Contracting Out National Sovereignty?—FCPA Jurisdiction Clauses in Defense Contracts and a Proposal for a State-to-State Approach Alternative

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Coping with corruption has emerged as a critical task of the global community. In this milieu, the Foreign Corrupt Practices Act (FCPA) is arguably an important contribution to the global fight against corruption. At the same time, however, robust application of the FCPA revealed various legal issues and problems. The FCPA's broad scope of application, for example, is one such problem. Ambiguous statutory terms are another. One area where robust FCPA application occurs is the defense sector. Because of the vast amount of public budget at stake and regulation of outside monitoring to protect the sensitive nature of the industry, the closed environment where defense contractors operate makes the defense industry an apt target of the FCPA. As such, the FCPA consistently served as an enforcement mechanism against defense contractors and their transactions. One peculiarity found in many defense contracts is the inclusion of an agreement provision that binds both the United States (U.S.) party and non-U.S. party to the FCPA. Such a provision in private contracts runs the risk of usurping the jurisdictional sovereignty of the foreign state to which non-U.S. contractors belong. This concern has become more acute due to increased application and enforcement of the FCPA in extraterritorial contexts. To curb jurisdictional usurpation, a more sustainable, global application of the FCPA is to establish a state-to-state bilateral agreement that specifically addresses the subject of anti-corruption and related enforcement cooperation.

Introduction 644
I. Anatomy of the FCPA 648

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53 CORNELL INT'L L.J. 643 (2020)

A. Recent Trend of FCPA Enforcement: Increasing Strong-Handedness 649
B. Extraterritorial Application of the FCPA 651
1. Various Tools of Extraterritorial Application 652
2. Conflicting Views on Extraterritorial Application 655
a. Critics' Views 655
b. Proponents' View 657
C. FCPA Enforcement Action Involving a Defense Contractor: BAE Case 659
1. Latest FCPA Enforcement Involving a Defense Contractor 661
a. Airbus Case 661
D. *Hoskins* and Its Implications 662
E. Application of FCPA by Contract 663
F. Korea: A Recent Example 665
II. Legal Analysis 665
A. Concept of Jurisdiction and Conflict of Laws 665
B. Rationale Behind the Extraterritorial Application of FCPA by Contract 669
C. Principles of International Law on National Jurisdiction 670
D. "Contracting Out" National Jurisdiction by Individual Corporations 671
1. The Problem with Contracting Out National Jurisdiction 673
2. Assessment Under Sovereignty Rules of International Law 675
III. Suggestions for Sustainable, Long-Term Solutions 675
A. Concluding Multilateral Conventions or Bilateral Agreements 675
Conclusion 681

Introduction

Identifying corruption as a primary threat to national security may seem unrelated at first glance. In the United States (U.S.) today, however, corruption is viewed as "a growing threat to the national security" of the country.[1] During the announcement of the U.S. Global Anticorruption Agenda in 2014, President Barack Obama's administration elaborated that "pervasive corruption siphons revenue away from the public budget and undermines the rule of law and the confidence of citizens in their governments, facilitates human rights abuses and organized crime, empowers

1. Press Release, Office of the Press Secretary, Fact Sheet: The U.S. Global Anticorruption Agenda (Sept. 24, 2014) (on file at https://obamawhitehouse.archives.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda [https://perma.cc/92SH-8JJ6]).

authoritarian rulers, and can threaten the stability of entire regions."[2] In the National Security Strategy issued in 2017, the President Donald Trump's administration noted that "[t]errorists and criminals thrive *where* governments are weak, *corruption is rampant*, and faith in government institutions is low," thereby acknowledging the causal connection between corruption and national security.[3] Evidenced further by the U.S. Department of Justice (DOJ)'s newly announced "China Initiative," it appears that corruption poses national security threats to the U.S. According to the DOJ, the Initiative "reflects the [DOJ's] strategic priority of countering Chinese national security threats and reinforces the President's overall national security strategy."[4] Against this backdrop, the Initiative lists a total of ten goals, including "[identification of] Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses."[5] The U.S. government's support for the Initiative and FCPA enforcement affirms its belief that corruption undermines national security by weakening government institutions and private sectors, thereby enabling terrorism and other criminal activities to proliferate.[6] Coincidentally, the U.S. government has directed its focus on corruption within the concept of national security in other contexts, most notably in the field of trade measures.[7] This new trend emerging in international trade reveals yet another inseparable link between corruption and national security, opening debates about the proper perspective needed to respond to the evolving trend.

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2. *Id.*

3. Anthony Cordesman, *Giving the New National Security Strategy the Attention It Deserves*, CTR. STRATEGIC & INT'L STUD. (Dec. 21, 2007) (emphasis added), https://www.csis.org/analