of the OECD monitoring system determines that it cannot provide accurate information on individual performance — which is however necessary for signatories to maintain effective control over each other, and to mitigate the risk they will be exploited by free riders.

Current *problem-solving* literature suggests that signatories are concerned that their unilateral enforcement of the OECD Anti-Bribery Convention would disadvantage their exporting companies in foreign business competition. Therefore, they need information on the likelihood that exporting firms of other countries pay bribes in international markets, so as to ensure their regulatory efforts will not hamper the competitiveness of their own companies. They also need this information so as to be able to confront and criticize lagging signatories for shirking their duties, or even to retaliate against them. Only by this approach can faithful signatories be assured that they will not be exploited, and only by this approach can they be certain that lagging signatories will be discovered and encouraged to enforce the Convention more aggressively to save their reputation or to avoid retaliation from faithful signatories. It should be noted that, when current *problem-solving* literature mentioned the preferences and strategies of "signatories", it refers to the preferences and strategies of national regulators in the public sector. Private sector actors such as transnational companies, are not taken as behavioral agents in this analytical model.

However, an overall evaluation of the tendency of foreign companies to pay bribes to foreign officials is objectively impossible. Transnational bribery, by its very nature, is a secretive enterprise that defies central monitoring. Numerous academic papers and policy reports have argued about how the surreptitious nature of transnational bribery makes the collective action against transnational

bribery difficult.[704] Although both the OECD and Transparency International are trying their best to evaluate the tendency of transnational companies from individual jurisdictions to pay bribes to foreign officials, their efforts only result in a set of disputable data.[705]

Given that it is unrealistic to have an overall understanding of the tendency of foreign companies to pay bribes, signatories may need information on specific instances of transnational bribery offence by foreign companies, with which they can also impose political pressure on the national regulators of the bribe-paying companies. However, the current structure of the OECD monitoring system determines that information on specific illicit payments is unavailable too. As Figure 2 depicts, the monitoring activity of the OECD WGB is completely isolated from Region 2, in which transnational bribery offences really take place. Besides, the OECD WGB, as the coordinator of the monitoring program, is neither authorized, nor equipped to monitor business activities of companies around the world. What even worse, the OECD WGB cannot even compel signatories to disclose all information on corrupt behavior of their companies. Furthermore, in real circumstances, it is quite difficult for all external examiners, either the OECD WGB or national prosecutors to grasp clues of transnational bribery offences. As a result, as Burger & Holland state, "they lack the power to compel OECD Member States to provide documents, and they can only encourage cooperation, which depends on the good faith of foreign government officials. These Working Groups lack any real enforcement power under the Convention."[706]

For these reasons, the OECD WGB only collects inaccurate information on

[704] See e.g., Tarullo (2004: 683 & 689), and Trace (2011: 1). Also see Chapter III, 4.1.

[705] For information on Transparency International's attempts to quantify corruption level see Transparency International Press Release, "Bribe Payers Index" available at: http://archive.transparency.org/policy_research/surveys_indices/bpi, (last visited: August 3, 2012). For critiques on the reliability of Transparency International Indexes see e.g., Chaikin & Sharman (2009: 12–13).

[706] Burger & Holland (2006: 55).

signatories' enforcement efforts by reviewing their national anti-bribery laws and interviewing national officials. Without accurate information on signatories' compliance with the Convention, shirking signatories can easily defy criticism from faithful signatories and the OECD WGB, and make justifications for their laissez-faire attitude. As Tarullo suggests, "while the United States and other advocates of the OECD Anti-Bribery Convention are well aware that the Convention is not being rigorously implemented, they have difficulty identifying specific instances of non-implementation (i.e., non-prosecution) in a convincing manner."[707]

In the second place, the way in which the OECD WGB processes information collected from signatories worsens the situation. Carpenter *et al*. analyzed the causal relationship between network structure and individual performance in public-goods game. A basic conclusion is that individuals in social circumstances are bound by a social network, in which individuals can only obtain information on those who are connected to them, but cannot have knowledge of those isolated from them — of course, here the term "local environment" is not a geographical concept, but a circumstance where individuals have linkages with each other.[708] Figure 2 shows that in the OECD anti-bribery system, there is only a one-way information channel from signatories to the central supervisor and then back to signatories, but no direct interconnections between signatories. So signatories can only acquire second-hand information already processed by other signatories in providing it to the OECD WGB and then processed again when storing it.[709] This arrangement for information flow means that the reliability of the information depends both on the good faith of other signatories, which has been denied by rational-choice theory, and by the efficiency of selection during the two levels of conveyance and storage.

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[707] Tarullo (2004: 689).

[708] See Carpenter (2012).

[709] See Burger & Holland (2006: 55).

3. Toward High-Level Information Inflow: Private Sector as Information Sources

Current literature has realized that the surreptitious nature of transnational bribery is a major impediment to effective monitoring. As Tarullo states, "the OECD Anti-Bribery Convention is more difficult to monitor than most economic agreements. Unlike, say, a trade agreement forbidding signatories from increasing tariffs, a potential 'violation' of the OECD Anti-Bribery Convention is not easy to discern. Bribery takes place in the shadows. It may never be visible to anyone but the immediate actors."[710] As we have been told both theoretically and empirically that it is unrealistic to count on an overall quantification of corruption level to solve the problem of the lack of information inflow, academic attention should be shifted to the likelihood of exposing concrete, specific corruption scandals which can embarrass a shirking national regulator. Accordingly, the first step to solving the monitoring problem in OECD anti-bribery collaboration is to design effective detection devices to acquire first-hand clues of illicit payments.

Then the role of private sector actors in anti-corruption campaign is highlighted. The term "private sector" refers to any private individuals, enterprises or organizations that have personal knowledge of hints of bribery. A private sector actor can be a victimized company suffering a loss of business because of others' acts of paying bribes. Grounded in rational-choice theory, companies are motivated to pay bribes because they want to obtain an advantage over business competitors and win tenders. During this process, competitors of bribe-paying companies may lose business opportunities that they would have won strictly on product price and quality. Therefore, their desire for combating corrupt behavior and reporting bribery offences should be taken into account. Of course, the term of private sector in this discourse is not limited to a victimized company. It can

[710] Tarullo (2004: 689). Also see Chapter III, 4.1.

also be an employee of the bribe-paying company, or a colleague of the bribe-accepting official, or any other person who has credible clues of transnational bribery. As there is little doubt that business competitors of bribe-paying companies are in a good position to acquire information on corrupt behavior and are incentivized to expose it, this group is the most important branch of private forces that should be taken into account when designing the monitoring system. The idea that private sector actors should play an important role in combating corruption is not original to this study, but a broad consensus across current anti-corruption literature.[711]

3.1 The Advantage of Private Sector Actors as Information Source

Scholars advocate the role of private sector actors in transnational bribery regulation primarily because collecting information and evidence on corrupt behavior is difficult and expensive for public bodies. Previous anti-corruption scholarship has told us that in business transactions, when the expected returns from paying bribes are great but the probability of being exposed is low, it becomes worthwhile for opportunistic actors to take a risk.[712] As corruption secretively takes place in the backside of business activities, it is quite difficult for external supervisors (e.g. national prosecutors) to acquire clues. As a result, the "impunity gap" — in Burger & Holland's words — on corruption regulation is quite large even in domestic anti-corruption activities, where national regulators have strong incentives to take action.[713] In the case of transnational bribery regulation, because transnational bribery offences take place in foreign countries, it is technically even more difficult for national prosecutors to obtain leads. Therefore, it is unrealistic to expect that public forces alone would detect

[711] Generally see e.g., Burger & Holland (2006).

[712] See Burger & Holland (2006: 46).

[713] See Burger & Holland (2006: 47).

transnational bribery effectively.

In view of this technical difficulty, scholars have argued that private sector actors, who have original information on corruption, should play an affirmative part in the anti-corruption campaign, so as to free up public resources from the burden of collecting information on possible corrupt behavior. In particular, scholars advocate that members of the private sector should be vested with private rights to initiate civil actions against bribe payers and/or bribe payees.[714] The first reason for this argument is explained in conjunction with the advantages of civil proceedings against corruption. As the burden of proof for civil actions (preponderance of the evidence) is much lower than that of public officials in criminal proceedings (proof beyond a reasonable doubt), it seems easier for the plaintiff to win the lawsuit.[715] Second, the private sector includes a number of stakeholders of a certain business opportunity affected by bribe exchanges. In many situations, they might have suffered a loss of business from the bribe exchanges between their business competitors and foreign officials.[716] These private parties are likely to have close contacts with both bribe payers and bribe payees, as well as professional knowledge regarding the quality and price of the products sold. They are unlikely to be prevented from accessing clues of bribery by technical business issues, and thereby are in a better position than prosecutors to uncover evidence of bribery. As Tarullo suggests,

> "[A] serious bidder is likely to have extensive knowledge of the relevant context within which the bidding takes place — the cost structure for the contracted work, the capabilities of its competitors, the preferences and proclivities of the government officials involved, and so forth. Thus, even short of explicit reports of bribery, a losing bidder may be best placed to recognize circumstantial evidence particularly to their own governments, about losing contracts because of bribery by their competitors."[717]

In addition to the ability of private sector actors to disclose clues of bribery

[714] See Young (2009), Burger & Holland (2006), and Carrington (2009).

[715] See Chapter IV, 3.3.

[716] See Burger & Holland (2006: 63).

[717] Tarullo (2004: 699).

offences, many private parties, especially those suffering from bribe offences, are also incentivized to disclose information regarding transnational bribery. As Burger & Holland state, "corporations that have strict policies against paying bribes or engaging in other forms of corruption have the greatest stake that large-scale international tenders be conducted without bribes."[718] "Some for-profit legal entities stand to gain from better enforcement of anti-corruption laws. Thus, they may be willing to commit resources where they have suffered damages."[719] As Figure 2 shows, if *Company A* pays bribes to foreign officials for the purpose of winning business opportunities, *Company B* may suffer a loss of business which it should have got by way of fair competition. As the most direct stakeholder and potential victim of an act of bribery committed by *Company A*, *Company B* will closely watch the activities of its competitors even without external encouragement.

3.2 The Legitimacy of Private Sector Actors as Information Source

In addition to stressing the efficiency of private sector parties as information sources, previous literature has also realized that competing companies which suffer a loss of business opportunities because of acts of paying bribes of other companies should obtain the right to claim compensation for their economic losses.[720] In other words, authorizing victimized companies to initiate civil actions is not only an efficient approach to combat corruption, but also a fair and effective approach to achieve justice.

The idea that victimized competing companies (or natural persons) should be authorized to make civil damage claims against bribe-paying companies is a

[718] Burger & Holland (2006: 62).

[719] Burger & Holland (2006: 48).

[720] See Burger & Holland (2006: 74), and Young (2009: 148).

natural extension of the domestic tort of unfair competition,[721] and a natural result of the rise of the theory of victims — a branch of criminology which emphasizes the role of victims in criminal litigation. Modern criminal justice scholars believe that under most situations, criminal offences offend two kind of legal interests. First of all, a crime offends the human rights of victims. For example, a murder violates the victim's right to life, and a theft violates the victim's property rights. Meanwhile, criminal offences also damage the welfare of the whole society because they violate social norms protected by criminal law.[722] In the ancient times, the private right of victims to take revenge on offenders or seek private relief was self-explanatory. With the rise of civil societies, private relief was gradually replaced by public relief. Private rights of victims were gradually limited. As a result, traditional criminal justice used to treat crimes as offences to good governance of the society, but neglect private rights of victims.[723] This was especially true in the domain of corruption crimes. In jurisdictions around the world, corruption crimes used to be considered as a category of crimes offending the integrity of public office and economic interests of the whole country — as Schmidt suggests, "when a person bribes a state official, the state suffers in the variety of ways…Government becomes inefficient and cannot provide social services at the same levels as less-corrupt governments."[724] With the rise of the study of victims since the 1960s, modern

[721] See, for the US, the Uniform Deceptive Trade Practices Act (1964 Act or 1966 Revision) and for Germany, Gesetz gegen den unlauteren Wettbewerb (UWG) (Unfair Competition Act).

[722] As O' Hara & Robbins put it, "The criminal offender often commits two distinct wrongs with each criminal act. First, the offender commits a wrong against the victim, who is left feeling both aggrieved and vulnerable. Second, the offender wrongs society by engaging in conduct that violates social norms, thereby undermining others' senses of personal security." O' Hara & Robbins (2009: 199).

[723] See O'Hara & Robbins (2009: 199-200), Rowland (1992), and Levine (2010).

[724] Schmidt (2009: 1121), also see Nichols (1997).

criminal justice theory began to stress the role of victims and necessity to compensate their losses.[725]

Against this background, conventional anti-corruption theory which considers corruption as a mere offence to public power[726] was flawed to give a full explanation of the rise of global collective regulation of transnational bribery. In particular, it cannot refute the argument that when corruption was permitted in another country, the act of paying foreign bribes did not constitute an offence[727]– as Sung notes, "From the demand-pull perspective, primary responsibility for policing bribery does not lie with the multinationals from exporting countries."[728] Highlighting the role of victim makes it possible to explain act of paying foreign bribes similarly to the tort of unfair competition, as a violation of the legal rights of other competitors that participate in the same bidding. Logically, bribe-paying companies are guilty not merely because they have infringed the integrity of public office of countries home to bribe-accepting officials, but also because they have victimized private interests of their business competitors.[729]

As it becomes possible to claim the liability of bribe-paying companies in international business transactions, independently of the liability of

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[725] See Cassell (2007: 865), and Roach (1999).

[726] See Nichols (1997), Young (2009: 144-145). For a more detailed introduction of academic viewpoints of this kind see Chapter I, 2.1.2 (A).

[727] For example, in February 2013, former Italian premier Silvio Berlusconi publically criticized prosecutors for arresting an Italian company's officer: "…these are not crimes. We're talking about paying a commission to someone in that country. Why, because those are the rules in that country." Available at: http://www.bloomberg.com/news/2013-02-14/berlusconi-tells-italian-firms-to-keep-bribing-after-orsi-arrest.html (last visited: 31 July 2014).

[728] Sung (2005: 114).

[729] As Sung states when he analyzes the liability of bribe-paying companies and the regulatory responsibility of countries home to bribe-paying companies: "Countries that had successfully maintained a scrupulous civil service system or implemented legal mechanisms against foreign bribery by their multinational corporations were recognized as fairer and most honest competitors in international trade in cross-country surveys." This statement puts implicitly that transnational bribery violates the interest of business competitors of bribe-paying companies. Sung (2005: 112-113). For general information on the private rights of business competitors see Burger & Holland (2006), and Young (2009).

bribe-accepting officials, it also becomes theoretically possible to justify the FCPA and the OECD Anti-Bribery Convention which combat corruption from supply side.[730] More importantly, because this interpretation emphasizes the competitive relationship between companies in international business transactions, it captures the principal concern of exporting countries in international markets: they want a level playing field and fair competition. This means that while the rise of the theory of victims helps to convince national policymakers of the significance of a global campaign against transnational bribery, it also makes the private rights of competing companies to claim civil damages a natural ramification.

As a result of this ideological trend, after the establishment of the OECD Anti-Bribery Convention, scholars began to analyze the independent liability of bribe-paying companies by arguing that their acts of paying bribes victimize their competitors in the same business transaction.[731] Burger and Holland even declared that private actors "are in a position to lead the next stage of the global fight against corruption".[732]

3.3 Existing Laws on Rights of Private sector actors

Many international treaties and national legal systems have confirmed the private rights of victimized companies or persons of corrupt behavior to initiate lawsuits. In November 1997, the Committee of Ministers of the Council of Europe issued *The Twenty Guiding Principles for the Fight against Corruption*, Article 17 of which requires its members "to ensure that civil law takes into account the need to fight corruption and in particular provides for effective remedies for those whose rights and interests are affected by corruption."[733] In November 1999,

[730] See Chapter I, 2.1.1 & 2.1.2 (A).

[731] See Young (2009: 146).

[732] Burger & Holland (2006: 73).

[733] Council of Europe (1997: Article 17).

Council of Europe enacted Civil Law Convention. Article 3 of the Civil Law Convention on Corruption states that, "1. Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. 2. Such compensation may cover material damage, loss of profits and non-pecuniary loss."[734] According to the *Explanatory Report to the Civil Law Convention on Corruption*, the plaintiffs of civil lawsuits are not limited to victims of corruption. Instead, it requires member countries to "take the necessary measures to protect employees, who report in good faith and on the basis of reasonable grounds their suspicions on corrupt practices or behavior from being victimized in any way."[735] Article 35 of the UN Convention against Corruption obliged signatories to take measures to make sure "entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." [736]

At national level, Germany created the private rights of victimized parties of corrupt practices as early as the nineteenth century,[737] but enacted legislation specifically targeted against bribery (*Gesetz zur Bekämpfung internationaler Bestechung* or the Act Against International Corruption, "AAIC")[738] in 1998 at the time of its ratification of the Convention, which was actionable under the general tort provision of the German Civil Code and provided a model for lawmaking of other European countries. As OECD WGB Phase 1 Report for Germany states, "It (German law) also raises the possibility of the applicability of subsection 823 (2) of the Civil Code, which provides for compensation where

[734] Council of Europe (1999: Article 13).

[735] Council of Europe (2009: 66).

[736] UN (2003: Article 35).

[737] Gesetz gegen den unlauteren Wettbewerb (UWG) (Unfair Competition Act).

[738] Gesetz zur Bekämpfung internationaler Bestechung, 10 September 1998 (Federal Law Reporter, vol II, p. 2327, 1998).

a person breaches a statute intended to protect others (e.g., Art. 2 of the [AAIC])."[739] In addition to tort actions existing in US states, the FCPA of the US had provisions on civil actions since it was created in 1977. However, the original version of civil proceedings in the FCPA was merely a counterpart to criminal procedure. It was under the full control of government agencies, not indicating any private rights of damaged business competitors or other private sector actors to seek private relief.[740] In the early years after the FCPA's criminalization of transnational bribery, US courts ruled that the FCPA provided no private cause of action.[741] However, since then private rights of victimized competitors had become a hot academic topic.[742] With the development of theories on transnational bribery regulation, US courts confirmed private rights of victimized competitors to claim civil damages against bribery offences in the 2000s. As Judge Richard Posner suggests in *Williams Elec. Games, Inc. v. Garrity*, "Commercial bribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by stripping away all his gain."[743]

The private right of victimized competitors to sue has become an important supplement to criminal proceedings in terms of exposing and deterring corruption. As a civil lawsuit requires a lower standard of proof and (in many countries) less judicial resources than a criminal proceeding, it is an efficient approach to expose corrupt behavior. The advantages of civil lawsuits over criminal proceedings were captured by the World Bank. As *Global Monitoring Report 2006* puts it, a civil lawsuit against corruption "empowers victims to litigate on their own initiative, potentially relieving public prosecutors of a

[739] Germany Phase 1 Report (1999: § 3.7), available at: http://www.oecd.org/dataoecd/14/1/2386529.pdf (last visited: 26 April 2014).

[740] See Young (2009:146).

[741] *See, e.g.,* Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990), cited in USDOJ & SEC (2012: 105).

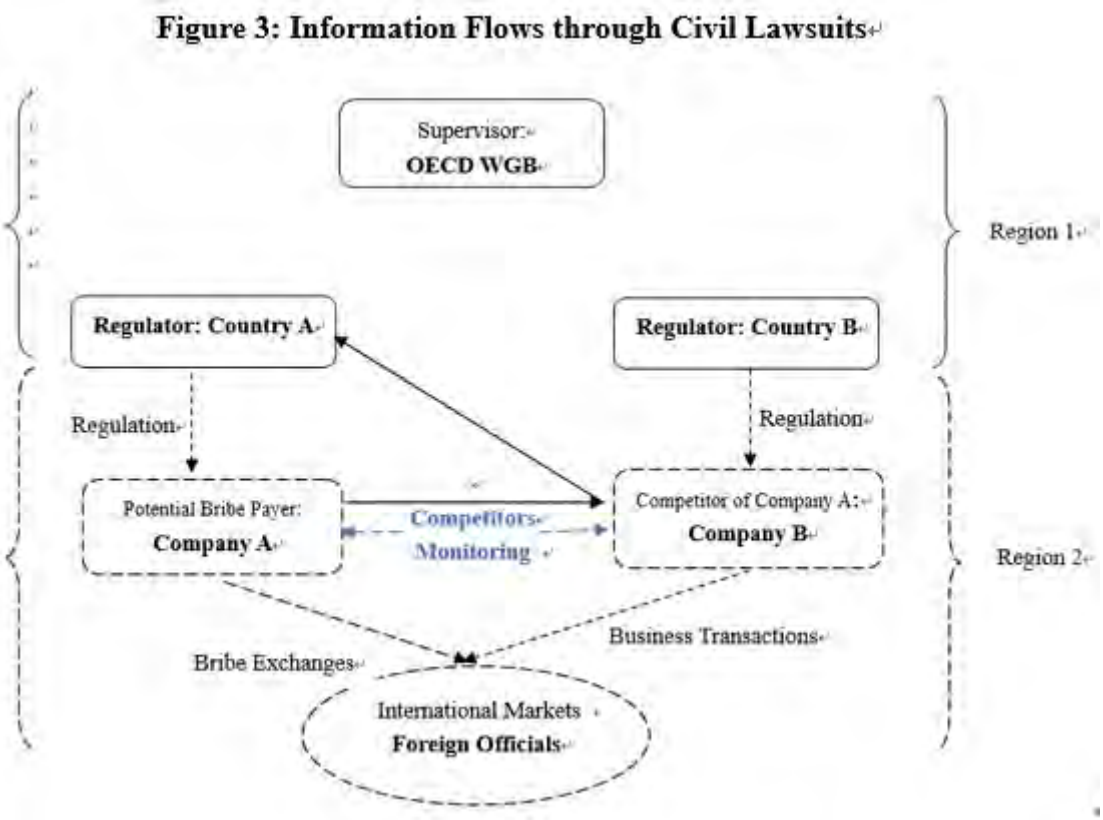
[742] See e.g., Pines (1994).

[743] Williams Elec. Games, Inc. v. Garrity, 366 F.3d 569, 576 (7th Cir. 2004).

complicated burden. Civil courts are less onerous, have a longer reach, and their burden of proof is less demanding than in criminal courts, making recovery of assets more likely."[744] It is also recorded that civil action against transnational bribery is becoming increasingly popular since the 2000s.[745]

4. Toward High-Level Information Processing: the Dominant Role of National Prosecutors

Figure 3: Information Flows through Civil Lawsuits



4.1 The Limited Role of Private Sector Actors in Transnational Bribery Regulation

A central argument of the preceding section is that original information on corruption is scarce, and therefore it is necessary to introduce private sector

[744] World Bank (2006: 183).

[745] See Young (2009: 145).

actors who have clues to expose bribery offences. With private sector actors as information sources, public resources can be free from the burden of collecting information on corrupt behavior. In the meantime, victimized private sector parties can be compensated. This is why both scholars and practitioners show great interest in providing an institutional guarantee for private sector actors who suffer damage in corrupt behavior to initiate civil claims.

However, the strength of private sector actors in an anti-corruption campaign is limited. A constant barrier for private sector actors to initiate civil actions against a suspected bribe payer is the difficulty of gathering solid, credible evidence that can ensure them to win a lawsuit. Although plaintiffs' burden of proof in civil lawsuits is lower than prosecutors' burden of proof in criminal lawsuits,[746] because private sector actors are less skilled than prosecutors in evidence collection, they may encounter more difficulties than prosecutors before they can satisfy the criterion of "preponderance of the evidence".[747] When the World Bank presented the advantages of civil lawsuits against corruption in its 2006 report, it also suggests that "Drawbacks (of civil actions) are that civil courts lack the strong evidence-gathering methods available to criminal courts and that they require adequate resources on the part of the litigators."[748] As a result, civil lawsuits initiated by private sector actors are something "easy to start" but "hard to win", in Young's words.[749]

An even more practical barrier is, currently, the countries home to bribe-paying companies (if they are members of the OECD Anti-Bribery Convention) and countries home to bribe-accepting officials have jurisdictions over transnational bribery offense. Private sector actors therefore have to initiate lawsuits in the home countries of either bribe-paying companies or bribe-accepting officials. As

[746] See Carrington (2009:151).

[747] See Burger & Holland (2006: 43).

[748] World Bank (2006: 183).

[749] See Young (2009: 152).

Tarullo suggests, private sector actors, especially disappointed business competitors of bribe-paying companies may be hesitant to sue in the courts of home countries of bribe-accepting officials because they may do not want to initiate a lawsuit that would definitely displease public officials of the country where they run business — especially when the probability of winning the lawsuit is not high. Further, these same disappointed competing companies could themselves have been bribe payers in this or another business transaction.[750] On the other hand, private sector actors may also be hesitant to sue in the courts of countries home to bribe-paying companies. Imagine that *Company B* suspects that its competitor *Company A* has paid bribes to officials in a bidding in a foreign country. If *Company B* wants to sue *Company A* in the home country of *Company A*, judges there may be affected by protectionism and thus biased in *Company A*'s favor. Even if *Company B* eventually wins the lawsuit, the cost of transnational litigation is likely to exceed recovered benefits.[751]

These concerns are likely to make private sector actors that have original information on corrupt behavior choose not to sue even when they have a strong desire to do so.[752] If private actors choose not to sue, or are likely not to win when they sue, bribe-paying companies would not be punished, and home countries of bribe-paying companies would not be embarrassed because of their dereliction of duties. Then the participation of the private sector in the anti-corruption campaign does not really come into play.

Another key factor accounting for the limited role of the private sector is that private sector actors can only provide fragmented, isolated pieces of evidence, but not sufficient proof of corrupt behavior to sustain a conviction. The comparative advantage of the private sector over public forces lies in their close proximity to bribe payers and bribe payees. The credibility of this kind of

[750] See Tarullo (2004: 700).

[751] See Young (2009: 152-153).

[752] See Tarullo (2004: 700), but Burger & Holland (2006: 62-63).

information is too low for members of the private sector to take independent action. Meanwhile, they are too weak to follow up the fragmentary clues in their possession sufficiently to reinforce the credibility of the evidence. If private sector actors choose not to sue after conducting a cost-benefit calculus, the information they possess regarding their competitors' corruption is wasted.

4.2 Incorporating the Private Sector and the Public Sector into a Holistic Solution Model: the US Model of *Qui Tam* Action and the Whistleblower Program

Given that the role of the private sector in combating transnational bribery is limited, there is a need to work out a holistic model which can incorporate the comparative advantage of private sector actors in gaining first-hand knowledge of corruption and the comparative advantage of public officials in generating solid evidence based on the original information provided by private sector actors. This holistic model encourages private sector actors that have easier access to evidence of transnational bribery to report it. If any private sector actor has acquired original information on transnational bribery offences which is insufficient for him to win a civil lawsuit, this person can report the information to public authorities who have jurisdiction over the suspected offence in the first place. Then public authorities would take over the process of evidence collection. Once the offence is verified, private sector actors who provide original information could claim damages or rewards based on the findings of public authorities.

The virtue of this model is threefold. For private sector actors, with the decrease in the cost of their part in the lawsuit and the increase in the likelihood of winning the lawsuit, they are more incentivized to inform against transnational bribery. For national authorities, with the decrease in the burden of finding evidence regarding transnational bribery from the shade of overseas business

activities, they can use public resources more efficiently and effectively. For the whole community of the OECD anti-bribery collaboration, this model would facilitate inflow of original information on transnational bribery.

This idea of incorporating the forces of the private sector actors into the forces of the public sector is embodied in the Federal False Claims Act[753] and Dodd-Frank Wall Street Reform and Consumer Protection Act (referred to as "Dodd-Frank Act"),[754] which create a role for private informants, as an exemplary institutional arrangement.

The Federal False Claims Act was enacted in 1863 to combat the fraud perpetrated by military companies that sold supplies to the Union Army. According to the 1863 version of this Act, private actors who have personal knowledge of the fraud offence can bring a civil lawsuit into the court on behalf of the government. After the plaintiff won the case, the offender who defrauded the government are required to pay double damages, and half of the damage would go to private actors who initiated the lawsuit.[755] However, this Act was not seriously enforced until 1986.[756] In 1986, Congress amended the False Claims Act, and increased the damages liability of those guilty of defrauding the government from double damages to treble damages.[757]

The False Claims Act, which encourages *qui tam Actions,* has been regarded as the most effective tool for federal government to control fraud against the

[753] Federal False Claims Act of 1863.

[754] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Also see Chapter V, 2.2.

[755] See Carrington (2010: 150), and Stengle (2008: 478).

[756] See Scammell (2004: 40). For a detailed discussion on the effectiveness of different versions of the False Claims Act see Chapter V, 3.2.1.

[757] False Claims Act Amendments, Pub. L. 99-562, 100 Stat. 3153 (27 October 1986). The Act was amended and reinforced once again in 2009 (Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617, 20 May 2009). Also see Carrington (2010: 140).

Federal Government.[758] This program allows private sector actors to initiate civil proceedings, in which judges only ask for "preponderance of proof" instead of "proof beyond reasonable doubt". After a private informant initiates a civil claim, the Department of Justice probably takes over the proceeding. This approach makes better use of both the original information from private sector actors and public resources. Moreover, private plaintiffs are free from the worry of litigation costs. If a private plaintiff wins the civil lawsuit, a substantial part (10%-30%) of the treble damages may go to him/her.[759] Even if he/she loses the lawsuit, it would be unlikely that a private sector plaintiff would not have to pay attorney's fees, given that a contingent fee arrangement should be possible.[760] Court fees and related costs (such as for expert witnesses) would, like the contingent fee arrangement, be subject to negotiation between the plaintiff and counsel. Private actors are in this way therefore incentivized to provide information regarding corrupt behavior.

Through the False Claims Act is not directed to transnational bribery regulation, its emphasis on the role of private sector actors in the enforcement of public laws has significant inspiration for the attempt of this Chapter to establish a holistic model which incorporates the advantage of private sector actor and the advantage of public power in the enforcement of public laws.

The Dodd-Frank Act is directly related to transnational bribery regulation. According to the Dodd-Frank Act, any persons have credible information on violation of securities law, in which transnational bribery is included, no matter whether they are stakeholders of the violation, can report this information to national authorities and get reward if the report results in a successful enforcement action.[761]

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[758] Many scholarly works have noticed the aggressive enforcement of the US False Claims Act since 1986. See e.g., Scammell (2004: 304-305).

[759] According to the law, 10%-30% fines may go to the whistle blowers as rewards and they can maintain anonymous. See Dodd–Frank Act, 15 U.S.C. § 78u-6 (b) (2012).

[760] For academic arguments supporting this program see e.g., Carrington (2009), but Hansberry (2012).

[761] See Dodd–Frank Act, 15 U.S.C. § 78u-6 (a) (6) (2012). For detailed discussion on the Dodd-Frank Act and the US's whistleblower program see Chapter V, 2.2.4.

Regarding to the function of the whistleblower program established under the Dokk-Frank Act of 2010, in transnational bribery regulation, as the DOJ & the SEC stated in *A Resource Guide to the US Foreign Corrupt Practices Act (2012)*, "Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapon in the law enforcement arsenal. Through their knowledge of the circumstances and individuals involved, whistleblowers can help SEC and DOJ identify potential violations much earlier than might otherwise have been possible."[762] The Whistleblower Program of the US established under the Dokk-Frank Act of 2010 provides another example of how the advantage of private forces and the advantage of public forces can be incorporated in a holistic model. Regarding to the function of the whistleblower program in controlling corruption, as *A Resource Guide to the US Foreign Corrupt Practices Act (2012)* suggests, "Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal. Through their knowledge of the circumstances and individuals involved, whistleblowers can help SEC and DOJ identify potential violations much earlier than might otherwise have been possible."[763]

In essence, both the *qui tam* action under the False Claims Act of 1986 and the Whistleblower Program under the Dokk-Frank Act of 2010 stress an incorporation of the advantage of private sector actor in obtaining first-hand information on violations and the advantage of public power in collecting solid evidence on violations in a holistic institutional arrangement. Both of them have inspiration for the solution model discussed in this Chapter.

[762] USDOJ & SEC (2012: 82). Of course, in practice, Dodd-Frank Act is also criticized by scholars because it causes a new kind of unfairness. The reality is that once a corporation is reported by a whistleblower to prosecutors, and the prosecutors accuse it of a crime of transnational bribery based on incomplete evidence, this corporation is highly likely to settle or plead guilty through non-prosecution agreements so as to avoid taking the allegations to trail, which may cause economic damages (e.g. company's reputation and stock price) times higher than fines, even if this corporation is not guilty in fact. See e.g., Hansberry (2012: 198).

[763] USDOJ & SEC (2012: 82).

5. Toward Effective Mutual Monitoring: Participation Rights of National Regulators in the Home Countries of Victimized Competitors

5.1 Can the US Model Be Marketed to Other Signatories?

Despite the self-evident utility of the US model of *qui tam* action and the whistleblower program as a deterrent to corruption, it is unlikely that it be marketed to all other signatories even through several other countries (e.g. India) have analogous institutions.[764] The utility of whistleblower program strongly relies on the political will of national regulators to take up the evidence offered and investigate acts of transnational bribery of their domestic companies, which is disputable under rationalistic assumptions. Even if the OECD Anti-Bribery Convention had indeed provided such a provision, it could not have been working as well as that in the US. As Carrington states, "there would remain the problem that most national courts who would be asked to hear such claims are less hospitable to plaintiffs bringing such civil tort cases. And perhaps many would be especially unreceptive to foreign claimants invoking international or foreign tort law against domestic defendant."[765]

This reason for this prediction is quite straightforward: as argued in Chapter III, the current collective action problem in OECD anti-bribery collaboration arises from the problem that the OECD WGB cannot give an accurate evaluation of anti-bribery efforts of signatories' national regulators, and the problem that faithful signatories' anti-bribery efforts have a risk of being exploited by shirking signatories.[766] Obviously, though the US mode of whistleblower program seems effective in resolving the former problem, it remains unable to resolve the problem of the exploitability of national anti-bribery efforts in OECD

[764] See Carrington (2009: 154).

[765] Carrington (2009: 159).

[766] See Chapter III, 4.

anti-bribery collaboration.

Under the OECD Anti-Bribery Convention, it is countries home to bribe-paying companies that have jurisdiction over transnational bribery offences.[767] When a victimized competitor (*Company B*) wants to initiate a civil lawsuit against a bribe-paying company (*Company A*), it has to make a claim in the court of the home country of *Company A* (*Country A*). Then whether *Company B* can win the lawsuit badly relies on the political will of national authorities of *Country A* to combat acts of transnational bribery of their domestic companies — which seems unlikely.[768] Grounded in the rational-choice theory, national regulators in the home countries of bribe-paying companies are unlikely to have the political will to regulate act of transnational bribery of their own companies — at least not as much as their political will to regulate that of foreign companies. So they may be quite reluctant to assist private sector actors from other countries to file claims against their domestic companies. They also might unreasonably question the credibility of information provided by private actors. As Tarullo states, "even if there is information available about a specific, possibly illicit payment, a prosecutor may have good reasons for declining to prosecute the case: insufficient evidence to meet a criminal conviction standard of proof, potential cost of the prosecution relative to other enforcement priorities, etc. It may not be an easy matter to distinguish instances of good faith non-prosecution from

[767] It is a conventional approach around the world that countries home to bribe-accepting officials also have jurisdictions over transnational bribery offences. As most countries condemn corruption, countries home to bribe-accepting officials might have motives to investigate transnational bribery offences. However, on the one hand, home countries of bribe-accepting officials are often less developed countries that have not yet address domestic corruption, they might be poorly-equipped to investigate corruption even if they have a political will (see 2.1.2 of Chapter I). On the other hand, the discussion in this Chapter is oriented to addressing the prisoner's dilemma inside OECD anti-bribery collaboration. Home countries of bribe-accepting officials that are member countries of the collaboration can definitely play a role, but when they are non-member countries, they are beyond the institutional arrangement of the collaboration. Therefore, the jurisdiction of home countries of bribe-accepting officials is not discussed in-depth here.

[768] See Chapter III, 2.

instances where prosecutors have ignored overseas commercial bribery in order to boost the competitive position of their country's firms."[769] Because the US model of *qui tam* action and the whistleblower program does not take into account the potential regulatory competition among signatories, it cannot necessarily work well even if it was transplanted to other signatories.

5.2 Taking the Role of National Regulators in the Home Countries of Victimized Competitors into the Solution Model

The monitoring problem in OECD anti-bribery collaboration demands a holistic solution which resolves the difficulty of collecting information on transnational bribery at the level of companies and also the regulatory competition at the level of national regulators in the same framework. There is little doubt that a US mode of whistleblower program, which combines the strength of private forces and the depth of public resources, would be effective to increase inflow of information on transnational bribery into the framework. However, for the purpose of resolving the regulatory competition at the level of national regulators, the US mode of whistleblower problem should be modified to facilitate information exchange among national regulators of different countries. This means a new information flow model (or monitoring system) should not only utilize business competition in the private sector, but also regulatory competition in the public sector.

Grounded in rational-choice theory, national regulators often have incentives to regulate transnational bribery if their companies have been victimized. The very reason for the US to negotiate the OECD Anti-Bribery Convention was to level the playing field for US companies in foreign markets.[770] Signatories to the OECD Anti-Bribery Convention are not only collaborators in OECD anti-bribery

[769] Tarullo (2004: 689).

[770] See Pieth (2007: 21). Also see Chapter I, 2.2.3.

collaboration, but also competitors in international markets. They are not only (if at all) motivated to regulate acts of transnational bribery of domestic companies as they have promised, but even more strongly motivated to protect domestic companies' legal business interests from being plundered by bribe-paying foreign companies in foreign markets. Perhaps national regulators of most signatories (if not all) are not materially incentivized to combat acts of paying bribes to foreign officials by their own companies. They are definitely motivated to prevent foreign companies — which are competitors of their domestic companies — from paying foreign bribes.

Compared with victimized companies, national regulators in the home countries are often more powerful to initiate dialogue with national regulators in the home countries of bribe-paying companies who have jurisdiction over transnational bribery offences, and then impose political pressure on them if they shirk their regulatory duties.[771] According to the arrangement of the OECD Anti-Bribery Convention, it is national regulators in the countries home to bribe-paying companies that are in the position to handle cases of foreign bribery. The whole process of detecting and investigating foreign bribery is completely under the control of national regulators in the countries home to suspected bribe-paying companies. National regulators in the countries home to victimized companies can hardly access this process, even if they are motivated to do so. This institutional arrangement leads to a situation that whether one signatory would regulate acts of transnational bribery of domestic companies is contingent on the political will of the national regulators in this country rather than on the pressure from external scrutiny. Lack of external scrutiny makes it possible for national regulators to shirk their duties for the benefit of domestic companies. Even if there is available information on foreign bribery offence, they can easily find excuses to not to take

[771] Considering the relative power imbalances in world politics, it could be very difficult to carry out a dialogue between national regulators from different countries. However, in a relative sense, the discursive power of national regulators is definitely be stronger than that of victimized companies, and in reality, it is indeed common for national regulators to dialogue and cooperate with each other. So the institutional arrangement is feasible in practice, despite its imperfection in theory.

an enforcement action.[772]

The participation of national regulators in the country home to the victimized company would impose political pressure on national regulators in the country home to the suspected bribe-paying company. Then the power of the victimized company and that of the suspected bribe-paying company are well balanced in the process of investigation. On the one hand, national regulators in the countries home to bribe-paying companies that otherwise may shirk their duties might feel pressure from national regulators in the countries home to victimized companies, and therefore enforce anti-bribery laws effectively. On the other hand, as national regulators in the countries home to victimized companies can indirectly monitor the behavior of foreign companies and regulatory efforts of regulators in other signatories, they are unlikely to shirk because of uncertainty in collective actions.

This is why national regulators in countries home to victimized companies should play a more active role in the fight against transnational bribery. For these reasons, the US model of a whistleblower program should be modified to incorporate the role of national regulators in the home countries of victimized competitors.

The participation of national regulators in the home countries of victimized companies in investigations to transnational bribery can be justified by the passive personality principle in the customary international law — which, in Ryngaert's words, refers to "the nationality of the victim, which certainly constitutes a legitimate interest of the State, also constitutes a sufficient jurisdiction link under international law". [773] As above noted in 2.2 of this Chapter, in normal situations, the territoriality principle is the basic principle for the application of laws. In exceptional situations, national laws can be extraterritorially applied according to the principle of active personality, the

[772] See Tarullo (2004: 689), and Burger & Holland (2006: 57).

[773] Ryngaert (2008: 93).

principle of passive personality, the protective principle or the university principle.[774] The enforcement of the FCPA-style laws is the application of active personality principle, which exterritorialy applies domestic laws to nationals abroad. The legitimacy of active personality jurisdiction is virtually uncontroversial. Scholars like Ryngaert even consider it as the responsibility of home countries to apply laws to nationals' behavior abroad.[775] When the OECD Anti-Bribery Convention requires signatories to regulate corrupt behavior of their companies abroad, it routinizes the application of active personality principle. The argument here which advocates the role of home countries of victimized competitors, is about passive personality principle, which refers to the extraterritorial application of laws to crimes where a country's nationals are victimized. [776]

Of course, national regulators in the home countries of victimized companies should only play a supporting role in anti-bribery campaign. The passive personality principle is considered as the most aggressive basis for extraterritorial jurisdiction.[777] Investigating transnational bribery offences means regulatory intervention into business transactions of companies, and it may lead to criminal liability of suspected bribe-paying companies and bribe-accepting officials. If the home countries of victimized companies dominate the whole process of investigations and prosecutions, it may cause unpredictable legal risk for perpetrators about applicable laws because "in many cases, he (the bribe payer) will not know the victim's citizenship…Apart from the obvious problems of rehabilitation when imprisoned in a foreign state, adherence to the passive personality principle would amount to a blatant rejection of the criminal justice

[774] For general information on law application principles see Ryngaert (2008).

[775] For discussion on the active personality principle see Ryngaert (2008: 88).

[776] See Cafritz & Tene (2003: 598-599).

[777] See Cafritz & Tene (2003: 598-599), and Ryngaert (2008: 93).

systems of other states."[778] Therefore, the application of the passive personality principle is often strictly limited; and it is more appropriate and practical for regulators in the home countries of victimized companies to play a supporting role, standing by in the whole process of investigation as external scrutiny forces. For instance, victimized companies of transnational bribery offences could be authorized to complain to both their home countries and the country home to suspected bribe-paying companies. Once the evidence meets certain criteria, the case would be opened, and the two or more countries involved could establish a joint investigation team to investigate the case.

5.3 Outlining a New Type Monitoring System

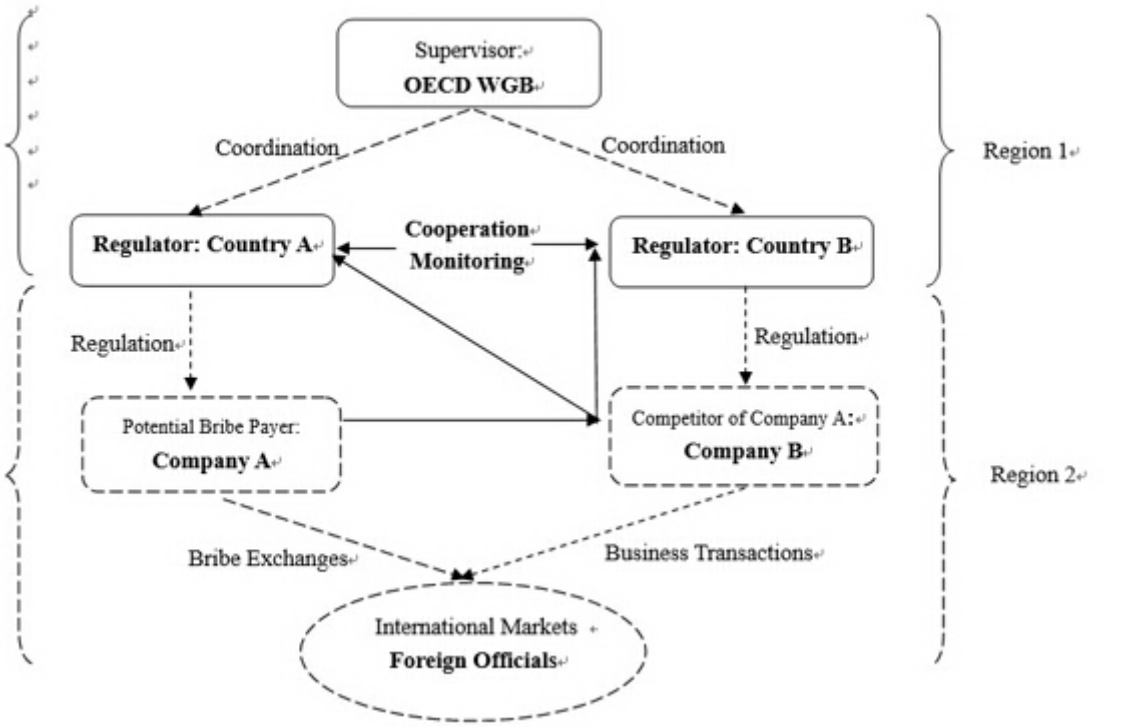
Now all the elements of the new monitoring system I propose have been laid out. In the first place, two levels of competitive relationships are introduced into this framework, illustrated by the solid linkage between *Company A* and *Company B* and that between *Country A* and *Country B.* At the level of companies, it should enable competing companies and any other private sector actors who have personal experience of corrupt behavior to disclose evidence of transnational bribery offences. Victimized companies should present relevant information to the home country of the bribe-paying company as well as their own home country authority. At the national level, institutional connections between home countries of bribe-paying companies (*Country A*) and home countries of victimized companies (*Country B*) should be established to facilitate the participation of national regulators of *Country B* in the information processing dominated by national regulators of *Country A.* This means the restructured network of information flows in the anti-bribery collaboration aim to provide national regulators of one country opportunities to participate in, or at least to be informed of, the investigation of another country regarding a transnational bribery offence from which their own companies may have suffered a loss of

[778] Jurgen (1990: 114).

business.

When the competitive relationships in the private sector and in the public sector are both introduced into the monitoring mechanism, connections between bribe-paying companies and victimized companies, and connections between national regulators of bribe-paying companies and national regulators of victimized companies are established. The isolation between players in the anti-bribery regime is eliminated. More frequent interactions among actors would enable national regulators of one country to gain a better understanding of the level of another country's enforcement of the OECD Anti-Bribery Convention and then make their own strategies. They do not have to count solely on a centralized supervisor, which might provide general, inaccurate information on others' compliance with the Convention, but would now have direct access to information on others' regulatory compliance. Information on state compliance would no longer come from law-on-the-books, but from the first-hand experience of competing companies. As this information flow framework is quite different from the current OECD monitoring system (which has a centralized structure and relies on the OECD WGB to collect and disseminate information), I call it a decentralized, bottom-up monitoring system (See Figure 4).

Figure 4: Restructured Information Flows



6. Conclusion

The arguments of this Chapter can be summarized under four headings: First, current literature has reached a consensus on the importance of effective monitoring for the enforcement of the OECD Anti-Bribery Convention and the under-performance of the current Monitoring system. However, no effective analysis has been offered of the structural flaws in the current OECD monitoring system that cause the monitoring problem. In other words, current *problem-solving* literature has not prescribed successful solutions to the problem it identified. This Chapter has sought to fill this analytical gap.

Second, the surreptitiousness of transnational bribery and the potential regulatory competition among signatory countries determine that the effectiveness of the OECD monitoring system is a function of the extent to which the institutional structure of the OECD monitoring system makes national anti-bribery efforts monitorable. However, the centralized architecture of the current monitoring

system relies on the OECD WGB to collect information from signatories by way of reviewing written laws and interviewing relevant national officials, and then to provide this information to signatories in the form of country reports. This approach fails to acquire and provide accurate, first-hand information on national regulatory efforts. As a result, it fails to help signatories maintain effective mutual control.

Third, in order to increase the level of information inflow, a new type of monitoring system should incorporate the comparative advantage of private sector action in finding evidence of corruption and the comparative advantage of public sector offices to investigate such evidence further, so that it can be convincing in court. For this reason, the US model of *qui tam* actions and the whistleblower program which commonly stress an incorporation of the role of private sector actor and the role of public power in a holistic institutional arrangement and has proved to be an effective tool in the enforcement of public laws should be introduced.

Fourth, the new type of monitoring program would not be effective if limited to a whistleblower program because of the problem of regulatory competition among signatories. Therefore, the role of national regulators in the home countries of victimized business competitors should be introduced into the information flow framework. Given that this approach involves the application of the passive personality principle of international law, which increases the legal risk for potential bribe-paying companies, national regulators in the home countries of victimized companies should only play a supporting role.

It should be noted that the three-level monitoring mechanism framed in this Chapter is a holistic solution model different from all policy recommendations prescribed by current *problem-solving* literature. As discussed in previous chapters, the standard *problem-solving* approach applied by current literature, which is based on the *political-will* assumption and only focuses on one level of interactions among signatories, has successfully attributed the “ineffective

enforcement" of the Convention to the "prisoner's dilemma" among countries, and has suggested to establish an effective monitoring mechanism to resolve this problem. However, it also has stopped at that. Its simplistic interpretative model which only focuses on one level of interactions among countries blinds scholars from capturing the root cause of the "ineffective enforcement"—a complex situation woven by the regulatory competition among national regulators from different countries and the fact that their regulatory efforts are not visible in a clearly measurable way. As a result, scholarly works following this simplistic interpretative model cannot prescribe successful solutions to the problem identified. In order to resolve this problem, a restructured *problem-solving* approach no longer treats signatories as unitary actors whose choices are embodied in the work of national regulators, but a system composed of both regulatory competition among national regulators of different countries in the public sector and business competition among companies from different countries in the private sector. Accordingly, the new monitoring model is framed based on both the competitive relationships on the two linked levels. It is a systematic, holistic *problem-solving* approach.

It should also be noted that this initial argument for the utility of the three-level monitoring mechanism constructed in this Chapter is at the theoretical level. At a practical level, before constructing such a monitoring mechanism, there are at least another two questions that must be taken into consideration:

First, the possibility of harassment complaints by private sector actors presents a real problem. In practice, although the effectiveness of *qui tam* actions and the whistleblower program of the U.S. discussed above is obvious to all, it is also cause for criticism from the business community and academia for such private enforcement. The central concern of dissidents is the potential risk of harassment complaints brought by opportunists given the big bonuses for them in case of successful lawsuits. Harassment complaints not only increase the workload for prosecutors, but also damage transnational corporations. As Hansberry suggests,

"[t]he whistleblower provisions will likely increase the number of FCPA investigations and also lessen a defendant's ability to combat the charges, given the nature of complaints from anonymous whistleblowers. Whistleblower anonymity may prevent a company from conducting a thorough internal investigation... Thus, companies and individuals may more frequently choose to settle or plead guilty to FCPA charges, regardless of the legitimacy of the allegations, because of the uncertainty resulting from anonymous accusations. Corporations have much to lose by taking FCPA allegations to trial. The mere fact that a corporation is under investigation by the government has reliably damaging results on shareholder confidence and stock prices."[779] This means, when instruments like the whistleblower program help to broaden information channels for prosecutors, they cause new problems. The practical design of a mechanism must take further elements into consideration (e.g., an operative filtering mechanism for potential nuisance claims) beyond merely increasing information inflows regarding transnational bribery.

The second problem concerns the opportunity for the participation of home countries of victimized competitors. Besides the legitimacy of the passive personality principle discussed above, which allows the participation of home countries of victimized competitors, in designing a mechanism the real possibility of reaching an agreement among countries on such an institution must be taken into account. A related question is how to ensure the efficacy of such an institution in the face of real and continuing power imbalances. In other words, the three-level monitoring mechanism framed in this Chapter only serves as a heuristic regime model which advocates broader channels for information collection and exchange, and more frequent interactions and mutual monitoring among players at the same level (e.g., among companies or among countries). The design of the concrete system in practice is another topic that requires an analysis of factors beyond the scope of this study.

[779] Hansberry (2012: 197-198).

Chapter V: Inspirations from the US's Increasingly Aggressive Enforcement

1. Introduction

The 15 years during which the OECD Anti-Bribery Convention has been enforced has made it clear that signatories' compliance with the Convention is characterized not only by most signatories' defection — as current literature highlights based on the small number of prosecutions in most signatories, but also by the increasingly zealous enforcement against transnational bribery by leading jurisdictions — the US, for example. This awareness is critical for academic analysis with a purpose of either constructing theories or formulating policy recommendations.

That the US has enforced the FCPA in an increasingly aggressive manner ever since the ratification of the OECD Anti-Bribery Convention is uncontroversial.[780] Many academic papers have restated how large the number of the US's enforcement actions is,[781] and how huge the amount of fines collected.[782]

[780] For data on the variation in the number of enforcement actions brought by the SEC and the DOJ see respectively: SEC Press Release: See SEC Press Release, "SEC Enforcement Actions: FCPA Cases", available at: http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited: 29 July 2014); and DOJ Press Release, "FCPA and Related Enforcement Actions", pp..10-11, available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited: 7 April 2014), USGAO (1981). For academic viewpoints on this question: Cortney C. Thomas states that "the (Foreign Corrupt Practices) Act had little to no effect in its first twenty-five years of existence. Then, in the early twenty-first century, the Department of Justice and Securities Exchange Commission ("SEC") began an exponential increase in the Act's enforcement." Thomas (2010: 439-440). Barbara Black states that "the SEC demonstrated little interest little interest in enforcing the anti-bribery provision and never asserted that it was related to the SEC's mission (prior to the 2000s)… Although the SEC did not signal any change in enforcement policy, the SEC began to enforce the FCPA in earnest in the early 2000s…and an SEC press release in October 2008 described FCPA cases as a 'growth' area." Black (2012: 1095, 1108, 1109). Also see Schmidt (2009: 1131).

[781] *Progress Report 2011 on Enforcement of the OECD Anti-Bribery Convention* (Transparency International) suggested that the number of enforcement actions of the US was 169 in 2009 and 227 in 2010. In both years the number of enforcement actions of the US exceeded the aggregation of enforcement actions of other signatories. See Heimann *et al.* (2011: 8).

Beyond that, there have been a series of innovative enforcement tools created in FCPA enforcement practice (e.g., whistleblower programs[783] and the application of diversion agreements[784]).

That the developmental trajectory of FCPA enforcement in the US is not entirely explicable by the standard rational-choice account is also uncontroversial. In Chapter I, I have labeled the standard model of previous analysis of global collective action against transnational bribery as a "*problem-solving* paradigm". Grounded in the rational-choice tradition, this paradigm assumes that domestic efforts to regulate transnational bribery disadvantage domestic companies in overseas business competition. Thus OECD anti-bribery collaboration under the Convention suffers the problem of a "prisoner's dilemma". There should be a centralized sanction mechanism or monitoring mechanism to prevent faithful state actors from being exploited by free-riding countries. Otherwise, the collective action would fail because of the defection of most members. No signatory would faithfully combat transnational bribery. Accordingly, academic research on global anti-bribery collaboration is actually an effort to solve a collective action problem.[785]

This formulation of the *problem-solving* paradigm has both virtue and limit: it is convincing to people who have noticed that the prosecution records in most signatories were poor, but does not apply well to the story of FCPA enforcement in the US, which does not develop following the logic of defection, and is

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[782] For example, Heidi L. Hansberry states that "The FCPA empowers both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) to enforce these two prongs…The DOJ and SEC have been overwhelmingly successful in their enforcement efforts, as measured by the price tags of the settlements they have achieved. The top ten corporate FCPA settlements in the past three years alone amount to over $ 3.1 billion…These figures make it clear that the FCPA has created a high-stakes game for implicated corporations, issuers, and individuals." Hansberry (2012: 195-196).

[783] See Hansberry (2012).

[784] For detailed discussion see Thomas (2010).

[785] See e.g., Tarullo (2004: 690), Magnuson (2013: 383), Brewster (2010: 308), and Davis (2012: 498). Also see Chapter I, 4.3.

making ambitious plan for even more aggressive enforcement in the future.[786]

Current literature has also realized this limit of the *problem-solving* paradigm, and has tried two approaches to "save" this powerful interpretative approach: One method is to relax some insignificant assumption of the standard *problem-solving* paradigm but retain the hard core of it, so as to resolve the conflict between the US case and the assumptions of the paradigm. The scholarship along these lines tends not to defy, but sticks to the assumption that domestic regulation of transnational bribery by the US disadvantages US export. However, it might rationalize US's strategy on FCPA enforcement as resulting from the fact that FCPA enforcement is consistent with US overall national interests (e.g. defense interest, foreign policy) beyond US export interest.[787] In essence, this approach attempts to construct a new landscape of "US national interests" in which its rationality lies. This line of thinking not only explains the US's concern with defense interests during the Cold War, but also predicts an increase in the enforcement of the FCPA after 11 September 2001, given that bribery of officials in some developing countries might be connected to the financing of terrorism.[788]

Another method, instead, tends to take the US case as an exception to the prediction of the standard paradigm. It calls into question the rationality of US state behavior, and argues that the developmental reality of FCPA enforcement results from irrational (or altruistic) decision of US officials.[789]

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[786] See Black (2012: 1109).

[787] As Pieth comments, "scholars have taken the enactment of the FCPA more or less for granted; few discuss the reasons for such an unusual step in the 1970s…there must have been strong domestic reasons for the US legislator to take this step unilaterally, reasons going beyond the general sympathy of the Carter administration for business ethics. Case law and legislative materials suggest that the US legislator believed it was acting to protect the free market system against the erosion of public confidence." Pieth (2007: 7-8). Also see Koehler (2012).

[788] For detailed discussion on the concerns of US Defense Department regarding transnational bribery regulation see Koehler (2012: 969).

[789] See e.g., Copeland & Scott (1999), and Davis (2002; 2012).

This attempt can hardly succeed — or to say the least, can hardly serve the objective of our analysis of the dynamic of the US's increasingly aggressive enforcement of the FCPA. The essence of both approaches is an attempt to defend the applicability of realistic assumptions in explaining the status quo of the enforcement of the OECD Anti-Bribery Convention around the world. Reconstructing a version of US national interests helps to rationalize the "state behavior" of the US, but it helps us little in predicting the future trend of FCPA enforcement and formulating policy recommendations for the reference of lagging jurisdictions — in any sense, the landscape of US national interests' is an *ex post* construction, instead of an objective reality. Treating the US case as an exception helps to defend the applicability of realistic assumptions in cases of many other countries. However, because it calls into question the rationality of behavior of the US, it only reconfirms that the realistic assumption is inapplicable in our exploration of the dynamic of the US's increasingly aggressive enforcement of the FCPA — an exceptional but important part of the reality of state compliance with the OECD Anti-Bribery Convention.

I seek to reveal this mystery of the dynamic of the increasingly aggressive enforcement of the FCPA. The starting point of this study is an awareness that FCPA enforcement does not result from any abstract, constructed "behavior" of the US, but is embodied in multiple domestic agencies' independent performance of their own statutory duties under the FCPA. Besides, FCPA enforcement lies in a set of concrete actions of these domestic enforcing agencies at specific moments of an evolving context. It is inappropriate to assume the performance of different agencies at different times as a unitary function of certain interests. In the discourse of this Chapter, FCPA enforcement is all about how different agencies had made responses to a certain circumstance in a period of time, which contributed to the current landscape of FCPA enforcement.

The FCPA authorized the SEC and the DOJ to share the statutory enforcement

authority of the FCPA.[790] So I observe the developmental trajectory of FCPA enforcement from these two paralleled perspectives. This Chapter has five sections. Section 2 analyzes how SEC's regulatory efforts on transparent corporate management in the past decades made its statutory duty of enforcing the FCPA — a previously remote task, become an inseparable part of its working routine. Section 3, in parallel, explains factors that accounted for a transformation of the DOJ's strategy on FCPA enforcement from "passive enforcement" in the first two decades to "active enforcement" in recent two decades. Section 4 extracts a general pattern characterizing the dynamic of FCPA enforcement by the US. Section 5 concludes major arguments of the discussion.

2. The SEC's Increasingly Aggressive Enforcement of the FCPA

When the FCPA was enacted in 1977, the Congress authorized the SEC to share the enforcement authority with the DOJ. The SEC is responsible for maintaining fair, orderly and efficient markets in securities in the US and regulates exchanges, issuers of securities, broker-dealers, investment funds, significant aspects of the accounting industry, and the FCPA. It has the authority to pursue civil, injunctive and (with law enforcement agencies) criminal remedies.[791] The DOJ supervises criminal enforcement over both issuers and domestic concerns, as well as civil enforcement over domestic concerns.[792] Here the term "issuer" refers to public companies that "has a class of securities registered under Section 12 of this title (the Securities Exchange Act of 1934) or is required to file periodic and other reports with SEC under section 15 (d) of this tile (the Securities Exchange Act of 1934)";[793] and The term "domestic concern" refers to "(A) any individual who is

[790] See §78dd-1 and §78dd-2 of Foreign Corrupt Practices Act of 1977. Also see USDOJ & SEC (2012: 4).

[791] See §78dd-1 of Foreign Corrupt Practices Act of 1977. Also see § 30A of the Securities Exchange Act of 1934 and USDOJ & SEC (2012: 4).

[792] See §78dd-2 of Foreign Corrupt Practices Act of 1977. Also see USDOJ& SEC (2012:4).

[793] See § 30 (A) (a) of Securities Exchange Act of 1934. Also see §78dd-1 of the Foreign Corrupt Practices Act of 1977 and USDOJ & SEC (2012: 4).

a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."[794] That is, the term "domestic concern" therefore includes businesses that are not listed on a stock exchange of the US and are not registered with the SEC.

By 2014, the SEC has enforced the FCPA for 37 years. Current anti-bribery literature has reached a rough consensus that Year 2001 is a watershed of SEC's enforcement of the FCPA — one major criterion for current literature to make this conclusion is the small number of enforcement actions before that date.[795] Prior to 2001, the SEC brought only a few enforcement actions involving violations of the FCPA.[796] Current scholarship labels the period prior to 2001 as the "quiet years" of FCPA enforcement,[797] in which the FCPA was a "legal sleeping dog".[798] Since 2001, SEC's enforcement effort increases steadily.[799] Though the calculation results of scholars are different, they converged on the viewpoint that FCPA enforcement prior to 2001 is unsatisfactory, and began to increase dramatically since the 2000s.

Factors accounting for this developmental trajectory, however, remain

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[794] See §78dd-2 (h) of the Foreign Corrupt Practices Act of 1977. Also see USDOJ & SEC (2012: 4).

[795] For articles describing the increasingly aggressive enforcement of the FCPA by the US see e.g., Hansberry (2012), Blume & McConkie (2007), and Thomas (2010: 439).

[796] See SEC Press Release, "SEC Enforcement Actions: FCPA Cases", available at: http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited: 29 July 2014).

[797] Black (2012: 1096).

[798] Blume & McConkie (2007: 91).

[799] During the period from 2001 to 2006, the number of FCPA actions brought by the SEC increased steadily, though remaining in the single digits; and since 2007, the number ramps up to double digits. See SEC Press Release, "SEC Enforcement Actions: FCPA Cases", available at: http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited: 29 July 2014). Also see Black (2012: 1108-1109).

unspecified. This Section attempts to solve this puzzle from the perspective of the SEC. In particular, it analyzes how the SEC's statutory duty under the FCPA is consistent with its central mission in different historical periods, and how this indicator affects SEC's efforts on and achievements in FCPA enforcement.

2.1 The SEC's "Quiet Years" in FCPA Enforcement in the First Two Decades

2.1.1 Enforcing the Anti-Bribery Prong of the FCPA: A Duty "Uncorrelated" to the SEC's Mission

2.1.1 (A) The SEC's Central Mission

The SEC was created against the backdrop of the stock market crash of 1929. As this led to the collapse of public confidence in capital markets, there was an urgent need for regulatory intervention of the Government to restore public faith. Accordingly, the Government enacted a series of laws,[800] obliging public companies to promote the level of information disclosure. According to these laws, public companies are required to "tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing."[801]

It is the Securities Exchange Act of 1934 that created the SEC and required the SEC to oversee key participants in the securities world so as to provide markets with rules of good corporate behavior and investors with true information.[802]

[800] Several examples of laws issued in this context are the Securities Act of 1933, the Securities Act of 1934, and the Investment Company Act of 1940, which requires companies to disclose their investment policies and their financial conditions to public investors.

[801] SEC Press Release, "The Investor's Advocate: How the SEC Protects Investors, Maintain Market Integrity, and Facilitates Capital Formation", available at: https://www.sec.gov/about/whatwedo.shtml#.U2YBm_mSz6Q (last visited: 4 May 2014).

[802] As § 4 (a) of this Act provides, "There is hereby established a Securities and Exchange Commission…to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternatively as nearly as may be practicable." § 4 (a), Securities Exchange Act of 1934. Also see the SEC Press Release, "The Investor's Advocate: How the SEC Protects Investors, Maintain Market Integrity, and Facilitates

From its creation the SEC has given a central place to promoting information disclosure. At present, eight decades after the SEC's creation, the SEC still defines its own mission as to be primarily concerned with "promoting the disclosure of important market-related information, maintain fair dealing, and protecting against fraud."[803]

Prior to 1977, the Securities Exchange Act of 1934 did not authorize the SEC to supervise the internal management and business activities of companies that were not securities intermediaries. Under this Act, the SEC's statutory duty with respect to listed companies was limited to overseeing the registration of their securities, the regular disclosure of information on the company and corporate management, and policing against fraud, abuse and false disclosure in the market.[804] A key element of high-quality information disclosure is full and true accounting records. As seen in Chapter II, the FCPA arose in a tradition closely related to the SEC's concern with false accounting problems.[805]

2.1.1 (B) The SEC's Statutory Duty of Enforcing the FCPA

In 1971, an investigation over questionable funds provided for President Nixon's re-election campaign led to the revelation of a series of false accounting methods for concealing transnational bribery by public companies. The event was known as the "Watergate Scandal".[806] This scandal reminded the Director of Enforcement of the SEC, Stanley Sporkin, of the problem of false accounting. Sporkin, as he states, asked "how did a publicly traded corporation record such an illegal transaction? What, if any, information did the outside auditors

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Capital Formation", available at: https://www.sec.gov/about/whatwedo.shtml#.U2YBm_mSz6Q (last visited: 4 May 2014).

[803] SEC Press Release, "The Investor's Advocate: How the SEC Protects Investors, Maintain Market Integrity, and Facilitates Capital Formation", available at: https://www.sec.gov/about/whatwedo.shtml#.U2YBm_mSz6Q (last visited: 4 May 2014).

[804] See §§ 10-14 of the Securities Exchange Act of 1934.

[805] See Chapter II, 2.1.2.

[806] For a detailed description of the revelation of the issue of transnational bribery see Koehler (2012: 932-934).

have?"[807] Then he initiated a series of investigations into corporate accounting, which showed that public companies had been accustomed to disguise questionable payments to foreign officials on their books and records. Soon after, the SEC started a voluntary disclosure program which encouraged public companies to disclose the illicit payments voluntarily to the SEC.[808] The situation was serious: "over 400 US companies admitted making questionable or illegal payments in excess of $ 300 million to foreign government officials, politicians and political parties."[809] This finding of the SEC generated a demand for making laws to prohibit false accounting methods, which finally, unexpectedly, resulted in the enactment of the FCPA. The FCPA has both accounting provisions and anti-bribery provisions, giving an overall prohibition of both false accounting methods and acts of foreign bribery.[810]

Here the paradox is, for the SEC, the accounting prong of the FCPA was precisely and solely what the SEC had requested at the time. The SEC had defined its own mission to be limited to overseeing information disclosure of public companies on business activities, rather than overseeing business activities themselves, unless the company operated under an SEC license, such as a broker-dealer or investment company.[811] Therefore, the SEC only intended to add accounting provisions into securities laws so as to promote the transparency of corporate management. As the SEC expressed this objective in its 1976 report to the Congress, it wanted an Act containing (a) "a prohibition against the falsification of corporate accounting records"; (b) "a prohibition against the making of false and misleading statements by corporate officials or agents to

[807] Sporkin (1997: 271).

[808] See Sporkin (1997: 270-272).

[809] United States Department of Justice, "Foreign Corrupt Practices Act Anti-Bribery Provisions" in A.B. Levenson *et al*., *Corporate Compliance and the FCPA*, 1997, p.131, cited in Sporkin (1997: 272).

[810] See §78dd-1 and §78dd-2 of Foreign Corrupt Practices Act of 1977.

[811] For a detailed discussion on the evolution of the SEC's enforcement program prior to 1977 see Atkins & Bondi (2008: 372-383).

those persons conducting audits of the company's books and records and financial operations"; and (c) a requirement for corporate management "to establish and maintain its own system of internal accounting controls designed to provide reasonable assurances that corporate transactions are executed in accordance with management's general or specific authorization".[812] All the SEC advocated, was institutional remedies to amend the supervision loopholes in the current securities laws.

Meanwhile, the SEC did not think it was necessary to prohibit transnational bribery. As it suggested in its 1976 report to the Congress,

"…the question of illegal or questionable payments is obviously a matter of national and international concern, and the Commission, therefore, is of the view that limited-purpose legislation in this area (without bribery prohibition) is desirable in order to demonstrate clear Congressional policy with respect to a thorny and controversial problem."[813]

Even if the forthcoming legislation had to have an anti-bribery prong, the SEC did not think of itself as the proper enforcing agency of such anti-bribery provisions. In the view of the SEC, bribery regulation involves intervention into substantial business activities, an area which the SEC had neither expertise nor mission to regulate. Therefore, the SEC suggested the Congress not to authorize that part of enforcement power to it. As Roderick Hills (SEC Chairman) stated in his testimony to the Senate Banking Committee in March 1977,

"[The SEC] would prefer not to be involved in civil enforcement of [the anti-bribery] prohibitions since they embody separate and distinct policies from those underlying the federal securities law. The securities laws are designed primarily to insure disclosure to investors of all the relevant facts concerning corporations which seek to raise their capital from the public at large. The [anti-bribery] prohibitions… would impose substantive regulation on a particular aspect of corporate behavior…[T]he enforcement of such provisions does not easily fit within the [SEC]'s mandate."[814]

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[812] Rubin (1976: 623-625).

[813] Rubin (1976: 623). For detailed discussion on the SEC's attitude see Chapter II, 2.1.2.

[814] *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing before the Committee on Banking, Housing, and Urban Affairs*, United States Senate, 95th Congress, first session, on S. 305, 1977, 124-125, cited in Black (2012: 1098-1099).

The result was, however, the FCPA indeed had an anti-bribery prong. The reason was straightforward: the immorality of transnational bribery was uncontroversial. Once the problem of transnational bribery was disclosed to public awareness, it could no longer enjoy an "uncertain" legal status as it had in the past. The US government had to prohibit it because it could never adopt a law allowing corrupt foreign governments.[815] This means, prohibiting transnational bribery was an unavoidable consequence as long as it was revealed through accounting, independently of the original mandate of the SEC or any other governmental agencies.[816]

Meanwhile, the Congress insisted on allocating the responsibility of supervising the civil enforcement of the FCPA over issuers (both the accounting prong and the anti-bribery prong included) to the SEC, despite SEC's resistance. The Congress had its own consideration: in any sense, most (if not all) of revealed transnational bribery cases were made by companies registered with the SEC, and the bribes were revealed by the SEC's disclosure and investigative programs. The SEC seemed to be the most appropriate agency for enforcing both accounting requirements and the new prosecution of anti-bribery under the FCPA. This consideration of the Congress can be found in a statement of the Committee on Banking, Housing and Urban Affairs in 1977,

> "After careful consideration the committee concluded that SEC should continue to have a role in the investigation of violations of the criminal prohibitions as they apply to companies under the jurisdiction of the SEC. The SEC has been the principal agency of the Government taking the lead in the investigation of foreign bribery. This is as it should be for the bribery of foreign officials often violates our securities laws to the extent the payment is not disclosed to investors. The SEC has thus developed considerable expertise

[815] As Charles L. Marinaccio, a Minority Counsel of the Senate Committee on Banking, Housing and Urban Affairs suggested, "In any reexamination of the FCPA, some things will not change: the United States will never adopt a policy that it is acceptable to corrupt foreign governments; the United States will never permit bribery to corrupt a free market; the United States will always require corporations to behave as responsible citizens; the United States will always seek to preserve the integrity of its capital markets. If the law changes, it will have to continue to meet the public policy objectives I have outlined." Marinaccio (1982: 348).

[816] See Chapter I, 2.3.

in investigation corrupt overseas payments. This same expertise can be put to work in investigating potential violations of the ant bribery provisions of this legislation. If this investigative responsibility were to be assigned solely to the Justice Department, as some had advocated, that agency would have to duplicate the investigative capability already in SEC at a greater cost to the Government."[817]

2.1.1 (C) The SEC's Resistance to the Statutory Duty

The SEC's resistance to this statutory duty of enforcing the anti-bribery prong (not the accounting prong) lasted for over a decade. Throughout the 1980s, the SEC for several times proposed to transfer its responsibility of enforcing the anti-bribery prong of the FCPA to the DOJ. The SEC reasserted that the anti-bribery prong of the FCPA, by its very nature, referred to intervention into the substantial part of a company's business activity, and was not consistent with the central mission of the SEC. Neither was SEC, which was trying to address the rapidly evolving securities markets and shape them into a "national market system" pursuant major amendments of the Securities Exchange Act in 1975,[818] equipped with necessary detecting and investigative techniques to fulfill this task.

The following paragraphs present several examples of SEC's attempts to get rid of its responsibility of enforcing the anti-bribery prong of the FCPA:

In March 1981, the Senate Banking Committee submitted a recommendation to the 97th Congress, including a recommendation for transferring the civil enforcement of anti-bribery provisions from SEC to the DOJ.[819] The SEC endorsed this proposal.[820]

Once again, in February 1983, the SEC proposed a consolidation of the

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[817] *Report of the Committee on Banking, Housing, and Urban Affairs United States Senate to Accompany S. 305, together with Additional Views*, 12, 95th Congress, first session, on S. 305, 95th Congress, 1st Session, Report No. 95-114, 28 March 1977.

[818] Securities Acts Amendments of 1975, Pub. L. 94-29, June 4, 1975, 89 Stat. 97 (1975).

[819] See S. Report 97-209, Part 1, 23 November 1981. Available at: http://beta.congress.gov/bill/97th-congress/senate-bill/708 (last visited: 7 May 2014).

[820] See Black (2012: 1105).

enforcement of anti-bribery provisions in the DOJ, or repealing it — as John S. R. Shad (SEC Chairman) stated in a joint hearing of the Committee on Banking, Housing, and Urban Affairs,

"Congress decided to assign certain antibribery civil enforcement responsibility to the Commission…The Commission's antibribery enforcement responsibility as set forth in section 30A of the Securities Exchange Act…The Commission's primary mission is disclosure, not substantive regulation of commercial transactions. Therefore repeal of section 30A or consolidation of that requirement within the Justice Department would not impair SEC's ability to administer the securities laws."[821]

In June of the same year, John R. Evans (a Commissioner of the SEC) restated SEC position with respect to the proposed amendments to the FCPA,

"A second major aspect of the amendments would eliminate the Commission's responsibility for civil enforcement of the anti-bribery provisions of the Act because this prohibition is based on a national policy unrelated to the objectives of the securities laws."[822]

In February 1985, once again, the Senate Banking Committee suggested to transfer the civil enforcement authority from the SEC to the DOJ.[823]

However, as above noted, the Congress had a reason to adhere to its decision too. All these proposals passed the Senate but did not pass the House.[824] Even by 1988, when the Reagan Administration enacted the Omnibus Trade Act of 1988 which amended the FCPA,[825] the proposal of consolidating civil enforcement of the anti-bribery prong of the FCPA over issuers to the DOJ was never put into effect.

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[821] *Business Accounting and Foreign Trade Simplification Act: Joint Hearing before the Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs*, United States Senate, 98th Congress, 1st Session, 24 February 1983, pp..48-49.

[822] Evans (1983: 11).

[823] See S. Report 99-486 Part 1, available at: http://beta.congress.gov/bill/99th-congress/senate-bill/430?q=%7B%22search%22%3A%5B%22foreign+trade+simplification%22%5D%7D (last visited: 10 May 2014).

[824] See Evans (1983: 11).

[825] Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, Title V, § 5001 (23 August 1988). For detailed information on the content of the 1988 Act see Hall (1994: 297-301).

The SEC's resistance to enforcing the anti-bribery prong of the FCPA reflects a gap between the SEC's statutory duty of enforcing the FCPA and its original mission — to enhance the quality, safety and fairness of the securities markets and promote transparency of corporate management at that time. Prior to the enactment of the FCPA, the SEC regularly prosecuted licensed intermediaries such as investment companies and broker dealers for breaches of law, but only policed the information disclosure of non-financial issuers. This workload was used to allocate staffing and material resources; the SEC also had established a large body of regulations specifically designed for this purpose. It was this objective of the SEC that caused its concern with the issue of false accounting problem revealed by the "Watergate Scandal", and explained its zeal for higher-standard accounting regulation.[826] The anti-bribery prong of the FCPA, however, seemed to be remote from the SEC then. The SEC could not easily incorporate its statutory duty of enforcing rules against transnational bribery into its enforcement programs designed to promote and police information disclosure by non-financial registered companies, even it had been active for decades prosecuting fraud, insider dealing, market manipulation and violations of requirements for licensed intermediaries.

Meanwhile, some ideological beliefs also prevented the SEC from adjusting to its new statutory duty. One ideological belief then of the SEC was that its regulatory behavior should keep a distance away from the concrete activities of the real (non-financial) economy aside from ensuring adequate disclosure, so as not to inhibit the freedom and creativity of the business community.[827] For this reason, the SEC was always trying to achieve a balance between maintaining effective regulation of the capital markets and avoiding over-reaching intervention. A statement of Harold M. Williams (SEC Chairman) in 1981 implied this underlying concern of the SEC. In order to resolve some business concerns with

[826] See Goelzer (1979).

[827] See the SEC's description of its own mission in Chapter V, 2.1.1 (A).

the accounting provisions of the FCPA then, Williams conveyed his faith that public companies could, and should have a wide range of discretionary power in decision-making in a particular business environment. He thought that the SEC should afford considerable deference to reasonable corporate behavior. As he stated, "the law long ago determined that it should avoid interfering in reasonable corporate decision making which entails the exercise of good faith judgment concerning routine matters. High societal costs — including lost innovation and vexatious litigation — would result if courts could substitute their judgments for those of business executives concerning such matters."[828] The reference to "long ago" might well have been referring to the debate in the early 1930s that chose a "disclosure based" system rather than the kind of "merit based" system then popular in US states for regulating the listing of companies on the stock exchange. Though this statement was not directed to explaining its resistance to the anti-bribery prong enforcement, we can sense the SEC's conception of the restricted area of its work. The duty of enforcing the anti-bribery prong, in the SEC's opinion, was in this restricted area.

Another ideological belief of the SEC was about its relation with industrial and commercial issuers, which were to be clearly delineated from the market players, which it had always heavily regulated since its creation in 1934. Prior to the 1990s, the SEC defined itself as more likely a "coordinator" that sought to amend any technical issues in its "disclosure-based" work or remedy aggrieved investors, instead of one prescribing sanctions over misconducting market players. Throughout the 1980s, a series of insider trading scandals led to the enactment of legislations in which the Congress provided the SEC with powers to impose variable penalties (e.g. the authority to impose treble damages in insider trading violations).[829] Yet the SEC showed reluctance to accept this authorization at the

[828] Williams (1981: 15).

[829] *See* Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264 (codified as amended in scattered sections of 15 U.S.C.). For a summary of the new authority of the SEC to impose penalties see Aktins & Bondi (2008: 387-388).

beginning, restating that the enforcement program of the SEC was designed for remedial purpose, instead of punitive purpose, and that the additional civil penalties to deter securities law violations, in the SEC's view, was marginal, with predictable negative externalities.[830] Although the SEC conceded that "variable-penalty provisions are appropriate to penalize and deter the broad range of conduct" in a memorandum in 1989,[831] the SEC's formal Director of Enforcement cautioned that the historical focus of the SEC was "remedial relief, rather than taking punitive action in every case."[832] The SEC's resistance to new powers in the 1980s suggests that the philosophical view of the SEC on its own mission probably constituted another reason for the SEC's reluctance to supervise civil enforcement of the anti-bribery prong of the FCPA, which had no tangible relationship to the securities markets.

These beliefs of the SEC, of course, were probably grounded in a broad ideological atmosphere of the whole society that government should not delve too deeply into business affairs outside of specifically regulated areas having special connection with public safety, a subject not to be explored in depth here.[833] What we are certain about is, these beliefs had significant impact on the SEC's allocation of resources. In order to avoid over-reaching intervention, the SEC showed extreme prudence in its enforcement of the accounting prong of the

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[830] See Memorandum from John S.R. Shad, Chairman, U.S. Sec. & Exch. Commission, to Rep. Timothy E. Wirth, Chairman, Subcomm. Telecomms., Consumer Prot., & Fin. of the H. Energy and Commerce Comm. 350, 22 February 1984, cited in Atkins & Bondi (2008: 384). For further discussion on the "remedial purpose" or "punitive purpose" of the SEC see Chapter V, 2.2.1.

[831] U.S. Sec. & Exch. Comm'n, Memorandum of the Securities and Exchange Commission in Support of the Securities Law Enforcement Remedies Act of 1989, *reprinted in* H.R. No. 975, 101st Cong., at 7, cited in Aktins & Bondi (2008: 384).

[832] *The Securities Enforcement Remedies Act of 1989: Hearing before the Sec. Subcomm. of the Senate Banking, House, & Urban Affairs Commission* (1 February 1990) (statement of Gary G. Lynch), cited in Atkins & Bondi (2008: 385). Of course, the SEC can and does seek very large civil payments and substantial criminal sentences against persons violating the Exchange Act or rules thereunder.

[833] For instance, after President Reagan won the election in 1981, he began to adopt conservative economic policies which emphasizes avoiding wasteful governmental activities and unnecessary regulatory intervention into markets. See Blanchard (1987) and Solow (1987).

FCPA in the 1980s (detailed discussion is given in the following subsection). Not to mention the enforcement of the anti-bribery prong — a statutory duty seemingly irrelevant to the SEC's pursuit for transparent corporate management, but also challenging the SEC's basic conception of its mission and its relation to listed companies that were not market players.

2.1.2 A Sharp Contrast: Zealously Enforcing the Accounting Provisions But Overlooking the Anti-Bribery Provisions

As a result, in the following two decades, the SEC treated the accounting prong of the FCPA and the anti-bribery prong of the FCPA quite differently. While the SEC achieved great progress in enforcing the accounting prong of the FCPA, its achievement in the anti-bribery prong was insignificant. One piece of evidence is that, by 1983, according to John Shad (SEC Chairman), the SEC had brought 24 enforcement actions under the accounting prong of the FCPA, but only 2 enforcement actions under the anti-bribery prong.[834]

2.1.2 (A) The SEC's Zealous Enforcement of the Accounting Provisions

After the FCPA entered into force, the SEC took a series of measures to implement the accounting provisions into its routine procedures. For example, in June 1979, the Commission issued a release to improve the independence of accountants that provided non-audit services for public companies.[835] The accounting profession also took active response to the requirement of the FCPA on internal accounting control systems. As the 1980 annual report of the SEC suggested, the AICPA's Special Adversary Committee on Internal Accounting Control, as well as individual accounting firms, endeavored to developing guidance for evaluating the effectiveness of internal accounting controls and for

[834] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 47 (testimony of John Shad).

[835] 1979 SEC Annual Report, 45th Annual Report of the Securities and Exchange Commission for the fiscal year ended September 30, 1979, vi.

public reporting on internal accounting controls, so as to fulfill obligations provided by the accounting portion of the FCPA.[836]

The SEC's adherence to the accounting portion of the FCPA was also reflected in its resistance to tremendous pressure from the business community throughout the 1980s. From 1981 on, the SEC received frequent complaints from the business community that the FCPA had disadvantaged them in international competition.[837] On 4 March 1981, the General Accounting Office (GAO) submitted a report titled "*Impact of Foreign Corrupt Practices Act on US business*" to the Congress.[838] This report presented the result of a questionnaire survey of 250 companies selected from the Fortune 1000 list of the largest US industrial firms. In this report, public companies complained how both the accounting portion and the anti-bribery portion of the FCPA disadvantaged them in foreign markets.[839]

On critical characteristic of these complaints was about the rigor of requirements on making records and establishing internal accounting control. Many companies complained that the cost of complying with requirements on accurate records and internal accounting control was much higher than any benefits from the activity they can predict.[840]

However, the SEC insisted on not lowering the accounting standards. First, the SEC explained that though administrating the accounting provision of the FCPA was "a difficult mandate", it intended to adhere to it. Williams (SEC Chairman) made this point clear in the conclusion of a 1981 statement, "I believe progress

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[836] 1980 SEC Annual Report, 46th Annual Report of the Securities and Exchange Commission for the fiscal year ended September 30, 1980.

[837] See *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 97th Congress, 1981,82 (testimony of William Brock) 1981, cited in Adler (1982: 1760).

[838] USGAO (1980).

[839] See USGAO (1980: 6-36).

[840] See USGAO (1980) (statement of comptroller general of the US).

has been made — and will continue — in assuring that public companies meet the statutory mandate for accurate records and meaningful internal accounting controls, without inflicting unreasonable costs on the business community and with only minimal federal intrusion upon internal corporate decision making."[841] Second, at that time, the 1981 GAO report suggested to add a threshold standard of materiality to the records-keeping provision of the FCPA. However, the SEC did not show enthusiasm in doing so unless "our actions or policies do not best serve the public interest or that the reach of the Act should be further clarified."[842] A piece of the statement of Charles L. Marinaccio might help explain the SEC's attitude — although he was not a Commissioner, but the minority counsel of Senate Committee on Banking, Housing and Urban Affairs. Marinaccio criticized the proposal of adding a standard of materiality and stated that, "the materiality standard is wholly inappropriate for the maintenance of assets accountability. Materiality may have sound reference to disclosure for investor protection, but I do not believe it has any place in the standard-setting or the responsibility of a board of directors to maintain the accountability for the assets of the corporation…Accountability of assets necessarily has to have a standard higher than materiality because we are talking about the way a board of directors manages a company."[843]

Of course, the SEC's adherence to high accounting standard did not mean it was reluctant to solve any technical problems in the operation of the new law. On the contrary, its great willingness to address the problem of ambiguities of the accounting provisions of the FCPA reconfirmed its zealousness in enforcing the accounting prong of the FCPA.

The business community also complained about the ambiguity of the accounting provisions; and the 1981 GAO report suggested the SEC provide guidance on

[841] Williams (1981: 23).

[842] Williams (1981: 21-22).

[843] Marinaccio (1982: 349-350).

criteria that would help to address this problem.[844] The SEC considered this business concern as the "rough edges" of a new piece of legislation which were solvable, and should be solved in the "forces of time and practical experience".[845] The SEC promised to play an active role. Meanwhile, it encouraged companies to contribute their thoughts and suggestions. Accordingly, on the one hand, the SEC sought to give more accurate explanation of the accounting provisions. For example, the SEC issued a policy statement interpreting the accounting provisions, as well as its original intention to enforce these provisions.[846] In January 1981, Williams (SEC Chairman) defined the purpose of the internal accounting provisions as "to assure that a public company adopts accepted methods of recording economic events, safe-guarding assets, and conforming transactions to management's authorization."[847] With regard to what would make a method "accepted", he interpreted that the accounting provision only targeted knowing or reckless violations, instead of inadvertent recordkeeping inaccuracies.[848] On the other hand, the SEC sought to foster an innovative environment in which the FCPA's original purpose, instead of the text, would be achieved. It promised to afford a wide degree of deference to issuers "in their good faith exercise of business judgment in designing, implementing, and maintaining accounting systems to meet the requirement of the Act".[849] For this reason, the SEC did not bring many enforcement actions against violations of the accounting provisions too. As Williams stated, "the Commission has addressed these areas through monitoring, constructive criticism, maintaining open lines of

[844] Many respondents complained that the ambiguity of accounting provisions and anti-bribery provisions caused US companies to forego legitimate business opportunities. USGAO (1981: 6-18).

[845] Williams (1981: 22).

[846] 1980 SEC Annual Report, 46th Annual Report of the Securities and Exchange Commission for the fiscal year ended September 30, 1980, ix.

[847] Williams (1981: 14).

[848] Williams (1981: 14-16).

[849] 1980 SEC Annual Report, 46th Annual Report of the Securities and Exchange Commission for the fiscal year ended September 30, 1980, ix.

communication, and a substantial measure of understanding…The very limited number of enforcement actions which the Commission has undertaken reflect those policies."[850]

Either the SEC's adherence to high accounting standards or its prudence in taking enforcement actions against violations of the accounting prong of the FCPA, signaled that the SEC was zealous in the enforcement of the accounting portion of the FCPA. In contrast, the SEC almost forgot the anti-bribery prong of the FCPA during the same period.

2.1.2 (B) The SEC's Neglect of the Anti-Bribery Provisions

Another key point of the 1981 GAO report was that the anti-bribery prong of the FCPA had disadvantaged US companies in international competition.[851] Many government officials endorsed this viewpoint. Some of them attributed this phenomenon to the ambiguous anti-bribery provisions. As Senator D' Amato stated in 1983,

"As the Foreign Corrupt Practice Act stands now, it still has a chilling effect on the desire of American corporations to conduct business overseas. It is in no one's interest to allow a law that impedes commerce to continue in this way."[852]

Senator Heinz also suggested that in the same Senate hearing,

"As a result, uncertainly in the business community continues, export opportunities are foregone, and actual sales are lost. In short, we continue to shoot ourselves in the foot. The real tragedy is that this waste can be avoided without compromising the law's objective. Those of us who support this bill also oppose bribery as much as anyone."[853]

Another viewpoint attributed this problem to the fact that the unilateral

[850] Williams (1981:21-22).

[851] See USGAO (1981: 6-18).

[852] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 2 (statement of Senator D'Amato).

[853] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 2 (statement of Senator Heinz).

enforcement of the FCPA by the US. As Lionel Olmer, the Under Secretary of Department of Commerce stated in its testimony in a Senate hearing in 1983:

> "It would be the uncertainty of it, the fear that the American supplier, if awarded a contract, would become subject to liability that would prevent the American supplier from filling the terms of the contract…In a Middle Eastern country, a U.S. company which had every reason to expect it would be designated a prime contractor lost that opportunity and was designated the subcontractor because we believe the foreign competitor, a Western European-based company, told the purchaser that the American company would be subject to the Foreign Corrupt Practices Act and there were all sorts of hazards to that which would put in danger the time frame within which the contract and the terms and conditions under it was to be fulfilled."[854]

Of course, there were other people arguing that FCPA enforcement had not disadvantaged US companies, given that US export increased steadily in the two decades, that the US outperformed its competitors (e.g. Germany, France and Japan) in the export market, and that some US companies probably had lost foreign market simply because of the bearish economic environment instead of FCPA enforcement.[855] However, opponents of the FCPA could also argue that the growth of US trade would have been more promising without the anti-bribery prong of the FCPA.

Despite the broad consensus on the adverse effect of the anti-bribery provisions of the FCPA on US business,[856] it was not a result of the enforcement effort of

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[854] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 55-57 (testimony of Lionel Olmer, Under Secretary of Department of Commerce).

[855] See Marinaccio (1982: 348). Besides, in 1980, the SEC sought comments from the business community on the impact of the anti-bribery portion of the FCPA. However, the replies it received made the SEC only concluded that there was no solid evidence proving a direct causal effect of FCPA enforcement on US economy. See *Statement of Commission Policy Concerning Section 30A of the Securities Exchange Act of 1934*, Exchange Act Release No. 17099, 20 SEC Docket 1258, 1262 (28 August 1980). In 1999, a study titled "the Foreign Corrupt Practices Act's Consequences for US Trade: the Nigerian Example" suggested that there was no evidence that FCPA enforcement had ever impeded the US's foreign trade; and the US share of export trade to industrial countries enjoyed a continuous steady growth between 1986 and 1996. See Geo-JaJa & Mangum (1999).

[856] See e.g., Chaikin (1997: 289), Wallace (2002: 1130-1131), and Magnuson (2013: 376). Also see Chapter I, 2.1.2 (B).

the SEC, but a result of the inherent deterrent effect of the FCPA, or any reasons other than the SEC — for example, US companies probably lost business because the competitors had fully recovered from WWII. As noted, the SEC brought few enforcement actions against transnational bribery during this period.[857] Even the few actions it did bring were not the result of the SEC's effective supervision, but mainly resulted from adventitious media disclosure of bribery scandals or were the by-product of the SEC's investigation in other areas. The SEC brought only two enforcement actions against bribery by 1983 — which, as John Shad stated in 1983, "have been brought under this provision also include antifraud and disclosure allegations and could have been brought without reference to section 30A."[858] Another piece of evidence for the SEC's omission is, while the 1981 GAO report suggested that 60% of respondents had updated their internal accounting control systems as a response to the accounting prong of the FCPA,[859] a 1995 survey conducted by Wayne State University suggested that only 35.9% of respondents had anti-bribery terms in their codes of conduct, and only 8.7% had taken measures to ensure bribery prohibition to be enforced.[860]

2.1.3 Implications of the SEC's Performance in the First Two Decades

A review of the SEC's performance in the first two decades has rich implications for our understanding of the whole picture of FCPA enforcement in the US:

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[857] See SEC Press Release, "SEC Enforcement Actions: FCPA Cases", available at: http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited: 31 July 2014).

[858] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 53 (testimony of John Shad). By 1998, among over 300 enforcement actions of the SEC, only four actions were under the anti-bribery provisions. See *Hearing on the International Anti-Bribery and Fair Competition Act of 1998 before the Subcommission on Finance and Hazardous Materials of the Comm. on Commerce*, 105th Congress, (statement of Paul V. Gerlach, Associate Director of Division of Enforcement, SEC), cited in Black (2012: 1106). Also see Rossbacher & Young (1997: 532).

[859] See USGAO (1981: 14).

[860] See Spalding & Reinstein (1995: 23-25).

First of all, we need to make a distinction between the SEC's enforcement efforts on the accounting prong of the FCPA and its efforts on the anti-bribery prong. The SEC had enforced the accounting prong zealously throughout the whole period. Initially, the SEC was indeed hesitant to take enforcement actions against violations of the accounting prong, and offered a wide range of deference to the business community in their faithful compliance with the accounting prong of the FCPA. However, one should be reminded that even the accounting prong of the FCPA, was an innovative regulatory tool then. It took the SEC as well as the whole US business community time to polish the "rough edges" of the new legislation. The prudent attitude of the SEC was not a signal of ineffective enforcement of the accounting prong, but reflected the SEC's unrelenting efforts to work out an appropriate way to achieve the initial purpose of the legislation to the largest extent.

Meanwhile, the SEC did not seriously enforce the anti-bribery prong of the FCPA.[861] Yet this was unlikely a result of the SEC's consideration of the export interest of the US, but more likely a result of the fact that the SEC's central mission had always been to police the market for fraud and abuse, not to police the world for violations of criminal law. The SEC's connection with issuers that were not financial market players was restricted to ensuring disclosure to investors.

Therefore, the SEC's enforcement of the FCPA in the first two decades was characterized by its differential treatment of the accounting prong and the anti-bribery prong of the FCPA; and the SEC's indifference in the anti-bribery prong of the FCPA did not result from its rational calculation of the payoff of FCPA enforcement, but resulted from the SEC's conception of its own historical mandate and its available resources at that time.

[861] The number of enforcement actions during this period was very small. See SEC Press Release, "SEC Enforcement Actions: FCPA Cases", available at: http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited: 29 July 2014).

2.2 The SEC's Increasingly Aggressive Enforcement of the Anti-Bribery Prong in Recent Two Decades

The first two decades after the enactment of the FCPA witnessed how the SEC neglected its statutory duty of enforcing the anti-bribery prong of the FCPA. This situation began to change since the 2000s. As many scholars noted, during the period from 2001 to 2006, there was a steady increase in the number of enforcement actions against foreign bribery brought by the SEC; and since 2007, the number began to increase dramatically.[862]

Many papers have captured this developmental reality, but have not fully interpreted it. A rationalistic scholar might attribute this reality to the ratification of the OECD Anti-Bribery Convention in 1999. Given that the Convention internationalized the prohibition of foreign bribery, the US seemed to be free from the worry of being disadvantaged by its foreign competitors in international markets. As a result, it might be more zealous to enforce the FCPA. Another possible motive was the US's political will to lead the global anti-bribery campaign.[863]

This rationalism-based explanation is questionable, given that though other countries had ratified the Convention, their enforcement records were very poor. The US was unlikely to have been free from the worry of being disadvantaged. There are also scholars arguing that the ratification of the Convention did not really change the payoff structure for individual countries.[864] Meanwhile, if the political will to lead the anti-bribery campaign could explain the SEC's aggressive enforcement of the FCPA since Year 2001, it cannot explain why the

[862] See SEC Press Release, "SEC Enforcement Actions: FCPA Cases", available at: http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited: 29 July 2014). Several examples of papers holding this viewpoint are Hansberry (2012: 202), Magnuson (2013: 399), and Black (2012: 1108-1109).

[863] See Clinton (1998: 2290).

[864] See e.g., Tarullo (2004).

SEC did not enforce the FCPA aggressively before 2000. In other words, it cannot give a coherent explanation of the whole story during the period from 1977 to 2014.

Like the story in the first two decades, the story in recent two decades should also be explained in the historical context in which SEC made decisions and took actions. If the 2000s witnessed a dramatic increase in FCPA enforcement by the SEC, the conditions for the SEC to do so must have been matured even earlier. In other words, something which broke down the SEC resistance to its duty of enforcing the anti-bribery provisions must have begun to happen prior to 2000.

Therefore, an understanding of the changes in the nature of the SEC's enforcement actions from the 1990s onwards caused by new regulatory challenges for the SEC during this period helps to explain how the SEC's statutory duty to enforce the anti-bribery prong of the FCPA gradually fit within the SEC's conception of its "central mission". A brief review of this historical context suggests that the SEC's zealous enforcement of the anti-bribery provisions of the FCPA is the side-effect of the SEC's expansion of enforcement power and zealous enforcement of federal securities laws at a general level. One popular view across scholarship on securities regulation is that loose regulation causes scandals in securities markets and then scandals led to the creation of new legislations and more aggressive regulatory tools.[865] Following this logic, the growing number of insider trading cases and other corporate scandals led to the enactment of a series of laws during the period from the 1980s to the 2000s, which authorized the SEC stronger power to deter and penalize violations of federal securities laws (e.g., internal financial controls and extraterritorial application of U.S. securities laws[866]).

Of course, the evolution of the SEC's enforcement programs *per se* is neither the focus of this Section nor a subject that could be discussed in detail here. So in the

[865] See generally Prentice (2006) and Atkins & Bondi (2008).
[866] See Prentice (2006: 777).

following subsections I select and analyze only those aspects which were most relevant to the SEC's enforcement of the anti-bribery provisions of the FCPA to illustrate how the expansion of the SEC's enforcement power at a general level incorporated the SEC's anti-bribery duty into its central mission.

2.2.1 The SEC's Regulation: from for Remedial Purposes to for Punitive Purposes

As discussed in 2.1.1., prior to 1990, the SEC considered its enforcement program as to be designed primarily for remedial purpose, but not for punitive purpose.[867] So when the Congress enacted the FCPA in 1977 and mandated the SEC to initiate civil litigations against public-company violators of the FCPA, as well as their officers, directors, employees, agents, or shareholders,[868] it is not surprising that the SEC did not appear to welcome this authorization.

The SEC adhered to this view for over a decade. In the 1980s, as a response to several insider trade scandals,[869] the Congress enacted the Insider Trading Sanctions Act of 1984,[870] the Insider Trading and Securities Fraud Enforcement Act of 1988,[871] and the Securities and Enforcement Remedies and Penny Stock Reform Act of 1990 (also referred to as "the Remedy Act").[872] These laws provide the SEC with the power to impose civil penalties against violators of federal securities laws to the SEC.[873] Yet the SEC thought that there was no

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[867] See Atkins & Bondi (2008: 383). Also see Chapter V, 2.1.1 (B).

[868] §30A of the Securities Exchange Act of 1934.

[869] See Katz (2010: 494).

[870] Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 1, 98 Stat. 1264. For detailed discussion on the history of this Act see Atkins & Bondi (2008: 386-387).

Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 1, 98 Stat. 1264. For detailed discussion on the history of this Act see Atkins & Bondi (2008: 386-387).

& Bondi (2008: 387-388).

[872] Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931. For detailed discussion on the history of this Act see Atkins & Bondi (2008: 388-394).

[873] See Atkins & Bondi (2008: 385).

urgent need for but potential negative externalities of introducing additional civil penalties into areas aside from insider trading cases. Providing the SEC with new power to impose civil penalties for violators of federal securities laws probably "change[d] the character of the enforcement program from remedial to punitive".[874]

During its subsequent enforcement practice in the 1980s, the SEC gradually realized the inadequacy of its existing tools (i.e., injunctions and disgorgement) in deterring violations of federal securities laws,[875] and the necessity of seeking variable approaches to penalize violators. Yet the Commission remained quite prudent in applying those penalty provisions. [876] However, this general trend already implied that there was an increasing need for more aggressive intervention of the SEC into areas of market abuse. The SEC just needed to adjust its enforcement programs, as well as its philosophical view, to this trend.

2.2.2 The SEC's "Right-to-Know" Corporate Misconducts

Prior to 1995, though the SEC had enforced the accounting prong of the FCPA for near two decades, the information flow on securities law violations was not quite effective — at least not enough for the demand of the markets, given that corporate scandals were revealed sometimes.[877] In 1995, the Enactment of Section 301 of the Private Securities Litigation Reform Act of 1995, [878] mandated independent auditors to detect and report clues of fraudulent corporate

[874] See, e.g., Memorandum from John S.R. Shad, Chairman, U.S. Sec. & Exch. Comm'n, to Rep. Timothy E. Wirth, Chairman, Subcomm. Telecomms., Consumer Prot., & Fin. of the H. Energy and Commerce Comm. 350 (Feb. 22, 1984), cited in Atkins & Bondi (2008: 384).

[875] See Atkins & Bondi (2008: 386).

[876] In 1990, Gary Lynch, the Director of Enforcement of the SEC stated that, "I think it is important for the Commission to maintain its historical focus on achieving remedial relief, rather than taking punitive action in every case, and that the Commission should still continue to judge the effectiveness of the Commission's enforcement program based on what it actually accomplishes, as opposed to what the dollar amount is that is ordered in a particular case." The Securities Enforcement Remedies Act of 1989: Hearing before the Subcommittee on Securities of the Committee on Banking, House, and Urban Affairs, United States Senate, 101st Congress, 2nd session, 1& 8 February 1990, p. 116 (statement of Gary G. Lynch).

[877] See Pitt & Shapiro (1990), and Atkins & Bondi (2008: 392).

[878] § 301 of the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (22 December 1995).

acts to the SEC provided certain conditions are met. As this Section was incorporated in the Securities Exchange Act of 1934 as Section 10A,[879] it is referred to as "Section 10A" in the following part. The legislative history of Section 10A, which significantly expanded the channel for the SEC to obtain information on instances of corporate misconduct, was relevant to our topic here.

As the story Riesenberg told, Section 10A can trace its origin in 1986, when frequently occurring fraudulent acts of public companies drew the attention of Representative Ron Wyden to question the due diligence of public accounting firms.[880] Then Wyden determined to take a radical measure to change this status quo — to oblige auditors to detect and report clues of violation of federal securities laws in their regular audit process.[881] In May 1986, Wyden introduced a bill titled *the Financial Fraud Detection and Disclosure Act of 1986*, with a purpose to "prescribe auditing standards for the detection and disclosure of financial irregularities".[882] This Bill was rejected by both the accounting profession and the SEC. The accounting profession criticized it for its broad and imprecise definition of "illegal and irregular activity" which if passed, would require auditors to audit a variety of corporate conducts that "they have neither

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[879] § 10A of the Securities Exchange Act of 1934.

[880] A basic view of Wyden then was that the financial reporting system had loopholes and in many revealed financial scandals auditors were blamable. As he puts it in a 1990 statement, "The GAO, in a 1989 study of 11 failed S & L's, found that in more than half of those cases, 'CPA's did not adequately audit and/or report the S & L's financial or internal control problems in accordance with professional standards.'" *Expanding Auditor Responsibility: Hearing before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, House of Representatives, 101st Congress, Second Session, p.4 (2 August 1990).

[881] Wyden stated in 1986: "all too often in recent years, independent auditors either have failed to detect or to report fraudulent activities at a number of major corporations and financial institutions in this country…a unanimous Senate subcommittee report required auditors to report illegal acts to government authorities for many years but the accounting profession had abdicated their responsibility, it is time for Congress to step in." 132 Cong. Rec. E1837 (daily ed. 22 May 1986) (statement of Ron Wyden), cited in Riesenberg (2001: 1417).

[882] H.R. 4886, 99th Cong. (1986), available at: https://beta.congress.gov/bill/99th-congress/house-bill/4886 (last visited: 31 July 2014). Also see Riesenberg (2001: 1417-1459).

the training nor the experience to make."[883] The SEC, on the other hand, was concerned that because the Bill required an auditor to report misconduct of his/her client directly to the SEC, bypassing the management of their clients, it would inhibit the active role of corporate management in addressing financial fraud, and would create "an adversarial relationship" between auditors and their clients.[884]

In order to reach a consensus, in August 1986, Wyden brought a new bill which had sought to resolve the criticism from the accounting profession and the SEC. On the one hand, the new bill contained a standard of "materiality" to narrow the range of illegal acts that the accountants should report to the SEC. On the other hand, auditors would not have to report instances of illegality to the SEC directly, but were required to report instances of illegality to the corporate management in the first place. However, this new proposal was not seriously considered because of some disagreements in the committee.[885]

Wyden and Representative John Dingell brought another version of the bill in August 1990, which lowered the duty of care of auditors on the basis of the 1986 version.[886] However, the accounting profession and the SEC still had reservations about the scope of auditing responsibility. James R. Doty (SEC General Counsel) suggested that the auditing responsibility should be more

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[883] See *SEC and Corporate Audits: Hearings on Detecting and Disclosing Financial Fraud before the Subcomm. On Oversight and Investigations of the Comm.* On Energy and Commerce, 99th Cong. P.129 (statement of Phillip B. Chenok), cited in Riesenberg (2001: 1422).

[884] See *SEC and Corporate Audits: Hearings on Detecting and Disclosing Financial Fraud before the Subcomm.* On Oversight and Investigations of the Committee on Energy and Commerce, 99th Cong. 302 (1985) (statement of John Shad, SEC Chairman), cited in Riesenberg (2001: 1422).

[885] For information on the content and objective of the new proposal see H. R. 5439, 99TH Cong. (1986), and 132 CONG. REC. E2986 (daily ed. Aug. 15, 1986) (statement of Rep. Wyden), cited in Riesenberg (2001: 1423). For information on the story of the second bill of 1986 see Riesenberg (2001: 1423).

[886] See *Expanding Auditor Responsibility: Hearing before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, House of Representatives, 101st Congress, Second Session (2 August 1990).

targeted at those relevant to regular audit process.[887] Donald L. Neebes (the Chairman of the Auditing Standards Board) also suggested that the new legislation should be consistent with existing auditing standards.[888] This bill was amended once again, passed the House, but was rejected by the Senate.[889]

In 1993, while Wyden introduced the bill one more time, limiting the auditor's responsibility to the existing auditing standards.[890] The SEC endorsed the new bill.[891] Finally, the new bill came out as Section 301 of the Private Securities Litigation Reform Act of 1995[892] and Section 10 (A) of the Securities Exchange

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[887] James R. Doty (SEC General Counsel) stated in the 1990 hearing, "Any decision to impose additional, new requirements for early fraud detection, as has been mentioned today, involves striking a difficult balance between the benefits of finding fraud at an early state and the costs to the capital formation process associated with new or extended procedures. That task is complex. It requires careful judgments, weighing incremental benefits against costs, and it requires the skills correctly to identify and define the types of problems that auditors my reasonably be expected to uncover during the course of an audit." *Expanding Auditor Responsibility: Hearing before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, House of Representatives, 101st Congress, Second Session, p.74 (2 August 1990) (statement of James R. Doty).

[888] He stated in the 1990 hearing that "we are prepared to statutorily define audit procedures related to illegalities and related party transactions, provided that those procedures are consistent with the professional literature and are within the auditor's competence to perform. Regrettably, there are some items in the July 30 discussion draft relating to audit procedures to detect illegal acts with which we have difficulty." *Expanding Auditor Responsibility: Hearing before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, House of Representatives, 101st Congress, Second Session, p.96 (2 August 1990) (statement of Donald L. Neebes). For information on the industrial standards of the accounting profession then see *Codification of Auditing Standards and Procedures Statement on Auditing Standards*, No. 53, No. 54 (American Inst. Of Certified Pub. Accountants 1989).

[889] See 136 CONG. REC. H13, 288 (27 October 1990) (statement of Rep. Brooks), cited in Riesenberg (2001: 1424).

[890] See H.R. 574, 103rd CONG. (1993), cited in Riesenberg (2001: 1435).

[891] As Richard C. Breeden (SEC Chairman) stated, "The Commission believes that adoption of H.R. 574 would not represent a dramatic change in existing law, though it would represent a step in the right direction. Proposed Section 10A is based on, and would serve to codify, existing auditing standards and practice currently aimed at the detection of fraudulent activity." *Financial Fraud Detection: Hearings on H.R. 574 before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, House of Representatives, 103rd Congress p. 50 (18 February 1993) (statement of Richard C. Breeden).

[892] § 301 of the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737.

Act of 1934.[893]

Riesenberg classifies Section 10 (A) to three basic prongs: the "Audit Procedures" prong, the "Let the Board Know" prong, and the "Let the SEC Know" prong.[894] The "Audit Procedures" prong is about specific procedures for public accounting firms to detect illegal corporate acts.[895] The "Let the Board Know" prong requires public accounting firms to inform the corporate management of a suspect illegal act (whether perceived to have a material effect on the financial statements of the issuer or not).[896] The "Let the SEC Know" prong requires an auditor to report the suspected misconduct which has a material effect but the issuer fails to take remedial action after the auditor reported to it.[897]

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[893] § 10 (A) of the Securities Exchange Act.

[894] See Riesenberg (2001: 1419-1420).

[895] § 10A (a) of the Securities Exchange Act of 1934 provides that, "Each audit required pursuant to this tile of the financial statements of an issuer by a registered public accounting firm shall include, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—(1) procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts; (2) procedures designed to identify related party transactions that are material to the financial statements or otherwise require disclosure therein; and (3) an evaluation of whether there is a substantial doubt about the ability of the issuer to continue as a going concern during the ensuring fiscal year." § 10 A (a) of the Securities Exchange Act of 1934.

[896] § 10A (b) (1) provides that, "If, in the course of conducting an audit pursuant to this tile to which subsection (a) applies, the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—(A) (i) determine whether it is likely that an illegal has occurred; and (ii) if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer, including any contingent monetary effects, such as fines, penalties, and damages; and (B) as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of such firm in the course of the audit, unless the illegal act is clearly inconsequential. " § 10 A (b) (1) of the Securities Exchange Act of 1934.

[897] § 10A (b) (2) provides that, "If, after determining that the audit committee of the board of directors of the issuer, or the board of directors of the issuer in the absence of an audit committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of the firm in the course of the audit of such accountant, the registered public accounting firm concludes that—(A) the illegal act has a material effect on the financial statements of the issuer; (B) the senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate

The content of first two prongs, in essence, is consistent with existing auditing standards. The uniqueness of Section 10A lies in the "Let the SEC Know" prong, which for the first time requires independent auditors to inform the SEC of "illegal acts that directly and materially affect the financial statements" of issuers.[898] This prong not only expanded the information flow for the SEC to grasp instances of corporate misconducts, but also provides a new tool for the SEC to supervise the work of auditors.

2.2.3 Further Expansion of the SEC's Supervision over Auditors

In August 1999, the SEC issued the *SEC Staff Accounting Bulletin* (in the following part referred to as "SAB 99"). [899] In SAB 99, the SEC gave a broad interpretation of its power authorized by Section 10A. SAB 99 has direct impact on the SEC's enforcement of the accounting prong of the FCPA, as well as indirect impact on the enforcement of the anti-bribery prong. Follows are several instances of how SAB 99 is related to FCPA enforcement.

For this event, Riesenberg held a critical point of view in at least four aspects.[900] First, SAB 99 requires issuers and auditors to comply with Section 13 (b) (2)-(7) of the Securities Exchanges Act of 1934 — the accounting prong of the FCPA. As noted, the accounting prong of the FCPA did not have the standard

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remedial actions with respect to the illegal act; and (C) the failure to take remedial action is reasonably expected to warrant departure from a standard report of the auditor, when made, or warrant resignation from the auditor engagement; the registered public accounting firm shall, as soon as practicable, directly report its conclusions to the board of directors." § 10A(b) (3) provides that "An issuer whose board of directors receives a report under paragraph (2) shall inform the Commission by notice not later than 1 business day after the receipt of such report and shall furnish the registered public accounting firm making such report with a copy of the notice furnished to the Commission. If the registered public accounting firm fails to receive a copy of the notice before the expiration of the required 1-business-day period, the registered public accounting firm shall—(A) resign from the engagement; or (B) furnish to the Commission a copy of its report (or the documentation of any oral report given) not later than 1 business day following such failure to receive notice." § 10 A (b) (2) & (3) of the Securities Exchange Act of 1934.

[898] See Deming (2005: 374).

[899] *SEC Staff Accounting Bulletin No. 99—Materiality* (Release No. SAB 99), 1, available at: https://www.sec.gov/interps/account/sab99.htm (last visited: 12 May 2014).

[900] See generally Riesenberg (2001: 1438-1444).

"materiality" as the threshold of violations of the law,[901] so the SEC required auditors not to apply a standard of "materiality" when they audit the accounting records of their clients. As SAB 99 states,

"[A]n intentional misstatement of immaterial items in a registrant's financial statements may violate Section 13 (b) (2) of the Exchange and thus be an illegal act. When such a violation occurs, an auditor must take steps to see that the registrant's audit committee is 'adequately informed' about the illegal act. Because Section 10A (b) (1) is triggered regardless of whether an illegal act has a material effect on the registrant's financial statements, where the illegal act consists of a misstatement in the registrant's financial statements, the auditor will be required to report that illegal act to the audit committee irrespective of any 'netting' of the misstatements with other financial statement items."[902]

Second, SAB 99 requires that financial management or the registrant's independent auditors should not rely on mere quantitative benchmarks to assess "materiality" which was the threshold of their reporting obligation to the SEC.[903] This is significant for the uncovering of instances of transnational bribery because one method of public companies to hide foreign payments was to falsify the record into small transactions.[904] The requirement of SAB 99 can help avoid this problem.

Third, SAB 99 made an extensive interpretation of the term of "illegal act". Section 10A requires auditors to detect "illegal act" of public companies, and defines the term "illegal act" as "an act or omission that violates any law, or any

[901] As SAB 99 summarizes, § 13 (b)(2)-(7) of the Securities Exchange Act of 1934 require issuers "must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant and must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP. In this context, determinations of what constitutes 'reasonable assurance' and 'reasonable detail' and degree of assurance that would satisfy prudent officials in the conduct of their own affairs." *SEC Staff Accounting Bulletin No. 99—Materiality* (Release No. SAB 99), 2, available at: https://www.sec.gov/interps/account/sab99.htm (last visited: 12 May 2014). Also see Riesenberg (2001: 1439).

[902] *SEC Staff Accounting Bulletin No. 99—Materiality* (Release No. SAB 99), available at: https://www.sec.gov/interps/account/sab99.htm (last visited: 12 May 2014).

[903] See *SEC Staff Accounting Bulletin No. 99—Materiality* (Release No. SAB 99), 1, available at: https://www.sec.gov/interps/account/sab99.htm (last visited: 12 May 2014). Also see Riesenberg (2001: 1438-1442).

[904] See e.g., Koehler (2012: 936).

rule or regulation having the force of law".[905] This definition is broader than the definition of an "illegal act" given by existing accounting standards in appearance.[906] However, in the view of Riesenberg, since the original intention of authors of Section 10A was to keep it consistent with existing accounting standards, but not to reach a broader range of the auditing practice,[907] Riesenberg thought the SEC should interpret the term "illegal act" narrowly.[908] Yet the SEC insisted on giving a broad explanation of the term "illegal act".[909] As Riesenberg commented, this is in fact an over-reaching application of Section 10A.[910]

Fourth, the SEC declared its power to impose civil penalties on independent auditors who violate the "Let the Board Know" prong in SAB 99. As Riesenberg suggested, Section 10A only authorized the SEC to impose civil penalties against an auditor that violated the "Let the SEC Know" prong,[911] which, in

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[905] § 10A (f) of the Securities Exchange Act of 1934.

[906] See *SEC Staff Accounting Bulletin No. 99—Materiality* (Release No. SAB 99), note 41, available at: https://www.sec.gov/interps/account/sab99.htm (last visited: 12 May 2014)

[907] See Chapter V, 2.2.2.

[908] See *Letter from the Committee on Federal Regulation of Securities and the Commission on Law and Accounting of the Business Law Section of the American Bar Association* (10 March 2000), cited in Riesenberg (2001: 1442).

[909] SAB 99 has words that "Section 10A (b) (1) requires the auditor to inform the appropriate level of management of an illegal act (unless clearly inconsequential) and assure that the registrant's audit committee is 'adequately informed' with respect to the illegal act." *SEC Staff Accounting Bulletin No. 99—Materiality* (Release No. SAB 99), available at: https://www.sec.gov/interps/account/sab99.htm (last visited: 12 May 2014).

[910] Riesenberg states, "This is a remarkable view of the statute. It certainly does not have any support in the legislative history or in the auditing literature on which the statute was based." Riesenberg (2001: 1444).

[911] § 10A (d) of the Securities Exchange Act of 1934 authorizes the SEC the power to impose civil penalties against an accounting firm: "(d) Civil penalties in cease-and-desist proceedings.—If the Commission finds, after notice and opportunity for hearing in a proceeding instituted pursuant to section 21C, that an independent public accountant has willfully violated paragraph (3) or (4) of subsection (b), the Commission may, in addition to entering an order under section 21C, impose a civil penalty against the independent public accountant and any other person that the Commission finds was a cause of such violation. The determination to impose a civil penalty and the amount of the penalty shall be governed by the standards set forth in section 21B." Section 10A (e): "Preservation of existing authority.—Except as provided in subsection (d), nothing in this section shall be held to limit or otherwise affect the authority of the Commission under this title." § 10 A (d) (e) of the

Riesenberg's point of view, was a provision to limit the SEC's power to impose civil penalties. As Riesenberg explains, under Section 10A, an auditor would not be subject to civil penalty by the SEC unless all following conditions were met: the auditor has reported an illegal act to the broad of the issuer; the issuer does not make appropriate remedial measures; and then the accountant fails to report this issue to the SEC. In addition, the reporting responsibility of auditors is also limited to where the illegal act would have a material effect. Literally, the accountant should not be imposed civil penalty when the auditor failed to report the suspected illegal act to the Board. However, in practice, the SEC did perform its power of imposing civil penalty against accountants who failed to report suspected illegal acts to the Board of issuers.[912]

Section 10A, together with SAB 99, assigned new obligations to independent auditors as well as new power to the SEC. This approach materially changed the interrelations between public companies, auditors, and the SEC. This detecting and reporting responsibility of auditors would urge them to do due diligence more faithfully.[913] As a result, this policy would result in an increase in the exposure rate of issuers' violation of the accounting provision of the FCPA, which would facilitate the revelation of issuers' violations of the bribery prohibition of the FCPA.

2.2.4 The Whistleblower Program

With the expansion of the SEC's power to oversee auditors and issuers, the change to reveal misconducts of issuers or auditors increased. In turn, the revelation of corporate accounting scandals required even more powerful tools to regulate corporate behavior. In 2001, several corporate scandals led to the demise

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Securities Exchange Act of 1934.

[912] See Riesenberg (2001: 1444-1448).

[913] In the early years after the enactment of Section 10A, the SEC reported that the accounting profession brought few reports filed with the SEC, and attributed this phenomenon to the accounting profession's omission. For information on this argument and justifications given by the accounting profession see Riesenberg (2001: 1444-1445).

of major companies such as Enron Corp. and WorldCom Inc., which enjoyed favorable reputation in the market until their collapse.[914] Once again, these corporate scandals caused a crisis of public confidence in capital markets and led to more radical regulation of the Government.

In April 2002, the Congress passed the Sarbanes-Oxley Act of 2002, seeking to further improve the accuracy and reliability of information disclosure pursuant to the securities law.[915] This Act brought auditing as a self-regulated industry to an end, and was the greatest incursion into the structure of auditing in US history. It introduced strict rules to enhance the independence of auditors (causing major reorganizations to spin off consulting arms) and created the "Public Company Accounting Oversight Board" to replace self-regulatory bodies in overseeing the performance of accounting firms in their audit of public companies.[916] Another key part of this Act important for the development of FCPA enforcement were provisions on whistleblower protection. Pursuant to Section 806, issuers were prohibited from retaliating against an employee because this employee's act of whistle blowing. A whistleblowing employee who alleges discharge is authorized to seek relief by filing a complaint with the Department of Labor, for which they would receive compensation.[917] Any official of a public company that retaliate against a whistle-blowing employee would be subject to fines and/or imprisonment.[918]

In July 2010, the Dodd-Frank Act substantially reinforced whistleblower protection through the introduction of provisions on whistleblower incentives.[919]

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[914] See Atkins & Bondi (2008: 394-395).

[915] Sarbanes-Oxley Act of 2002, Public Law 107-204, 116 STAT. 745, 30 July 2002, available at: https://www.sec.gov/about/laws/soa2002.pdf (last visited: 4 May 2014).

[916] Title I, Sarbanes-Oxley Act of 2002, Public Law 107-204, 116 STAT. 745, 30 July 2002, available at: https://www.sec.gov/about/laws/soa2002.pdf (last visited: 4 May 2014).

[917] § 806 of the Sarbanes-Oxley Act of 2002.

[918] § 1107 of the Sarbanes-Oxley Act of 2002.

[919] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

Under the Dodd-Frank Act, a whistleblower refers to "any individual who provides, or 2 or more individuals acting jointly who provides, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation by the Commission."[920]Whistleblowers that voluntarily provided original information leading to successful enforcement actions in which over $1,000,000 in sanctions is ordered would receive a reward equal to 10%-30% in total of the monetary sanction.[921]

In August 2011, the SEC adopted final rules to implement whistleblower provisions of the Dodd-Frank Act (i.e., the SEC's Whistleblower Program).[922] The enhancement of whistleblower incentives and whistleblower protection is significant for the enforcement of the accounting prong, as well as the anti-bribery prong of the FCPA.[923]

2.3 A Bridged Gap between Enforcing the Accounting Provisions and the Anti-Bribery Provisions of the FCPA

Atkins and Bondi describe the history of legislative actions mentioned above as a result of the Congress's response to public sentiments against corporate scandals on either insider trading, or corruption — as they say, "Congress reacted to the new spate of corporate scandals in the same way that it did in response to the insider trading scandals in the 1980s."[924] This is not surprising. After all, public confidence is vital to the robust development of capital markets.[925] Regulators of capital markets are very sensitive to public sentiments, and although they rarely

[920] § 922 of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Also see § 21F of the Securities Exchange Act of 1934.

[921] § 748 (b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

[922] Exchange Act Rules 17 C.F.R. §240 (12 August 2011).

[923] The DOJ and the SEC consider the whistleblower program as one of the most effective tool in FCPA enforcement. See USDOJ & SEC (2012: 82). Also see Chapter IV, 4.2.

[924] Atkins & Bondi (2008: 384-385).

[925] See Donald (2005).

respond quickly to anecdotal corporate scandals disclosed by media or the criticism of academics, they make changes quickly when public confidence is so badly shaken that the market enters freefall, as it did before the enactment of Sarbanes Oxley Act or Dodd Frank Act. As adequate information disclosure is a nonintrusive way to reduce the risk of misbehavior and thus maintain public confidence in capital markets, Congress and the SEC have tended to steadily increase the level of transparency of corporate management. The number of listed companies — foreign listed companies in particular — increased dramatically during the 1980s and the 1990s. With it, the international dimension of the SEC's activity of market protection also increased. Therefore, the 1990s and the 2000s witnessed that the markets' demand for adequate information disclosure increased; and the SEC's demand for more effective tools to ensure adequate information disclosure increased accordingly. After each of 2001 and 2008, the US also became much more aggressive in collecting data on US businesses and citizens active abroad, in the first case to fight terrorism[926] and in the second to fight tax avoidance.[927]

All these factors have fed into the SEC's increased enforcement of both prongs of the FPCA. The expansion of enforcement interest of the SEC was coupled with an increase in the power and variety of enforcement tools. As Atkins and Bondi have observed with regard to the expansion following the collapse of the dotcom bubble, "Congress…provided the SEC with significant authority to enforce new and existing laws. The Sarbanes-Oxley Act of 2002 imposed significant, additional requirements on corporations and their officers and directors. The Sarbanes-Oxley Act greatly expanded the Commission's enforcement powers and the criminal penalties for violating the federal securities laws."[928]

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[926] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001.

[927] See The Foreign Account Tax Compliance Act of 2010.

[928] Atkins & Bondi (2008: 384-385).

Newly-created enforcement tools, the increasing official control over of auditors to guarantee their objectivity, and the increasingly active role of private sector through civil litigation and whistleblowers, had significantly improved the information flows about corporate misconduct, in which violations of the anti-bribery prong of the FCPA were included. It is very unlikely that the SEC specifically sought out to increase its power over violations of the anti-bribery prong of the FCPA. However, with the large increase in activity and information, including the level of enforcement of the FCPA's accounting prong, an increase in the uncovering of violations of the anti-bribery prong was a natural consequence.

What Atkins and Bondi did not notice is that this historical background also reformed the relations of the SEC to other players in its working context. This bureaucratic reality has put the work of the SEC under more stringent external scrutiny. Its discretionary power to focus on certain kinds of violations but overlook other kinds has become smaller and smaller. For example, Section 10A of the Exchange Act mandated auditors to detect and report illegal acts of public companies. Under these provisions, the SEC was not only entitled to enjoy the "right-to-know", but also had to file reports properly. It received a statutory duty that it had no power to neglect. On the other hand, if violations of federal securities laws were revealed by the media, the private sector, or the DOJ, instead of the internal control systems in public companies established under the FCPA, the auditors, or the SEC, this might well damage the reputation of the SEC if the offence discovered was one that the SEC should have detected earlier. In fact, one reason for the Congress to establish the whistleblower program was that some senators lost faith in the ability of the SEC and the accounting profession to detect misconduct.[929] For the SEC then, enforcing the anti-bribery prong of the FCPA has become a natural result of its enforcement of the accounting prong, for the public and Congress expects information arising under

[929] See Scammell (2004: 69-73).

those provisions to be acted. Otherwise, such scandals could damage public confidence and the SEC's own reputation. In this way the gap between the statutory duty of the SEC to enforce the anti-bribery prong of the FCPA and its central mission to improve information disclosure has been bridged.

3. The DOJ's Increasingly Aggressive Enforcement of the FCPA

The FCPA authorized the DOJ to be responsible for criminal enforcement of the FCPA (both the accounting and the anti-bribery prongs) over both issuers and domestic concerns. As the SEC is only responsible for bringing civil and administrative actions under the Exchange Act and related acts regulating licensed and regulated activity, the DOJ also takes charge of civil enforcement of the FCPA over domestic concerns, which are not under the SEC's supervision.[930] The 1998 amendment to the FCPA extended the jurisdiction of the FCPA to foreigners that conduct an act of transnational bribery or act in furtherance of such act within the territory of the US.[931]

By 2014, the DOJ has enforced the FCPA for 37 years. The enforcement efforts of the DOJ is always a big concern. Current literature mainly uses the number of enforcement actions as the measure of the DOJ's enforcement efforts, and concludes that the FCPA was poorly-enforced by the DOJ in the first two decades but well-enforced since the 2000s, parallel to the historical development of the SEC's enforcement.[932] For example, the OECD commented in *implementing the OECD Anti-Bribery Convention: Report on the United States 2003* that, "since the enactment of the FCPA, the Department of Justice has brought a relative smaller number of enforcement actions…approximately 32

[930] See §78dd-2 of Foreign Corrupt Practices Act of 1977. Also see USDOJ & SEC (2012: 4).

[931] International Anti-Bribery and Fair Competition Act of 1998, Pub.L. 105–366, 112 Stat. 3302 (enacted 10 November 1998). Detailed discussion is given in Chapter V, 3.2.2.

[932] See Chapter V, 1, Paragraph 2.

criminal prosecutions and seven civil enforcement actions have been brought by the DOJ under the anti-bribery provisions of the FCPA."[933]

Instead of using labels like "ineffective enforcement" and "effective enforcement", I would rather label the differing performance of the DOJ in bringing enforcement actions before and after Year 2001 as the DOJ's "passive enforcement" and "active enforcement" years. The reason is straightforward: what I want to characterize here is the variation in the DOJ's efforts on FCPA enforcement, but not how FCPA took effect generally. Anyway, as Urofsky *et al*. argue, the FCPA, as law, has its inherent deterrent effect on transnational corporate bribery. Variation in the number of enforcement actions brought by the DOJ annually can only explain variation in the DOJ's efforts, or variation in the effectiveness of the DOJ's enforcement tools, but cannot explain variation in the effectiveness of the FCPA in preventing violations of the FCPA.[934]

3.1 The DOJ's "Passive Enforcement" in the First Two Decades

As noted, the DOJ's enforcement efforts during the 1980s and the 1990s can be characterized as "passive enforcement". During this period, the DOJ, like the SEC, did not bring many FCPA enforcement actions; and the enforcement actions it did bring mainly resulted from clues of violations of the FCPA

[933] See OECD (2004: 30). For more information: Urofsky stated that "Although the first two decades following the enactment of the FCPA saw some notable cases against some of the United States' most prominent corporations, recent years have seen a significant uptick in the frequency, scope, and severity of FCPA actions". Urofsky *et al*. (2012: 1158). Hansberry said that, "The FCPA was not heavily enforced during the first twenty years of its existence and was considered a 'legal sleeping dog'. Enforcement actions by both the DOJ and the SEC have recently increased dramatically." Hansberry (2012: 202). Thomas noted that, "the Act (the FCPA) had little to no effect in its first twenty-five years of existence. Then, in the early twenty-first century, the Department of Justice and Securities Exchange Commission ('SEC') began an exponential increase in the Act's enforcement. This same time period also saw an important development in the means by which a prosecutor might bring an FCPA enforcement action…" Thomas (2010: 439-440).

[934] There is also voice arguing that the FCPA was well-enforced after its creation. People should not only take prosecution records as the criterion, but should also consider factor like the deterrent effect of the FCPA, and the effectiveness of internal controls. See e.g. Urofsky *et al.* (2012: 1147).

revealed by foreign governments, media, or the SEC in its investigation into violations of federal securities laws, but not from the DOJ's effective detection. For example, the case of *United States v. Kenney International Corp.* (Court Docket Number: 79-CR-372), filed on 2 August 1979 in the District of Columbia, resulted from the revelation of bribery deals by the Cook Islands. According to the *Offer of Proof*, Kenney International Corp. was a domestic concern which promised to pay bribes to the Cook Islands Party so as to retain a contract with the Government. In March 1978, as the *Offer of Proof* stated, the Cook Islands Party "won a majority of seats in the Legislative Assembly… However, in July 1978…the Honorable Chief Justice Donne of the High Court of the Cook Islands disallowed the votes of the Cook Islands Party supporters whose travel had been subsidized as 'unlawful votes tainted by bribery'. As a consequence, the Cook Islands Party lost its control of the Legislative Assembly to the opposition party…" After the acts of foreign bribery of Kennedy International were revealed in the Cook Islands,[935] the DOJ of the US came to investigate Kenney International Corp.'s acts of paying foreign bribes. In this case, the DOJ did not actively "detect" the case by applying any anti-bribery tools. Instead, it simply started an investigation according to the FCPA after the revelation of the case. Another example is the case of *United States v. Sam P. Wallace Company*, Inc. (Court Docket Number: 83-CR-034), filed on 23 February 1983 in the District of Puerto Rico resulted from the revelations occurring in a SEC enforcement action. In this case, the DOJ investigated Sam P. Wallace Company, Inc. — a US company based in Texas for it had paid bribes to the Chairman of the Trinidad and Tobago Racing Authority in 1981.[936] This criminal proceeding was not a

[935] United States v. Kenny International Corp. Court Docket Number: 79-CR-372, (filed on 2 August 1979 in the District of Columbia), available at: http://www.justice.gov/criminal/fraud/fcpa/cases/kenny-international.html (last visited: 20 May 2014).

[936] United States v. Sam P. Wallace Company, Inc. Court Docket Number: 83-CR-034, (filed on 23 February 1983 in the District of Puerto Rico), available at: http://www.justice.gov/criminal/fraud/fcpa/cases/sam-wallace-company.html (last visited: 20 May 2014).

result of the DOJ's active detection, but was a subsequent action of the SEC's enforcement action against the company — the SEC started an enforcement action against Sam P. Wallace Company, Inc. in 1980 because as a public company it violated the Exchange Act.[937] In this case, the DOJ did not actively reveal the misconduct of the company too. The DOJ simply passively enforced the FCPA.[938]

3.1.1 The Tension between FCPA Enforcement and the DOJ's Central Mission

It was the Judiciary Act of 1789 that created the Office of the Attorney General. At first, the Attorney General was only one person, mandated "to prosecute and conduct all suits in the Supreme Court", and represent the interest of the federal government. With the increase in the amount of litigations involving the federal government after the Civil War, on 22 June 1870, the Congress established the DOJ as an executive department of the federal government. The DOJ was authorized the power to take charge of legal affairs of the US and control all criminal prosecutions and civil litigations relating to the interest of the country.[939] As present, the DOJ defines its own central mission as "to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of

[937] See SEC 1981 Annual Report, 47th Annual Report of the Securities and Exchange Commission for the Fiscal Year ended September 30, 1981, 62, available at: http://www.sec.gov/about/annual_report/1981.pdf (last visited: 20 May 2014). Also see SEC v. Sam P. Wallace Co. Inc., Robert Buckner and Alfonso Rodriguez (81-cv-1915) (D.D.C., 13 August 1981).

[938] Logically, this "passive enforcement" can be attributed to the DOJ's lack of political will, or lack of effective enforcement tools, or both.

[939] For the law see Public Acts of the Forty First Congress, 22 June 1970, available at: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=016/llsl016.db&recNum=197 (last visited: 19 May 2014). For relevant information see DOJ Press Release, "Statutory Authority", available at: http://www.justice.gov/about/about.html (last visited: 31 July 2014).

justice for all Americans."[940] For over 100 years, the DOJ has also been entrusted with enforcing the Sherman Act's criminal penalties against unfair business practices under the rubric of antitrust enforcement,[941] and since the 1990s has prosecuted international cartels.[942]

Because of the DOJ's mission and experience protecting US national interests, the DOJ would technically be more concerned about the negative effects of FCPA enforcement than the SEC. Different from the SEC's "indifference" in foreign bribery regulation in the first two decades, the DOJ was very mindful of the adverse consequence of effective enforcement of the FCPA. This is because, as Carrington comments, "it (the DOJ) recognized that American investors were rewarded and American workers found jobs as a result of deals with foreign governments whose officers often expected to share the bribes' wealth even if it might impose a cost on the people they were purporting to serve and on the efficiency of the global marketplace."[943] This claim is more likely true given the fact that under the FCPA, the DOJ is responsible for criminal enforcement over registered issuers and other domestic companies, as well as civil enforcement over unregistered domestic companies. Prior to 1998, the DOJ's jurisdiction was limited to US nationals and entities. Given the popular viewpoint that domestic efforts to combat foreign bribery disadvantage domestic companies in foreign markets,[944] the DOJ's enforcement actions would probably cause a damage on (instead of providing protecting) US interests because they initially targeted at only US companies. In addition, it is an objective truth that where there is a new piece of legislation, it takes the enforcing agency time to incorporate its enforcement duty into its routine proceedings and formulated new tools. The

[940] DOJ Press Release, "Our Mission Statement", available at: http://www.justice.gov/about/about.html (last visited: 19 July 2014).

[941] See § 1 of Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1-7 (2 July 1890).

[942] This expansion of the DOJ's enforcement activities is discussed at http://www.justice.gov/atr/public/guidelines/209114.htm (last visited: 27 July 2014).

[943] Carrington (2010: 134).

[944] See e.g., Beck & Maher (1989), LeVine (1989), Hall (1994), and Davis (2002; 2012).

SEC's experience in enforcing the FCPA suggested that the SEC was hesitated to initiate enforcement actions against violations of the accounting provisions of the FCPA in the first two decades, despite the SEC's strong political will to do so.[945] For the DOJ whose enforcement actions would lead to the application of criminal sanctions over US companies, it is no wonder that the DOJ would be very conservative in FCPA enforcement.

The DOJ's conservative attitude was also a response to the critiques from the business community, academia, and officials of the adverse effect of the FCPA on US business. A comparable variation of its enforcement of the antitrust laws in response to changing philosophy toward business regulation has been repeatedly documented.[946] As noted, the 1981 GAO report found that companies believed they were disadvantaged by the unilateral US enforcement of the FCPA, and recommended that Congress "closely monitor the status of U.S. efforts to reach an international antibribery agreement."[947] In a Senate hearing in 1983, many participants agreed that the FCPA had disadvantaged the US economy. Senator D' Amato criticized the ambiguities of certain provisions of the FCPA and commented that, "As the Foreign Corrupt Practices Act stands now, it still has a chilling effect on the desire of American corporations to conduct business overseas. It is in no one's interest to allow a law that impedes commerce to continue in this way."[948] Senator Heinz endorsed this viewpoint and stated that, "As a result, uncertainty in the business community continues, export opportunities are foregone, and actual sales are lost. In short, we continue to

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[945] See Chapter V, 2.1.

[946] For example, Lin *et al.* show that government initiated antitrust cases dropped from an annual high of over 1500 in 1975 to just about one third of that at the end of Reagan administration. See Lin *et al.* (2000: 264).

[947] USGAO (1981).

[948] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 2 (statement of Senator D'Amato).

shoot ourselves in the foot. The real tragedy is that this waste can be avoided without compromising the law's objective."[949]

3.1.2 The DOJ's Conservative Strategy

For all these reasons, the DOJ adopted a conservative strategy when operating its discretionary power about whether to investigate a suspected FCPA violation. First, similar to the SEC, the DOJ offered a wide range of deference to companies' compliance with the FCPA in their business activities. As Philip Heymann, the Assistant Attorney General for the DOJ's Criminal Division stated in 1979, "[p]ro forma adoption of an anti-bribery policy will not insulate top management and the company from intense investigation and prosecution if serious controls are lacking[,]…where a company has been making good faith efforts to monitor its employees, that will be relevant in our decision how to proceed." [950]

Second, as Tarullo suggests, "the path of the domestic law enforcement system reflects a set of priorities, which in turn reflect — albeit imperfectly — domestic political considerations." [951] The DOJ also defined its work priorities in prosecuting violations of the FCPA. In the same statement in 1979, Heymann proposed several factors that would increase the likelihood of investigation and prosecution: (a) the DOJ would be more inclined to investigate cases in which all other competitors were American companies. It was quite easy to understand this preference of the DOJ because in this kind of case, US companies would obtain the business opportunity even if no bribes were paid. The act of foreign bribery

[949] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 2 (statement of Senator Heinz).

[950] Heymann, Philip B. (1979). "Justice Outlines Priorities in Prosecuting Violations of Foreign Corrupt Practices Act", AM. BANKER, 21 November 1979, 8, 10, cited in Urofsky (2012: 1147).

[951] Tarullo (2004: 688).

did not bring any profit for the overall export of the US, but was an unnecessary spending that victimized other US companies. It is in the US's interest to combat this kind of corporate behavior, instead of tolerating it. (b) The DOJ would allocate resources to cases in which not all competitors were US companies, but a bribe-paying US Company was the only one engaging in corrupt practices. This means, though the DOJ did not want to enforce the FCPA against US companies too aggressively so as not to disadvantage its own companies in foreign markets, it did not allow US companies to take the lead in paying bribes. In other words, although the DOJ did not intend to prosecute FCPA violation aggressively, it would never encourage bribery. (c) The DOJ would investigate cases actively in which a foreign country was fighting against corruption actively. In other words, although the DOJ might tolerate US companies that had to pay bribes in countries where corruption is pervasive, it did not want US companies to become the makers of a corruption culture in a foreign country.[952] In addition, the DOJ also required attorneys to receive permission from Washington before handling investigations into foreign bribery offense.[953]

The difficulty in detecting transnational bribery and the scarcity of investigative resources made the DOJ reluctant to allocate resources to investigate FCPA violations. It is not easy to obtain information on corrupt behavior because corruption is a secretive enterprise.[954] It became even more prohibitive for prosecutors to obtain evidence of transnational bribery because it often took place beyond the territory of the country. Meanwhile, some attention should be

[952] See Heymann, Philip B. (1979). "Justice Outlines Priorities in Prosecuting Violations of Foreign Corrupt Practices Act", AM. BANKER, 21 November 1979, 8, 10, cited in Urofsky (2012: 1147).

[953] As Thomas suggests, "During the first two decades of the FCPA, enforcement was 'sporadic' at best. The DOJ enforced the Act with great trepidation, fearing that the Act's enforcement would damage relations with allies, presumably because such accusations against allied government officials would be far from diplomatic. As a result, the DOJ required U.S. Attorneys to receive permission from Washington before pursuing bribery charges. Twenty years after the FCPA's passage, only seventeen companies and thirty-three individuals faced prosecution." Thomas (2010: 448-449).

[954] See Chapter III, 4.2.

paid to the fiscal expenditure reform in the US in the 1980s. From the middle 1980s, US Government began to pass legislation aiming at resolving the problem of federal deficit. In 1990, as a part of the Omnibus Budget Reconciliation Act of 1990 the "Pay-As-You-Go" rule (the PAYGO rule) was established, requiring new spending or tax changes not to worsen the federal deficit.[955] This rule was extended for several times thereafter.[956] The PAYGO rule had direct impact on the enforcement of the FCPA. One example is, in 1998, when Senate Report No. 105-277 sought to amend the FCPA for the second time in order to make it consistent with the newly-passed OECD Anti-Bribery Convention, it had to contain a statement highlighting that the implementation of the new legislation would not result in any significant cost to the federal government.[957]

Given that enforcing the FCPA was costly, it is not surprising that the DOJ would be more inclined to allocate limited resources to other types of crimes which are less costly and more relevant to US national interests.

The facts discussed above suggests that while the DOJ's statutory duty of enforcing the FCPA seemed to be inconsistent with the DOJ's original mission to protect US national interests, the DOJ was trying to reconcile the two by way of allocating prosecution resources to cases in which active FCPA enforcement was consistent with US national interests, or at least, would not burden US companies too much.

3.1.3 The Limited Effect of the Conservative Strategy

However, the effectiveness of the balancing strategy was limited because of the

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[955] Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508, 104 Stat. 1388 (5 November 1990).

[956] For a detailed description of the PAYGO rule see Homey & Kogan (2006), and Office of Management and Budget, "The Statutory Pay-As-You-Go Act of 2010: a Description", available at: http://www.whitehouse.gov/omb/paygo_description/ (last visited: 13 May 2014).

[957] See Appendix of Senate Report No. 105-277 (4 May 1998), available at: http://www.justice.gov/criminal/fraud/fcpa/docs/senaterpt.pdf (last visited: 20 July 2014). Also see Chapter V, 3.2.4.

rule of law. On the one hand, the FCPA has its own inherent deterrent effect on corporate behavior in foreign markets.[958] In the 1983 Senate hearing which discussed whether and how to amend the FCPA, Lionel Olmer, the Under Secretary of the Department of Commerce, conveyed his concern that the FCPA had significant adverse effect on the export of the US because of the "chilling effect" of the FCPA *per se*, irrespective of any actions taken by the enforcing agencies. He stated,

"In many areas of the world in which this act takes on larger importance, it will not be a precise understanding of the nuances of the legislations that would cause a prospective buyer to shy away from it when warned by a competitor to U.S. companies…In a Middle Eastern country, a U.S. company which had every reason to expect it would be designated a prime contractor lost that opportunity and was designated the subcontractor because we believe the foreign competitor, a Western European-based company, told the purchaser that the American company would be subject to the Foreign Corrupt Practices Act and there were all sorts of hazards to that which would put in danger the time frame within which the contract and the terms and conditions under it was to be fulfilled."[959]

This means that in Olmer's view, the actual impact of the FCPA on the business community was only partially determined by the actions of the DOJ.

On the other hand, the discretionary power of the DOJ was limited. The DOJ can try to avoid enforcing the FCPA too aggressively so as not to burden US companies in foreign markets. However, as an enforcing agency, it had to ensure all revealed instances of violations of the FCPA were prosecuted. In other words, the DOJ could not choose whether to enforce the law or not. This was a product of legislation transferring discretion over enforcement to the Executive Branch.

In addition, it was also impossible for the Congress to repeal the FCPA or decriminalize transnational bribery.[960] As Charles L. Marinaccio, the minority

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[958] See Urofsky *et al.* (2012: 1147).

[959] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 55-57 (testimony of Lionel Olmer, Under Secretary of Department of Commerce).

[960] For a similar argument see Chapter II, 3.1.

counsel of Senate Committee on Banking, Housing and Urban Affairs stated,

"In any reexamination of the FCPA, some things will not change: the United States will never adopt a policy that it is acceptable to corrupt foreign governments; the United States will never permit bribery to corrupt a free market; the United States will always require corporations to behave as responsible citizens; the United States will always seek to preserve the integrity of its capital markets. If the law changes, it will have to continue to meet the public policy objectives…"[961]

Therefore, the House rejected several attempts of the Senate in the 1980s to amend the FCPA because they had a flavor of weakening the anti-bribery objective of the FCPA. In the 1983 Senate hearing, Senator Heinz said that their proposed bill had many merits. But "unfortunately, we were unable to convince key members in the House of the merits of the bill, despite sustained negotiations throughout 1982." [962]

Then the DOJ seemed to have been trapped in a dilemma. Fulfilling its statutory duty of combating foreign bribery was costly, and to some degree, damaging US business in foreign markets. It was not surprising that the DOJ would not allocate a lot of resources to prosecuting transnational bribery offences, but would rather allocate resources to investigations into other kinds of crimes or investigations into foreign bribery offences that would not damage US business interest badly. Yet the DOJ's efforts to surmount this dilemma by setting work priorities had only limited effect. After all, if it did not have to work actively to "mine" instances of foreign bribery, it had to prosecute foreign bribery offences that were revealed by other information channels.

[961] Marinaccio (1982: 348).

[962] *Business Accounting and Foreign Trade Simplification Act*: Joint Hearing before the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, United States Senate, 98th Congress, first session, on S. 414, 24 February 1983, 3 (statement of Senator Heinz).

3.2 The DOJ's "Active Enforcement" in Recent Two Decades

The 2000s witnessed a significant increase in the DOJ's efforts on FCPA enforcement. It is recorded that the number of prosecutions brought during the period from 2001 to 2006 is more than four times that during the comparable period 1996-2000.[963] This trend has been maintained since then. Besides, the amount of monetary sanctions imposed by the DOJ over FCPA violators increased. It is recorded that the top ten FCPA settlements in 2009, 2010 and 2011 amount to over $3.1 billion.[964] On 12 December 2008, the US filed a settled enforcement action against Siemens Aktiengesellschaft ("Siemens") with violations of the FCPA, in which Siemens alone was required to pay a total of $ 1.6 billion in disgorgement and fines, which at that time was the largest amount of money a company had every paid to resolve corruption charges by then.[965]

This overall development trend took place against the backdrop in which private sector actors played an increasingly important role in uncovering crimes, the jurisdiction of the FCPA expanded to a wide range of foreigners, and cooperation between US domestic regulatory agencies in both domestic enforcement of laws and international activities increase dramatically because of the events of September 11, 2001.[966] As noted in Section 2, a series of legislative actions in the 1990s altered the relations of the SEC with major participants of the

[963] See Thomas (2010: 449). For enforcement actions brought by the DOJ see US Press Release, "FCPA and Related Enforcement Actions", available at: http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited: 31 July 2014).

[964] See Hansberry (2012: 195). Also see DOJ Press Release, "FCPA and Related Enforcement Actions", available at: http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited: 29 July 2014).

[965] Then, Siemens agreed to pay $ 350 million in disgorgement to the SEC, $ 450 million criminal fine to the DOJ, and a fine of over $ 850 million to German enforcing agencies. See SEC Press Release, "SEC Files Settled Foreign Corrupt Practices Act Charges against Siemens AG for Engaging in Worldwide Bribery with Total Disgorgement and Criminal Fines of Over $1.6 Billion", Litigation Release No. 20829, 15 December 2008, available at: http://www.sec.gov/litigation/litreleases/2008/lr20829.htm (last visited: 8 May 2014).

[966] See generally Middlemiss & Gupta (2007).

securities world, and therefore altered the costs and motives of the SEC to enforce the anti-bribery prong of the FCPA. The DOJ experienced the same situation. Another series of legislative actions altered the DOJ's relations with whistleblowers and suspected companies, and thereby altered the costs and motives of the DOJ to enforce the FCPA in the 2000s.

3.2.1 Private Enforcement of Public Law: Private Sector Actors as Whistleblowers

The lack of information flow is a long-standing problem that makes public enforcement of anti-bribery laws difficult and expensive. Therefore, the government has a more urgent need in anti-corruption activities than in any other fields to seek assistance from private forces.

The US government has a long history of cooperating with private forces in uncovering crimes where the government is the victim. In fact, the US has developed a robust system for *qui tam* actions, and a well-functioning whistleblower program. The two programs dramatically expanded the information flows about FCPA violations, and decreased the operational costs for the DOJ to detect and investigate corruption.

3.2.1 (A) The Enactment of the False Claims Act and qui tam Actions

The False Claims Act, which permits private enforcement of public law, can trace its origin in the Colonial America. The practice of private enforcement of public law was a law enforcement tool transplanted from England to the jurisprudence of the colonial America.[967] However, as practice showed that permitting a private citizen to bring an action for public interest led to widespread informer abuse, the English forsook this practice. The American repealed this system too in the 1800s because it was incompatible with the US's

[967] See Notes (1972: 83). Also see Stengle (2008: 476-477).

increasing demand for centralized power.[968]

During the Civil War, some corruption scandals took place in the military industry — which damaged interests of the federal government.[969] Against the background of a time when the DOJ had not been established, President Lincoln showed strong interest in making use of the force of private sector actors to reveal corruption. President Lincoln's effort resulted in the enactment of the False Claims Act of 1863.[970] With a purpose to fight fraud that was damaging the Government, this law not only required the offender to pay double damages, but also encouraged private citizens who had personal knowledge of an offence to initiate a civil litigation on behalf of the Government. Half of the damages would go to the private sector if the litigation succeeded.

It should be noted that the enactment of the False Claims Act of 1863 took place in the context that the DOJ had not yet established, and therefore the Government had to rely on private forces to cope with the large amount of fraud offences against the Government. In 1870, several years later, the DOJ was created.[971] In 1943, the DOJ advocated repealing private enforcement of public law, or at least, amending the False Claims Act of 1863, for a purpose of limiting informer abuse.[972] The proposal of the DOJ led to the Act being amended in 1943, lowering the percentage of damages going to a successful *qui tam* plaintiff and raised the threshold for private sector actors to initiate *qui tam* lawsuits.[973] This

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[968] Stengle (2008: 478).

[969] See Carrington (2010: 150), and Stengle (2008: 478).

[970] False Claims Act of 1863, 12 Stat. 696-699 (2 March 1863).

[971] See DOJ Press Release, "Statutory Authority", available at: http://www.justice.gov/about/about.html (last visited: 21 May 2014).

[972] A background event of this proposal was that some *qui tam* plaintiff who "stole" information from the DOJ initiated a civil litigation on the behalf of the government against contractors rigging bids and took away half of the damage after won the lawsuit. However, as before this civil litigation, the DOJ had obtained evidence and had initiated a federal indictment in the first place, the *qui tam* action under the False Claims Act of 1863 brought no interest to the Government, but only caused it a loss of half of the damage. See Stengle (2008: 478-479).

[973] See False Claims Act Amendments, Ch. 377, 57 Stat. 608 (23 December 1943) (codified

1943 Amendment meant that the False Claims Act existed only in name for another four decades.[974]

This "quiet years" of the False Claims Act of 1943 ended in the 1980s, when the adventitious disclosure of fraud and corruption scandals in military spending shocked the Government once again. The DOJ was criticized for its failure to detect those misconducts. For the purpose of recovering the stolen assets of the US,[975] the Senate brought an amendment to the False Claims Act of 1943, advocating a revitalization of the *qui tam* actions under the False Claims Act. The 1986 Amendment increased the amount of damages from double damages to treble damages, of which 15%-30% would go to the *qui tam* plaintiff.[976]

The revitalization of *qui tam* actions by the 1986 Amendment not only provided a new enforcement tool for recovering US assets, but also redefined the relationship between the DOJ and the private sector. In particular, it created potential competition between private enforcement and public enforcement — an objective that Senator Grassley (the Sponsor of the Act) had sought to achieve. Senator Grassley believed that authorizing private sector actors to initiate civil actions would encourage the DOJ to investigate the alleged illegal acts more actively.[977] The False Claims Act of 1986 was amended once again in 2009, making it more attractive for private participation in public law enforcement.[978]

Currently, the *qui tam* provisions of the False Claim Act of the US have played an important role in combating fraud against the federal government. As Stengle comments, "The FCA (False Claims Act) over the last twenty years has proven

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as amended at §3730 (d) and §3730 (e)).

[974] See Scammell (2004: 42).

[975] See Scammell (2004: 69-73).

[976] False Claims Act Amendments, Pub. L. 99–562, 100 Stat. 3153 (27 October 1986).

[977] See Scammell (2004: 69-73).

[978] Fraud Enforcement and Recovery Act of 2009, Pub.L. 111–21, S. 386, 123 Stat. 1617 (20 May 2009).

itself to be an important weapon in the federal government's attempts to recapture stolen money...*Qui tam* actions, through their decentralized nature, their inherent grant of needed resources, and their impressive historical pedigree, are likely our best bet for effectively addressing fraud against the government." [979] By 2004, there had been more than 10,000 false-claim cases.[980] At present, most false-claims cases are brought under domestic corrupt practices laws other than the FCPA.[981] However, the antifraud and anticorruption purpose of the False Claims Act unavoidably made the revelation of transnational bribery an easier job.

3.2.1 (A) the Whistleblower Program

On the other hand, under this tradition of private enforcement of public laws, the Congress also worked out a special whistleblower program to combat violations of federal securities laws. In 2002 and 2010, the Congress enacted the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 respectively that – as discussed at length above – have provisions on whistleblower protection and whistleblower incentives. At present, the whistleblower program has become one of the most effective tools for the DOJ to enforce the FCPA.[982]

3.2.2 The Expansion of the Jurisdiction of the FCPA to Foreigners

If private enforcement of public law expanded information inflow on transnational bribery, the expansion of jurisdiction of the FCPA to foreigners mitigated the DOJ's concern about the adverse effect of FCPA enforcement on US business in foreign markets.

In 1997, the OECD Anti-Bribery Convention was signed. Article 4 of the OECD

[979] Stengle (2008: 509-510).

[980] See Scammell (2004: 304-305).

[981] See Sporkin (1997: 153).

[982] For more details about the US's whistleblower program see Chapter V, 2.2.4. Also see Chapter IV, 4.2.

Anti-Bribery Convention provides terms about jurisdiction:

"1. Each party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory. 2. Each party which has jurisdiction to prosecution its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. 3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution. 4. Each party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps." [983]

The Jurisdiction suggested by the Convention does not only apply to a country's nationals, but also foreigners that commit an offence in a country's territory. This suggested jurisdiction is broader than that of the 1977 version and the 1988 version of the FCPA, which only applied to issuers registering with the SEC and unlisted US companies or other business entities (domestic concerns). Therefore, on 25 June 1998, the Committee on Banking, Housing, and Urban Affairs, reported an original bill titled the "International Anti-Bribery Act of 1998" to amend the FCPA in order to incorporate the suggestion of the Convention.[984] This Bill was passed and known as *International Anti-Bribery and Fair Competition Act of 1998*, which amended the 1977 FCPA ("the 1998 Act").[985]

The 1998 Act expanded the jurisdiction of the DOJ dramatically. First, it eliminated the old provision which gave disparate treatment to US nationals and foreign nationals employed by US companies. The 1977 version of the FCPA applied to issuers as well as officers, directors, employees, or agents of issuers.[986] However, prior to 1998, a US national who violated the FCPA was subject to both criminal penalty and civil penalty, while a foreign national was only subject

[983] OECD (1997a: Article 4).

[984] Senate Report No. 105-277 (30 July 1998).

[985] See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998).

[986] See § 78dd-1 of the Foreign Corrupt Practices Act of 1977. Also see USDOJ & SEC (2012: 4).

to civil penalty.[987] Section 2 (d) of the 1998 Act amended the Securities Exchange Act of 1934 and revised this provision.[988] Second, the 1998 Act added territorial jurisdiction to the FCPA, applying its anti-bribery prohibition to foreigners, provided that these foreigners are "while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of [an act of foreign bribery]."[989] Third, the Congress suggested to make a broad interpretation of the application of territorial jurisdiction so as not to require an extensive physical connection.[990]

To a large extent, the 1998 Act mitigated the DOJ's concern that the US's unilateral enforcement against transnational bribery would damage US export interests — which was also the objective of the Congress through the amendment. Senate Report No. 105-277 had made this point clear,

"It is impossible to calculate with certainty the losses suffered by U.S. businesses due to bribery by our foreign competitors. The Commerce Department has stated that it has learned of significant allegations of bribery by foreign firms in approximately 180 international commercial contracts since mid-1994, contracts that were valued at nearly $80 billion. This legislation, coupled with implementation of the OECD Anti-Bribery Convention by our

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[987] § 32 (c) (2) of the Exchange Act (1997 version) provides, "(B) Any employee or agent of an issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States…who willfully violates section 78dd-1 (a) of this title, shall be fined not more than $ 100, 000, or imprisoned not more than 5 years, or both. (C) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates section 78 dd-1 (a) of this title shall be subject to a civil penalty of not more than $ 10, 000 imposed in an action brought by the Commission." § 32 (c) of the Securities Exchange Act of 1934 (1997 version).

[988] § 32 (c) (2) of the Exchange Act (1997 version) provides, "(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd–1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission." § 32 (c) of the Securities Exchange Act of 1934 (1998 version). Also see § 2 (d) of the International Anti-Bribery and Fair Competition Act of 1998.

[989] § 4 of the International Anti-Bribery and Fair Competition Act of 1998.

[990] See *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Commentary) at para. 25. Also see Senate Report No. 105-277 (30 July 1998) for a detailed introduction of how the 1998 Act expanded the jurisdiction of the 1977 version of the FCPA in the discussed three aspects.

major trading partners, will go a long way towards leveling the playing field for U.S. businesses in international contracts."[991]

After this revision, the US expanded the DOJ's jurisdiction under the FCPA to foreigners. If foreign governments did not want to prosecute their bribe-paying companies in foreign markets out of business consideration, the DOJ can do this provided that it could find any commerce nexus between the company and the US. The US government asserts jurisdiction to prosecute a FCPA violation if any portion of the act of bribery takes place in the US, or any participant of the bribery exchange is a US national.[992] Even a "telephone call to the United States, a letter mailed to the United States, the use of air or road travel, or the clearing of a check or wire transfer of funds through a financial institution in the United States" may lead to a US assertion of its jurisdiction.[993]

In subsequent enforcement practice, the US applied the territoriality jurisdiction and the active personality jurisdiction to the largest extent practical. An extreme example is that, in a FCPA settlement in 2011 required JGC Corp. a Japanese company, to pay an amount of $ 218.8 million in fines for paying bribes to Nigerian government officials,[994] based on the fact that — as Magnuson suggests, "JGC aided and abetted its partner in causing U.S. dollars-denominated wire transfers to pass from an account in Amsterdam to an account in Switzerland via correspondent bank account in New York."[995] Magnuson also suggests that in the FCPA settlements, foreign companies are likely to pay higher fines than comparable US companies.[996] Most of the largest FCPA settlements were against non-US companies; and most of fines were paid by non-US

[991] International Anti-Bribery Act of 1998, Senate Report No. 105-277 (30 July 1998).

[992] See Magnuson (2013: 397).

[993] See Brown (2001: 359).

[994] See United States v. JGC Corporation, Docket No: 11-CR-260 (filed on 6 April 2011, in the Southern District of Texas). Available at: http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp.html (last visited: 28 July 2014).

[995] Magnuson (2013: 401-402).

[996] See Magnuson (2013: 401).

companies.[997]

Of course, Article 4 of the OECD Anti-Bribery Convention provided a solid legal base in international law for the DOJ's aggressive enforcement of the FCPA against foreigners. It should also be noted that the firmer enforcement of the FCPA by the DOJ against foreigners is also closely related to the changes in the international activities of the US government after September 11, 2001. The events of September 11, 2001 made the US government realize the importance of enhancing cooperation among domestic agencies in sharing information that probably helped to prevent terroristic attacks, and created a political atmosphere supportive of more active prevention of and tougher sanctions over multi-jurisdictional crimes against the U.S.[998] It is this general trend of more rigorous enforcement of U.S. laws both domestically and internationally that allows the DOJ more powerful and better equipped in investigations of FCPA violations.

Regardless of the broader political context, the DOJ's aggressive enforcement of the FCPA against foreigners, as Magnuson argued, had become an effective tool for the US to surmount the "prisoner's dilemma" among players in the Convention. When the whistleblower program makes it no longer difficult to obtain information on acts of transnational bribery, the aggressive enforcement against foreigners levels the playing field for US companies in overseas markets, and also has an effect to urge other governments to enforce actively. The DOJ has no reason to enforce the FCPA any less aggressively.

3.2.3 The Application of Diversion Agreements: an Effective Tool to Save Social Costs?

Since the 1990s, the DOJ began to use diversion agreements in its FCPA enforcement actions. Since the 2000s, diversion agreements gradually become a

[997] See Magnuson (2013: 400).

[998] See Middlemiss & Gupta (2007: 138).

major means for the DOJ to settle FCPA enforcement actions.[999] The application of diversion agreements to solve FCPA violations not only saves the DOJ substantial resources, but also minimizes the social costs of criminal enforcement of the FCPA.

The main forms of diversion are deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Diversion agreements are a kind of agreement between prosecutors and defendants, pursuant to which the prosecutor would impose a lesser charge on a likely guilty defendant, avoiding a full-scale prosecution that might bring a heavier penalty.[1000] As Thomas describes them, diversion agreements provide prosecutors "with a third option when determining whether or not to prosecute a corporation."[1001]

In regular criminal proceedings, diversion agreements are a means for the DOJ to resolve the dilemma that the need to obtain justice and recover for violations of the criminal laws are strong, but judicial resources are limited, or evidence collection is difficult. In FCPA enforcement, diversion agreements are also a tool for the DOJ to reconcile the need to prosecute FCPA violations without destroying a defendant US company. The case of Arthur Anderson, Enron's accounting firm, is a good counterexample of how regular criminal prosecutions without diversion agreements can destroy a defendant company: because of the firm's refusal to a diversion agreement, the failure of the firm in its criminal lawsuit led to the dissolution of the 80 year old firm, with 28,000 people losing their jobs.[1002]

3.2.4 The Big-Dollar FCPA Settlements as an Incentive

Under the FCPA, for each violation of the anti-bribery portion of the FCPA,

[999] See Thomas (2010: 453).

[1000] See Thomas (2010: 451).

[1001] Thomas (2010: 451).

[1002] For the story of Arthur Anderson see Thomas (2010: 453).

defendant corporations or other business entities face a fine of up to $2 million while individuals are subject to a fine of up to $100,000 and imprisonment for up to five years; for each violation of the accounting prong of the FCPA, defendant corporations face a fine of up to $25 million while individuals face up to $25 million in criminal fines and imprisonment for up to 20 years.[1003] For this reason, it is also possible that the DOJ has ramped up FCPA enforcement because of greater benefits in big-dollar FCPA settlements.[1004]

Because of the existence of the "PAYGO" rule, we have a reason to believe that the big-dollar FCPA settlements which would not worse the financial deficit but probably increase fiscal revenue, would attract investigative resources of the DOJ from elsewhere to FCPA enforcement.[1005]

We can see evidence supporting this point from the statement of Ann M. Harkins, the Acting Assistant Attorney General, when the Senate passed the 1998 Amendment to the FCPA,

"Therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act. Receipts from fines would be deposited into the CVF and could be spent in the following year. Thus, direct spending from the CVF would match the deposits into the CVF with a one-year lag. Our preliminary estimate is that the net effect of the enrolled bill on the deficit will be less than $ 500,000 annually. This proposal should be considered in

[1003] §78ff (a) of the Foreign Corrupt Practices Act of 1977.

[1004] For example, Black suggests that, "Economic and political science literature forecasts that multiple-goal agencies will devote too many resources on responsibilities that are easier to measure and have higher incentives and will devote too little attention on responsibilities that are harder to measure and have lower incentives. The SEC's decision to ramp up FCPA enforcement in recent years may be consistent with this prediction: both the SEC and the enforcement attorneys may derive greater benefits (publicity, sense of accomplishment, and, for the attorneys, future job prospects) from big-dollar FCPA settlements against multinational corporations than they do from bringing enforcement actions to deter and punish more mundane types of fraud that do not grab headlines." Black (2012: 1115).

[1005] In 1990, as a part of the Omnibus Budget Reconciliation Act of 1990 established the "Pay-As-You-Go" rule (the PAYGO rule), requiring new spending or tax changes not to worsen the federal deficit. Omnibus Budget Reconciliation Act of 1990, Pub. L. 101–508, 104 Stat. 1388 (5 November 1990). Also see Chapter V, 3.1.2.

conjunction with all other proposals that are subject to the pay-as-you-go requirement."[1006]

3.3 Efforts of the DOJ to Reconcile FCPA Enforcement and US National Interests

It may be noted that the trajectory of the DOJ's FCPA enforcement actions is basically a continuous effort to reconcile the DOJ's statutory duty to prosecute FCPA violations with its more fundamental mission — to protect US interests. This goal of the DOJ never changed.[1007]

However, the dilemma is that the DOJ has broad discretionary power to determine whether to enforce the FCPA aggressively or mindfully, based on its trade-off between multiple US interests and its consideration of its own working priorities, but it has no full control over the actual impact of the FCPA. Its mission to get existing laws upheld sets the bottom line for the DOJ's possible conservative or aggressive attitude. No matter how reluctant it might decide to be in regulating transnational bribery, it would have to allocate prosecution resources to FCPA violations already revealed. On the other hand, even if the DOJ had prosecuted no FCPA violations, the FCPA has its own deterrent effect on behavior. This bottom line, together with the inherent deterrent effect of the FCPA, determines that the FCPA is in fact enforced to a certain degree, independently of the discretionary power of the DOJ and the SEC. US companies would continue to be disadvantaged in overseas markets simply because Congress passed the FCPA in 1977 and could not repeal it in the 1980s.[1008] In addition, the work of the SEC, and the participation of the private sector, and the independent role of the media, created a situation that "passive enforcement" was no longer an effective strategy for the DOJ to minimize the adverse effects of FCPA enforcement on US business interests, but something could come under

[1006] Senate Report No. 105-277 (30 July 1998). Also see Chapter V, 3.1.2.

[1007] See Chapter V, 3.1.1.

[1008] See Chapter II, 2.1.2 & 3.1.1.

criticism from the public on its omission or low efficiency.[1009]

Then choices for the US Government as well as the DOJ were few. The Government had to make every effort to achieve an international agreement. And it indeed led to the creation of the OECD Anti-Bribery Convention.[1010] The new context determined that the optimal way, also the only way for the DOJ to reconcile its statutory duty of enforcing the FCPA and fundamental mission to protect US interests is to expand the jurisdiction of the FCPA to foreigners, and actively enforce it.[1011] For this reason, the 2000s and the 2010s has witnessed how the DOJ has created a variety of enforcement tools and has made zealous enforcement efforts against foreign companies. One extreme example is that the FCPA has become an effective tool for the US companies to defend their interests against foreign competitors. Under the current enforcement programs of the DOJ, it is possible for a US company which has paid bribes to foreign officials to disclose their own FCPA violations to the DOJ, but meanwhile report instances of its rivals' FCPA violations.[1012] In conclusion, the transformation of the DOJ's enforcement efforts from "passive enforcement" to "active enforcement" was not because the DOJ's goal changed, but because the institutional change in its work context has redefined the way in which it could fulfill its goal.

4. Increasingly Aggressive Enforcement: An Unavoidable Result of Independent Performance of Duties of the SEC and the DOJ

The preceding discussion suggests that FCPA enforcement in the past decades did not result from the US as a whole, or enforcing agencies' evaluation of how much payoff they could get from FCPA enforcement. Instead, the developmental

[1009] See Chapter V, 3.1.3 &3.2.1.

[1010] See Chapter II, 3.1.1.

[1011] See Chapter V, 3.2.2.

[1012] See Magnuson (2013: 411).

trajectory of FCPA enforcement was more like a story about how the development of financial markets regulation facilitated the SEC's enforcement of the FCPA, and changes in international reach spurred the DOJ's enforcement efforts. This process is incremental, and irreversible.

4.1 The Increasing Demand for Transparent Corporate Management Caused a "Black Hole Effect" Altering the Institutional Context for FCPA Enforcement

The development of securities regulation has been a steady increase in transparency. Securities regulators are sensitive to public sentiments because public confidence is vital to the robust development of financial markets. As timely, adequate information disclosure is recognized as the most effective way for candid communication between public companies and investors, the SEC, as well as the Congress, have acted to steadily increase the transparency of corporate management.

The growing demand of public investors for transparent corporate management evolved to a strong social force that aggregated contemporary legislative actions, the invention of enforcement tools, and especially the practice of the accounting profession toward this goal. In other words, it has created a "black hole effect" in the securities world. The term "black hole" is an astronomic concept, describing an astronomic phenomenon that "a discrete, invisible perimeter surrounding the nucleus of a black hole in space" has such "a great gravitational force that the space/time continuum begins to wrap…As a result, all matter, light, and energy passing this perimeter is sucked into an infinite dense state called 'singularity'".[1013] In last decades, the term "black hole effect" has been widely applied in social sciences.[1014] There are some parallels between this astronomic

[1013] Schmonsees (2005: 3).

[1014] See e.g., Magee *et al.* (1989).

phenomenon and the US's reinforcement of its accounting regulation to achieve the transparency of corporate management. The preceding review of the developmental trajectory of the SEC's regulatory tools suggests that the social demand for timely, adequate disclosure of key market-related information has served as the "singularity" that urged the SEC to invent, or support others (e.g., the Congress, the business community) to invent new tools that would achieve transparent corporate management. All rule-making is this domain would never deviate from, but reinforce this goal. This is what I call the "black hole effect" in the securities world.

This "black hole effect", embodied in a series of legislative activities serving the same goal, was not isolated, but has profound externalities in other areas. Those new tools of the government with a purpose to reinforce corporate transparency, have gradually woven into a holistic regulatory system with complicated interactions between players in the securities world. For example, the reporting obligation of auditors activated auditors to detect illegal acts of their clients, and the whistleblower program activated employees to report their employers' illegal acts. This change, of course, led to a drastic promotion of the accountability of corporate management, which was the primary goal of policymakers.

With the rapid increase in corporate transparency, it became no longer difficult for either regulators or other market players to uncover instances of secretive illegal acts. During this process, the dark space in which transnational bribery previously took place has been illuminated. The market's demand for transparent corporate environment changes the institutional environment in which the SEC enforces the FCPA.

More profoundly, the regulatory system driven by the social demand for transparent corporate management also reformed the interrelations between the regulator and key players in the securities world. The regulatory system mentioned above involved multi-level participants (e.g., the Congress, the SEC, the accounting profession, public companies, employees of companies, and

public investors), and established mutual restraining ties among them. For instance, the Senate may support a bill that encourages private enforcement of public laws so as to urge the SEC to work more diligently;[1015] and the SEC may support a bill that obliges auditors to detect and report corporate misconduct so as to increase information flows on questionable corporate management.[1016] This mechanism, created an invisible competition among all players in the securities world in detecting instances of accounting misconduct or illicit payments. The rule of this competition makes the first discoverer of instances of illegal acts awarded while it subjects the lagging ones to the risk of suffering penalty or a loss of reputation. For example, if a corporate bribery scandal is revealed by the media or other agencies beyond the securities regulatory system, it would humiliate both the auditor and the SEC because of their failure in preventing and discovering the same. Unconsciously and significantly, this new system limited the set of choices of the SEC. Enforcing the anti-bribery prong of the FCPA is no longer irrelevant to its mission, neither has it had the discretionary power to overlook it. In a word, the "black hole effect" driven by the modern capital markets' zeal for transparent corporate management, unintentionally and inevitably incorporates the statutory duty of enforcing the anti-bribery prong of the FCPA to its central mission of promoting information disclosure two decades later.

4.2 Performance of the SEC and the DOJ that Fails Rational-Choice Interpretations

Both the SEC's neglect of the anti-bribery prong of the FCPA in the early years and its increasingly zealous enforcement of the anti-bribery prong of the FCPA in recent years are consistent with its own working logic, but not inconsistent with each other — as some scholars have argued. For example, Black considered

[1015] See e.g., Scammell (2004: 69-73).

[1016] See Chapter V, 2.2.1 (B) & (C).

SEC's "recent, unexplained aggressive enforcement" as resulting from the revelation of several corporate scandals in the early 2000s. At that time, the SEC was criticized by Congress and society for its failure to "hold executives at the biggest firms accountable for fraud that happened on its watch."[1017] Given the SEC's "diminished reputation as an effective enforcer of the federal securities laws", it enforced the FCPA to "reassert its importance".[1018] In Black's view, the SEC's zealous enforcement of the FCPA was a kind of ineffective resource allocation — perhaps like Roger Federer mastering ping pong to avenge a defeat at Wimbledon. However, this viewpoint seems not to have grasped the fact that the SEC's mission to promote information disclosure and its statutory duty to combat transnational bribery — two previously unrelated activities in the 1970s — had become reconcilable and even inseparable in the 2000s as a result of the incremental change in the institutional context and the globalization of the securities markets. The criticism of the SEC's failure to prevent those corporate scandals, in fact, only proved that the SEC had an even more urgent need to detect and investigate illegal acts — foreign bribery included — before the media, other agencies, or even the bankruptcy courts took hold of the case.

Now it is time to reflect on the flaws of a rational-choice interpretative approach to the dynamic of FCPA enforcement by the US in the past decades. From the perspective of the SEC, one major flaw of the standard rational-choice approach — at least the one in current anti-corruption literature — is that it assumes the goal of an enforcing agency is perfectly embedded into a single aim projected for the whole country, which is unrealistic.[1019] A review of the history of FCPA enforcement by the SEC reveals that the developmental trajectory of the SEC's enforcement of the FCPA was more likely to be relevant to the SEC's adherence to its own logic of fulfilling official duties. This is a process probably, but not

[1017] Hallman (2012).

[1018] Black (2012: 1114).

[1019] See Chapter I, 4.3, and Chapter III, 5.1 & 5.2.

necessarily, consistent with the maximization of US national interests. As we saw, after the Congress delegated a part of the enforcement authority of the FCPA to the SEC, the SEC tried to avoid it for about two decades because it did not think enforcing the anti-bribery portion of the FCPA fit within its central mission. This inherent tendency often leads them to displace public goals with self-serving departmental goals. As a result, the realization of departmental goals does not necessarily indicate the realization of public welfare — the overall interest of the country in this example.[1020] Magnuson's words, though probably unconsciously, reaffirms the existence of a gap between the aggregated effect of domestic agencies' independent performance of official duties and the constructed "economic rationality" of the country: "One explanation (of the US's aggressive enforcement of the FCPA when other signatories do not the same thing) is that the United States would like to respond to the non-cooperation of its treaty partners with reciprocal non-cooperation, but that it simply does not have that option. The executive branch is not in the business of telling its prosecutors to ignore the law."[1021] This means, we can only fully understand the dynamic of FCPA enforcement by way of focusing on the choices of the SEC, instead of the choices of a constructed "state actor".

Another flaw of the standard approach is its excessive emphasis on the free-will, rational choice of actors on an isolated matter. This interpretative approach neglects the impact of many other influential contemporary factors such as the cognitive biases of governmental officials at a certain moment of time, their conception of priorities among multiple goals, and the fact that their cognitive biases and work priorities change with the circumstances. As such, the increasing enforcement of the bribery prong of the FCPA can be understood in the need for the SEC to ramp up its enforcement activity generally.[1022] In other words,

[1020] See Black (2012: 1113-1114).

[1021] Magnuson (2013: 392).

[1022] Christopher Cox (SEC Chairman) said in 2008 that, "It is because we understand the direct connection between strong markets and securities law enforcement that the SEC has

whether to enforce the anti-bribery prong of the FCPA was never a result of isolated rational calculation of FCPA enforcement. Under the premise of admitting the rationality of the SEC's choice, we need to take into account how the institutional context in which the SEC made a choice defined the SEC's optimal choice; and this evolving context explains variation in the SEC's choice at different moments of time.[1023] This means we can only well understand the dynamic of the SEC's performance in FCPA enforcement by way of focusing on the institutional context in which the SEC made rational choices.[1024]

Therefore, in order to understand the dynamic of FCPA enforcement in the US, we should not revolve around the question of what kind of national interests affect the US's decision on whether to enforce the FCPA, but should focus on what was the optimal choice for the SEC — one of the major enforcing agencies of the FCPA — in a given institutional context, and how the incremental change in this context explains the developmental trajectory of the SEC's enforcement of the anti-bribery prong of the FCPA. The whole process took place in the social context of the US. It was an endogenous one that resulted from the combined effect of US players' pursuit of their own narrow self-interests.[1025]

The creation of the FCPA in 1977, as well as the increasingly aggressive enforcement of the FCPA by the SEC was an unavoidable by-product of the capital markets' increasing demand for transparent corporate management and its

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consistently made enforcement our top priority. Today, more than one third of the entire agency works in our enforcement program. We currently devote a higher percentage of the SEC's total staff to enforcement than at any time in the past 20 years…The SEC brought a record number of enforcement actions against market manipulation in 2008…We're proud to point out that in 2008, the SEC brought the highest number ever of insider trading cases in our agency's history…The same is true with our record-setting number of cases under the Foreign Corrupt Practices Act against public companies that use corporate funds to bribe foreign officials. Since January 2006, the SEC has brought 38 of these foreign bribery cases—more than were brought in all prior years combined." Cox (2008).

[1023] In essence, this is a classical idea of the theory of institutions. As Douglass C. North said, we just need to integrate individual choices with the constraints institutions impose on choice sets. See North (1990: 5).

[1024] See Chapter I, 4.3, and Chapter III, 5.3.

[1025] See Magee *et al*. (1989: xiv).

new global nature, in which activities abroad were understood to have significant impact for risk at home. The whole process was endogenous to the US conception of regulation, and as long as US interests continue to expand globally is irreversible. Once the FCPA was created, the enforcing agencies (both SEC and DOJ) have had to safeguard a bottom line that any revealed FCPA violations would be prosecuted. Both the SEC and the DOJ have the discretionary power to determine whether to enforce the FCPA in a light or heavy handed manner, yet they have no discretionary power to suspend enforcement completely. The bottom line of rule of law that the SEC and the DOJ had to safeguard locked the SEC and the DOJ in a path to enforce the FCPA.

This endogenous phenomenon of increasingly aggressive enforcement of the FCPA, has externalities too, of course. While it meant that issuers listed in the US were paying fewer bribes, it indeed disadvantaged US issuers and domestic concerns in international competition. The US community's concern about this adverse consequence (or externality) of FCPA enforcement, became even stronger in the 2000s because the enforcing agencies of the FCPA can no longer counteract this adverse consequence by means of taking a conservative attitude in enforcing the FCPA against US issuers and domestic concerns. The US had to seek remedies other than controlling its enforcement efforts against US issuers and domestic concerns.

Then the application of the FCPA to foreigners becomes an effective tool to counteract the adverse consequence of the enforcement actions against US issuers and domestic concerns. Since the US cannot compete with other jurisdictions on the level of tolerating foreign bribery, as Marinaccio suggests, it has to create a competition with other jurisdictions on the level of regulating foreign bribery.[1026]

[1026] Marinaccio stated that "I believe, if confronted with a situation of either paying a bribe or losing an export sale, we should never have in our lifetime a policy that in effect says: 'Okay, go bribe, you have to do it to get the business.'…we live in a country where there are some things we just cannot do. And if other countries might allow such practices, then we

4.3 The "Catfish Effect" of the US's FCPA Enforcement on Other Regulatory States

On an international scale, the DOJ's wide declaration of jurisdiction over foreign companies under the FCPA has to some extent created a "catfish effect" that would activate other jurisdictions which used to be inactive in enforcing against foreign bribery to become more active. The term "catfish effect" initially refers to an effect that the introduction of a catfish which is active and somehow aggressive into a container would makes inactive sardines in this container swim quicker and keep alive. When the term "catfish effect" is applied to management, it refers to that a strong competitor can force weak members to compete and get stronger. It is in essence an incentive mechanism.[1027]

Today, transnational bribery is viewed as a global evil. The US's prosecution of foreign companies on the basis of even miniscule commercial contacts between that company and the US would not only humiliate the home countries of those bribe-paying companies for their failure to enforce the Convention, but also result in big-dollar fines that deprive their companies of expected interests in bribe payments. As a result, the aggressive US enforcement against foreigners may encourage other governments to take the Convention obligations seriously. Or else a successful US prosecution of a foreign company would damage the reputation, as well as the material interests, of the home country of the foreign company. In other words, the US's aggressive enforcement of the FCPA against foreigners has created a regulatory competition between the US and other jurisdictions in which the active regulator would benefit while the inactive regulator would suffer. It has turned a "race to the bottom" into a "race to the top".[1028] Just like a series securities scandals led to the creation of new laws by

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cannot, and should not, compete on that level." Marinaccio (1982: 349).

[1027] See Zhao (2006: 10).

[1028] See Generally Weingast (1995), and Mosley & Uno (2007). Chapter IV, 1.1 has referred to the term "race to the bottom".

the Congress and innovative enforcement tools by the SEC in the 1990s and the 2000s, FCPA violation scandals would definitely force other regulatory states to update their anti-bribery laws and regulatory tools.

Indeed, there is also concern about the adverse effect of the DOJ's aggressive enforcement of the FCPA against foreigners on the attractiveness of US capital markets to public companies. In the past, foreign companies in need of capital had an incentive to list on US stock exchanges because these exchanges were deep, liquid and well regulated.[1029] However, with the rise of alternative markets since the 2000s, the dominance of US securities markets has weakened. In this circumstance, the FCPA's rigorous accounting and anti-bribery provisions may drive companies subject to the FCPA to delist from the US markets. One example is, as Magnuson observed, companies like Siemens, Daimler, Volvo and ABB delisted their securities from US stock exchanges after they were prosecuted for FCPA violations.[1030]

Basically, this concern is unnecessary. Since it was the inherent demand of capital markets for transparent corporate management that created a circumstance in which transnational bribery was intolerable for both governmental agencies and the public, the story would take place in capital markets beyond the US territory too. Even in the Chinese markets, which unlike the US are not fundamentally based on a purely disclosure based model, transparency is essential. The attractiveness of capital markets to public investors is roughly inversely proportional to their tolerance for ill-formed accounting practice and illicit acts of public companies. As long as there is a need to maintain market confidence, regulators of any stock markets would never stop promoting the level of securities law enforcement.

In addition, the jurisdiction of the FCPA, even in the broadest sense, can only

[1029] See Coffee (2002: 1757).

[1030] See Magnuson (2013: 416).

apply to a limited portion of companies around the world. For this reason, there is concern that the effect of the extraterritoriality of the FCPA is limited. For example, after demonstrating the effect of the US's extraterritorial application of the FCPA to foreigners in urging other signatories to regulate transnational bribery, Magnuson also shows his concern that "unilateralism is only feasible for as long as one country has the power to force foreign actors to comply with its regulations. The United States has long relied on this approach, conditioning market access on compliance with regulatory regimes. As alternative markets arise, the United States may progressively lose its unilateral power to regulate international corporate bribery, and multilateral cooperation may become necessary."[1031]

I think we should be cautiously optimistic on the "catfish effect" of the US's enforcement of the FCPA against foreign companies. The extent to which FCPA enforcement would affect the anti-corruption atmosphere not only result from the zealousness of the US's enforcement efforts, but also the development level of capital markets other than the US. As long as the prospect of global capital markets is promising, the "catfish effect" of FCPA enforcement would spread from the US to other advanced capital markets, which then would create another example of "catfish effect" and affect more and more governments and companies. We have every reason to believe that this trend would be faster or slower, but would never stop or retrograde.

5. Conclusion

The story of the US's increasingly aggressive enforcement of the FCPA has at least two inspirations. On a national scale, the official duties of different enforcing agencies do not add up to the "overall interest" of the country, and the combined effect of independent performance of official duties of enforcing

[1031] Magnuson (2013: 417).

agencies does not follow the prediction of the standard accounts based on the *political-will* assumption. The logic of the enforcement of the FCPA by an enforcing agency is rooted in its adherence to its own mission in an evolving institutional context which constrains its choice set. During this process, enforcing agencies and the context in which they worked experienced a process of mutual engagement. This reciprocal causation that has led to the US's current achievement in anti-bribery enforcement cannot be well understood by an analysis uprooted from historical specificities.

Precisely for this reason, we can hardly draw direct and detailed lessons from the US for other signatories because the seemingly trouble-free operation of the FCPA in the US did not arise overnight. It took decades, and is deeply embedded in the political structure of the US. In other words, historical specificities make the US experience unique, and subsequently not transplantable. Yet the US case can still inspire other countries in an indirect way: by analyzing how the institutional framework of the US has generated the complex causal processes leading to effective anti-bribery enforcement, other countries can develop comparable institutional networks according to own national conditions.

On an international scale, sanction and monitoring designed to alter the payoff structure of a country in terms of enforcement against transnational bribery, as the standard *problem-solving* approach argues, is not the only way (to say the least) to overcome the collective action problem among most signatories. The US case indicates that inverting the incentive to defect by actively prosecuting foreign companies and thereby shaming foreign regulators is also a powerful force against the previously existing prisoners' dilemma. Moreover, the impact of good regulation on the cost of capital has received something close to universal recognition. Thus the "catfish effect" of the leading jurisdiction can be expected to spread the rigorous enforcement outward throughout signatories.

Chapter VI: Conclusion

The formation of OECD anti-bribery collaboration was marked by two watershed events: first, the US's enactment of the FCPA in 1977 for the first time in human history outlawed transnational bribery — nationals or domestic companies' acts of paying bribes to foreign officials in international business transactions. Then, in 1997, the US managed to internationalize the FCPA and established the OECD Anti-Bribery Convention with 33 other signatories. The formation of the OECD Anti-Bribery Convention internationalized the FCPA approach, and signaled the establishment of the OECD anti-bribery collaboration. Thereafter, another seven countries have participated in the Convention, becoming the second generation of signatories. As of June 2014, OECD anti-bribery collaboration already has 41 member countries.[1032]

In the early years after the enactment of the FCPA and the formation of the Convention, numerous papers discussed why the US and other signatories chose to outlaw transnational bribery so as to help people make sense of such an innovative anti-bribery approach. A general question for discussion was whether the FCPA approach is wise. However, the criteria for assessing the wisdom of the FCPA approach were given by scholars' ideological beliefs.[1033] Since the 2000s, the wisdom of the FCPA was called into question less. Academic focus was shifted to practical effect of the Convention in controlling transnational bribery. Scholars began to study whether signatories' domestic enforcement of the Convention is effective, and whether there is any space for improving Convention enforcement through institutional betterment.[1034]

This thesis has analyzed the dynamic of Convention enforcement systematically (but not on an *ad hoc* basis), with an awareness of major academic insights and

[1032] See Chapter I, 1.1 and Chapter II.

[1033] See Chapter I, 2.1.2 and Chapter II, 2.2.

[1034] See Chapter I, 2.3.

gaps of previous work on this subject matter:[1035] First of all, this study has discussed flaws of the *problem-solving* approach in current literature and suggests an improved *problem-solving* approach to resolve the "monitoring problem" current literature identifies but fails to solve, and a contextual approach as a supplementary methodology to enrich our understanding of the the developmental reality in leading jurisdictions[1036] Second, this study has analyzed a seemingly outdated but in fact unexplained prerequisite question for building theories on Convention enforcement—the dynamic of the institutionalization of the OECD anti-bribery collaboration. [1037]Third, this study has built a causal attribution model to explain the dynamic of general compliance with the Convention by signatories by presenting major academic insights and gaps of current *problem-solving* literature.[1038] Forth, this study has built a holistic solution model for the monitoring problem in OECD anti-bribery collaboration—to which current *problem-solving* literature failed to prescribe successful solutions.[1039] Fifth, this study has also tried to draw inspirations from the developmental reality in a leading jurisdiction — the US — to understand how domestic politics affect a signatory's Convention enforcement.[1040]

1. Methodology: The *Problem-Solving* Paradigm and a Contextual Approach

1.1 The *Problem-Solving* Paradigm in Current Literature

A review of literature reveals that how current analyses of the enforcement of the

[1035] For the reason for this operation see Chapter I, 1.1.

[1036] See Chapter I.

[1037] See Chapter II.

[1038] See Chapter III.

[1039] See Chapter IV.

[1040] See Chapter V.

Convention describe questions biasedly from a single perspective. 15 years after the ratification of the OECD Anti-Bribery Convention, many scholars found that the actual enforcement of the Convention has below their expectation, and then formulated the status quo of the enforcement of the Convention as a problem of "ineffective-enforcement", and then made causal attributions and prescribed solutions for this "problematic" collaboration. This study has labeled this general analytical model for the dynamic of Convention enforcement as a *problem-solving* paradigm.[1041]

With regard to specific methods, the *problem-solving* approach in current literature conceives signatories to the OECD Anti-Bribery Convention as unitary actors in world politics, and analyzes the causes of their free choices and their "ineffective enforcement" of the Convention. More specifically, current problem-solving literature often borrows wisdom from economic and political literature on collective action problems and characterizes signatories' collective enforcement of the OECD Anti-Bribery Convention as a "prisoners' dilemma" which encourages defection rather than cooperation. In other words, the *problem-solving* paradigm, as a general methodology, normatively formulates Convention enforcement as ineffective and prescribes policy recommendations to resolve hurdles to effective enforcement. The *problem-solving* approach in current literature, as specific methods, borrows wisdom from existing collective action theories and analyzes one level of interactions among signatories. [1042]

1.2 The Ideological Roots of the *Problem-Solving* Paradigm

A review of current literature on Convention enforcement has also found how scholars have explained signatories' compliance with the OECD Anti-Bribery Convention path-dependently, bound to the way in which they understood the wisdom of the FCPA approach. For this reason, how earlier scholars answered

[1041] See Chapter I, 2.4.

[1042] See Chapter I, Section 3.

the question of the wisdom of the FCPA approach have exerted significant influence on the genesis and formation of the *problem-solving* paradigm.

Earlier fragmented explanations of the wisdom of the FCPA approach can be categorized into two general models according to their preconceptions of the relation between the problem of transnational bribery and regulatory intervention. Accordingly, earlier explanations affected the formation of the *problem-solving* paradigm in two ways:

Bribery-Centric Explanations. This kind of explanations considers transnational bribery as another example of corruption which exerts deleterious effects on social life. National regulators are in the second place to respond to it. The wisdom of the FCPA lies in the "evil" of transnational bribery. In early years, this kind of explanations helped people make sense of the unprecedented FCPA approach. However, this kind explanations' excessive emphasis on the similarities of transnational bribery also led people to expect transnational bribery is controlled as effectively as domestic corruption control in signatories. As a result, the huge gap between reality and this expectation led scholars to formulate the status quo of Convention enforcement as "ineffective-enforcement", which is the logical starting point of the *problem-solving* paradigm.

Regulation-Centric Explanations. This kind of explanations considers the FCPA approach as the starting point to explain its wisdom. Regulators are in the first place that have defined the "evil" of transnational bribery. The wisdom of the FCPA approach lies in whether it exerts positive effect on the society. According to this logic, scholars stress a lot how one country's unilateral enforcement of the FCPA disadvantages domestic companies in foreign markets. In early years after the enactment of the FCPA, this kind of explanations pointed out the negative effect of the FCPA approach on US national interests, and thus urged US officials to negotiate the Convention with other countries. After the formation of the Convention, the assumption that a country's unilateral enforcement of the

Convention disadvantages domestic companies became a major argument for scholars to explain the "ineffective-enforcement" of the Convention in the *problem-solving* paradigm.[1043]

1.3 Strength and Limitation of the *Problem-Solving* Paradigm

The strength of this paradigm is reflected in its explanatory power. Formulating the status quo of Convention enforcement as a problem of "ineffective-enforcement" allows scholars to borrow theories from existing wisdom to explain the "ineffective-enforcement" of the Convention as another example of collective action problem in public goods game.[1044]

However, this paradigm also has significant limits. First, its excessive commitment to conventional wisdom has resulted in an excessive emphasis on the common characteristics of OECD anti-bribery collaboration as an international collective action, but overlooks its uniqueness. As a result, many effective solutions to regular collective actions do not work for the problem in OECD anti-bribery collaboration. One example is the argument on the utility of central monitoring. The utility of central monitoring in guaranteeing a collective action is premised under the assumption that individual efforts are monitorable. However, given the surreptitious nature of transnational bribery, OECD anti-bribery collaboration cannot count on a central monitoring system to evaluate individual efforts and mitigate their worry of being exploited by others.[1045]

Second, the paradigm completely avoids explaining the developmental reality in leading jurisdictions — why a few signatories (e.g. the US) indeed enforce the Convention. The status quo of the enforcement of the Convention is not only

[1043] See Chapter I, 2.

[1044] See Chapter I, 4.1.

[1045] See Chapter I, 4.2.

characterized by most signatories' "ineffective enforcement", but is also characterized by a few signatories' increasingly zealous enforcement. As the *problem-solving* paradigm takes a formulation of the "ineffective-enforcement" of the Convention as logical starting point, it is inherently limited to explain this positive reality and drew inspirations from it.[1046]

1.4 A Contextual Approach as a Supplementary Methodology

This study has suggested a positive, contextual approach which comes to grips with interactions of domestic political forces of signatories, constraints imposed by preexisting institutional contexts on domestic agencies' choices sets, and the path-dependence of institutions as a supplement to explain the developmental reality in leading jurisdictions. This historical approach is not proposed to replace the theoretical function of the problem-solving paradigm. It is suggested to fill the gap that the *problem-solving* paradigm has failed to explain.[1047]

2. The Dynamic of the Formation of OECD Anti-Bribery Collaboration

An understanding of the dynamic process of the enactment of the FCPA to the formation of the OECD Anti-Bribery Convention is a logical prerequisite for our next-step understanding of the practical effect of these laws. However, current academic literature based on the *political-will* assumption and grounded in rational-choice tradition often undercut this dynamic process to a question of how the US and other signatories traded off conflicting national interests. Given that it is impossible to specify national interests that affected a country's strategy on whether to outlaw transnational bribery, this interpretative approach only provided speculative and inaccurate explanations. These explanations managed

[1046] See Chapter I, 4.3.

[1047] See Chapter I, 4.4-5.3.

to help people make sense of the unprecedented FCPA approach, but cannot sustain a progressive manner of understanding the operation of OECD anti-bribery collaboration on successive historical stages.[1048]

In view of this gap, this study has adopted a contextual approach to analyze the dynamic of the institutionalization of OECD anti-bribery collaboration. Its central attention has been focused on how legislator made decision in concrete historical contexts — in particular, how intertwined interactions among political forces in a given value system brought about the FCPA and the OECD Anti-Bribery Convention.[1049] The analysis has found that the institutionalization of OECD anti-bribery collaboration was not only characterized by rational choices of anthropomorphized signatories, but also the path-dependence of institutions which delimits choices sets of signatories or domestic agencies. This study has also discussed three key operative factors accounting for the establishment of central institutions of the collaboration:[1050]

First, an initiator for an official discussion on the legal status of transnational bribery is necessary. Such an event could arise independently of any political agenda — for example, in the 1970s, it was the Watergate Scandal that brought the problem of transnational bribery to public awareness, and raised a question of the legal status of transnational bribery. Such event could also be consciously pursued by certain political forces — for example, in the 1990s, it was the US government that initiated a discussion on whether and how the establish a Convention to criminalize transnational bribery around the world on the OECD forum.

Second, consultations and concessions between different political forces took place so as to reach a consensus. Once there is a public discussion on whether to

[1048] See Chapter II, 2.2.

[1049] See Chapter II, 2.3, 3.3, 4.3.

[1050] See Chapter II, 5.2.

outlaw transnational bribery, all stakeholders who had an interest demand around it would try to achieve its own interest demand to the largest extent practical. A legislator can hardly sacrifice one stakeholder's interest demand to other stakeholders' interest demand—under many situations they also do not have to, but would try to coordinate the preferences of different stakeholders to eventually reach an optimal position. This process was reflected in the repeated negotiations and concessions among political forces.

FCPA enactment would affect many aspects of US national interests. When there was a public discussion on whether to outlaw transnational bribery, all stakeholders made their own interest demands, and sought to achieve them to the largest extent practical. For example, the SEC which was missioned to protect public investors demanded for prohibiting using false accounting methods to conceal transnational bribery; the Defense Department which protected national security demanded for prohibiting US companies from undermining US national security by paying bribes in foreign sales of military equipment; and the State Department demanded for protecting US's country image.[1051] Then US legislators needed to take into account the demands of multiple domestic agencies, and tried to work out a scheme which gave consideration to all of them. To this end, legislators found that a mere prohibition of false accounting methods was a necessary and also sufficient scheme. This explained why President Ford suggested a bill only prohibiting false accounting in 1976.[1052]

For the formation of the Convention, when the US government initiated the discussion on whether and how to establish the Convention, countries involved in the discussion tried to coordinate the central concern of the US — its unilateral enforcement of the FCPA disadvantage US companies, and the central concern of many other countries — their upcoming anti-bribery approach would disadvantage their companies in competition with companies from

[1051] See Chapter II, 2.3.

[1052] See Chapter II, 2.3.

non-signatories. To this end, some European countries proposed a draft agreement that only criminalized their nationals' acts of paying bribes in member states of the agreement, but not in nonmember states.[1053]

Third, the normative function of law delimits the moral boundaries of legislative activities. Law performs the task of defining and encouraging morally correct behavior. Lawmaking is therefore strictly bound up with moral correctness. It can never explicitly or implicitly encourage violations of established values of the society. After the issue of transnational bribery was brought to the discussion table of US Congress or the OECD forum, there was soon a consensus on the "moral incorrectness" of transnational bribery before there was a consensus on the legal status of transnational bribery. Therefore, the original versions which reflect the optimal coordination equilibrium of interest demands made by stakeholders should be amendable to this moral boundary. The moral boundary of law shapes the final version of the outcome of coordination. For this reason, President Ford's bill which only criminalized false accounting was rejected. The FCPA which has not only accounting provisions but also anti-bribery provisions came out. The draft Convention which only criminalized transnational bribery in member states was rejected. The current version of the Convention which criminalizes transnational bribery everywhere came out.[1054]

3. The Dynamic of State Compliance with the Convention

A causal attribution model to explain systematically the dynamic of state compliance with the Convention is the theoretical foundation for the next-step, which is the formulation of policy recommendations for better Convention enforcement. In the *problem-solving* paradigm, this work is reflected in the part of identifying and explaining the "problem".

[1053] See Chapter II, 3.3.

[1054] See Chapter II, 2.3.

Current *problem-solving* accounts are mainly grounded in the rational-choice tradition, formulated the status quo of Convention enforcement as a problem of "ineffective-enforcement", and then identify impediments to better Convention enforcement.[1055] However, current literature does not differentiate between root causes and peripheral causes for the problem of "ineffective-enforcement" of the Convention, but only presented a rich but chaotic landscape of causal attributions. For this reason, it failed to lay a thorough theoretical foundation for next-step prescription of policy recommendations.[1056]

This study has filled this gap left by current literature without altering its own logic, which has asserted that variation in incentives for signatories explains variation in their actual strategies on treaty compliance, and has given a systematic explanation of the causal chain of the "ineffective-enforcement" of the Convention, from the most intuitive, peripheral causes to the most fundamental, central causes:

First, it has explored destabilizing factors in the indigenous collaboration that encourage defection. These destabilizing factors include both are not limited to poor expected benefits but high costs of transnational bribery regulation, the existence of a large group of non-signatories, and the free-riding problem in public goods game.[1057]

Then, given the general belief that well-crafted institutions can coordinate collective actions, use the power of its collective force to make defecting more painful than working, this study has further attributed the problem of "ineffective-enforcement" to the monitoring program in OECD anti-bribery collaboration which fails to resolve destabilizing factors in the indigenous

[1055] See Chapter I.

[1056] See Chapter III, 1.

[1057] See Chapter III, 2.

collaboration.[1058]

Further, this study has argued that the OECD monitoring program fails because of the surreptitious nature of transnational bribery and the immeasurability of national regulatory efforts. The utility of central monitoring, a conventional effective solution to collective action problems does not apply to the nonroutine problem of the "ineffective-enforcement" of the OECD Anti-Bribery Convention. To compensate the adverse effects of destabilizing factors in the community of collaborators, the collaboration needs to establish a holistic solution model to address the exploitability of national regulatory efforts — a traditional concern of collective action theory as well as the immeasurability of national anti-bribery efforts — a traditional concern of anti-corruption analyses simultaneously.[1059]

In addition to causally attributing the problem of "ineffective-enforcement" following the logic of the *problem-solving* paradigm, this study has also argued that the fact that some leading jurisdictions have indeed enforced the Convention should also be causally attributed. In view of that the logic of the *problem-solving* paradigm cannot explain this developmental reality, this study has discussed the possibility of adopting a historical analysis of the case of the US's increasingly aggressive enforcement of the FCPA.[1060]

4. A Solution Model for the Problem of "Ineffective-Enforcement"

Current literature has reached a consensus on the utility of a monitoring system for OECD anti-bribery collaboration, and the under-performance of the current monitoring system. However, no effective analysis has been offered of the structural flaws in the current OECD monitoring system that cause the monitoring problem. This study has analyzed that the surreptitious nature of

[1058] See Chapter III, 3.

[1059] See Chapter III, 4.

[1060] See Chapter III, 5.

transnational bribery and the potential regulatory competition among signatories determine that the effectiveness of the OECD monitoring system is a function of the extent to which the institutional structure of the OECD monitoring system makes national anti-bribery efforts monitorable. The OECD anti-bribery system needs an innovative monitoring approach which allows high-level inflow of information on instances of transnational bribery, and effective mutual monitoring among signatories on the detection of and prosecution over transnational bribery offences.[1061]

This study has also formulated a three-level solution model to address the monitoring problem:

First, anti-corruption practice and scholarship has suggested that the lack of information on transnational bribery has made transnational bribery regulation difficult. Anti-corruption practice and scholarship has also proved that private sector actor is good information source. Therefore, this monitoring program should encourage private sector actors to report clues of transnational bribery so as to resolve the lack of first-hand information on acts of transnational bribery.[1062] This means that the new *problem-solving* model would no longer focus merely on the performance of national regulators in the public sector, but also on the role of actors in the private sector.

Second, given the weakness of private sector actors in collecting solid evidence, this monitoring program should incorporate the comparative advantage of private sector actors in finding evidence of transnational bribery and the comparative advantage of public sector offices to investigate such evidence further, so that it can be convincing in courts. The US modes of qui tam action and whistleblower program are examples of this kind of institutional arrangement.[1063] This means,

[1061] See Chapter IV, 1, 2.

[1062] See Chapter IV, 3.

[1063] See Chapter IV, 4.1, 4.2.

the new *problem-solving* model not only highlights the role of the private sector, but also emphasizes the cooperation between the private sector and the public sector.

Third, given the general concern that national regulators in the home countries of bribe-paying companies may shirk duty because of protectionism, this monitoring program would not be effective if limited to a whistleblower program. The role of national regulators in the home countries of victimized business competitors should be introduced into the monitoring framework to ensure that national regulators in the home countries of bribe-paying companies would handle relevant investigations duly. This study has also put forward several matters needing attention for the construction of such a solution model in practice.[1064]

5. Inspirations from the US's Increasingly Aggressive Enforcement of the FCPA

The status quo of signatories' enforcement of the OECD Anti-Bribery Convention is characterized not only by most signatories' "ineffective-enforcement", but also by a few signatories' zealous enforcement.[1065] In order to fully understand the dynamic of Convention enforcement, this study has taken the US as an example to analyze the developmental reality in leading jurisdictions.

This study has analyzed the developmental trajectory of the US's increasingly aggressive enforcement of the FCPA. The starting point of this analysis is an awareness that FCPA enforcement does not result from any abstract, constructed behavior of the US, but is embodied in multiple domestic agencies' independent performance of their statutory duties under the FCPA in an evolving historical

[1064] See Chapter IV, 4.3, 4.4.

[1065] See Chapter III, 5.1.

background.[1066] Given that the FCPA authorized the SEC and the DOJ to share the statutory enforcement authority, this study has analyzed the developmental trajectory of FCPA enforcement from these two paralleled perspectives.

First of all, this study has explored why the SEC enforced the accounting provisions of the FCPA but neglected the anti-bribery provisions of the FCPA prior to 2001, but enforced both the accounting provisions and anti-bribery provisions since then. In the early years after FCPA enactment, though the SEC was mandated the authority to enforce the FCPA, the SEC was only interested in enforcing the accounting provisions of the FCPA, but showed no interest in the anti-bribery prong. This is because prior to 1977, the Exchange Act of 1934 did not authorize the SEC to supervise the internal management and business activities of companies that were not securities intermediaries, and the SEC defined its own mission with respect to listed companies as limited to overseeing the registration of their securities, the regular disclosure of information on the company and corporate management, and policing against fraud, abuse and false disclosure in the markets.[1067] The statutory duty of enforcing the anti-bribery prong of the FCPA was considered as uncorrelated with this central mission.[1068] Therefore, the SEC was not enthusiastic in enforcing the anti-bribery prong of the FCPA.

However, the development of capital markets gradually bridged the gap between the SEC's duty of enforcing the anti-bribery provisions of the FCPA with its disclosure-based central mission. The acceleration of capital securitization demanded adequate information disclosure and more rigorous regulation. Congress and the SEC have tended to steadily increase the level of transparency of corporate financial condition and management activity, and therewith multiply regulatory tools. The expansion of enforcement interest of the SEC was coupled

[1066] See Chapter V, 1.

[1067] See Chapter V, 2.1.

[1068] See Chapter V, 2.1.

with an increase in the regulatory powers of the SEC. Newly-created enforcement tools, the increasing official control over auditors to guarantee their objectivity, and the increasingly active role of private sector through litigation and whistleblowers, had significantly improved the information flows about corporate misconduct, in which violations of the anti-bribery prong of the FCPA were included. Meanwhile, the SEC was not only entitled to enjoy the "right-to-know", but also had to file reports properly. It received a statutory duty that it had no power to neglect. Moreover, if violations of the FCPA are revealed by media or other agencies instead of the internal control systems of public companies, this might well damage the reputation of the SEC if the offence discovered was one that the SEC should have detected earlier. For the SEC then, enforcing the anti-bribery prong of the FCPA became an unavoidable ramification of its enforcement of the accounting prong. In this way the gap between the statutory duty of the SEC to enforce the anti-bribery prong of the FCPA and its central mission to improve information disclosure has been bridged.[1069]

Second, this study has analyzed the DOJ's passive enforcement of the FCPA prior to 2000 but active enforcement of the FCPA since then. In the first two decades after FCPA enactment, the US was the only jurisdiction in the world that regulated transnational bribery. Given the general belief that a country's unilateral enforcement of the FCPA disadvantaged US companies,[1070] the DOJ, which was missioned to protect US national interests and the DOJ's statutory duty of FCPA enforcement seemed to be inconsistent with its central mission. In response to this situation, on the one hand, the DOJ adopted a conservative strategy on FCPA enforcement. It was very prudent in bringing enforcement actions against transnational bribery. On the other hand, the DOJ tried to mitigate the conflict between its statutory duty of FCPA enforcement and its central

[1069] See Chapter V, 2.2, 2.3.

[1070] See Chapter I, 2.1.2 (B).

mission of protecting national interests of the US by preferentially allocating investigative resources to transnational bribery offences which would not damage US business community significantly.[1071]

However, the conservative strategy of the DOJ only had limited effect because the DOJ always had to investigate revealed transnational bribery offences, and the FCPA had inherent deferent effects on US business community. For this reason, and in accord with the changing philosophy in the US following the September 11 attacks which supports more aggressive enforcement of US laws domestically and internationally, the US extended the jurisdictional reach of the FCPA to foreign companies soon after the passage of the OECD Anti-Bribery Convention so as to level the playing field for US companies in international markets. The DOJ's increasingly aggressive enforcement of the FCPA in recent two decades is mainly a result of its increasingly aggressive enforcement against foreign companies.[1072]

Third, the US's increasingly aggressive enforcement of the FCPA has at least two inspirations: On a national level, FCPA enforcement results from the independent performance of duties of domestic agencies. The logic of the enforcement of the FCPA by an enforcing agency is rooted in its adherence to its own mission in an evolving working context. The combined effect of the independent performance of different agencies does not necessarily follow the assumption of the rational-choice account on the constructed "country behavior".[1073] On an international level, US's FCPA enforcement has created a "catfish effect" on other signatories. The US's aggressive enforcement of the FCPA against foreign companies on the basis of a very tiny commerce nexus between the US and that company would not only humiliate home countries of investigated bribe-paying companies, but also lead to big-dollar fines that

[1071] See Chapter V, 3.1.

[1072] See Chapter V, 3.2, 3.3.

[1073] See Chapter V, 4.1, 4.2.

deprive those companies of their expected interests in bribe payments. As a result, the US's aggressive enforcement of the FCPA against foreign companies may create (or probably have created) a positive regulatory competition between the US and other signatories. By this approach, the US can urge other signatories to enforce the Convention more faithfully so as to prevent their companies from enforcement actions under the FCPA. From this perspective, the US's increasingly aggressive enforcement of FCPA enforcement has provided a new approach other than control-oriented solutions (e.g., a sanction or monitoring mechanism in the anti-bribery collaboration) suggested by the standard *problem-solving* analysis. Inverting the incentive to defect by actively prosecuting foreign companies and thereby shaming foreign regulators is a powerful force against the previously existing prisoners' dilemma. Moreover, the impact of good regulation on the cost of capital has received something close to universal recognition. Thus the "catfish effect" of leading jurisdictions can be expected to spread the rigorous enforcement outward throughout the signatories.[1074]

6. Future Research Directions: the Contributions and Limitations of Contextual Analysis

With regard to an analysis of the dynamic of signatories' collective enforcement of the OECD Anti-Bribery Convention, this study has discussed the virtues and limits of the standard *problem-solving* approach in current literature, and has suggested a contextual approach as a supplementary analytical model. The demand for this supplementary analytical model is generated by the developmental reality of global transnational bribery regulation. In the early years after the establishment of the OECD Anti-Bribery Convention, signatories' collective enforcement against transnational bribery did not achieve obvious

[1074] See Chapter V, 4.3

progress. Academic analysis overlooked historical detail in favor of a focus on the "non-action" of signatories, and resorted to existing compliance theories collected from other areas of social science applied didactically to the problem. Therefore, although the *problem-solving* paradigm could only produce an inaccurate understanding, it was and still is a necessary step, especially in an era when signatories' collective enforcement of the Convention has created few historical facts for analysis. However, the importance of this methodology will gradually fade as the global anti-bribery collaboration launches more positive signals. In recent years, the global anti-bribery collaboration has begun to make headway, and has also produced a richer mix of data for academic analysis. This new context makes a contextual approach which explores casual processes leading to the developmental reality in leading jurisdictions possible.

As time goes on, it can be expected that a contextual approach will encourages a positive analysis of the developmental reality and highlight the historical specificities that allow an articulated, gradual understanding of transnational bribery regulation based in actual fact. This will enrich not only understanding but also regulatory repertoire. For example, during its increasingly aggressive enforcement of the FCPA, the US has created many novel regulatory tools (e.g. civil claims, non-prosecution agreements and whistleblower protection). Previous normative analyses mainly tested regulatory tools endogenously generated within FCPA enforcement practice against contemporary ethics, norms and laws, but avoided exploring the causal processes positively generating their development. This sort of normative analysis, despite its utility in announcing value judgments and encouraging heightened efforts, does not help us discover that facts and patterns behind past failures. The contextual approach suggested in this study grasps regulatory tools as products of social practice, and thus indicative of latent contemporary consensus of the society. This approach can guide scholars to mine and unpack the latent consensus, and then redefine the social meaning that transnational bribery has taken on and the orientation of

regulation. This method is broader than that found in past political declarations and academic claims, and I argue that it has a higher claim to academic rigor.

Despite the virtues of the contextual approach as a supplement to the standard *problem-solving* paradigm, it makes no claim to replace the *problem-solving* paradigm at the current stage of anti-corruption analysis. Nevertheless, the *problem-solving* approach should not continue without contextual supplement. Transnational bribery regulation is not only about national regulators' political will and anti-corruption techniques. More fundamentally, it is driven by the process of globalization which brings about high-level economic interdependence and regulatory interdependence. Given the complexity of the world economy and political relations, the global campaign against transnational bribery is destined to be a daunting task that will not experience substantive breakthroughs without carefully conceived efforts. The developmental trajectory of the global anti-bribery collaboration in past years also reconfirms this reality. For this reason, though the contextual approach is expected to weaken the dominance of the *problem-solving* paradigm in current literature, it cannot replace the *problem-solving* paradigm in a foreseeable future.

In addition, the contextual approach remains an actor-centric approach, despite its emphasis on contextual factors. As discussed in this study, the contextual approach highlights the causality between individual choices and Convention enforcement, and takes contextual factors as variables that delimit actors' choice sets, affecting their cost-benefit calculation, and shaping their interaction patterns. Emphasis on contextual factors does not affect the basic formulation that Convention enforcement results from choices made by actors at multiple levels in exporting countries. Like the *problem-solving* paradigm, the contextual approach provides no space for discussing causal factors beyond this set, such as changes in importing countries. This means that this analytical framework composed of both the *problem-solving* paradigm and the contextual analysis cannot cover all international variables accounting for Convention enforcement.

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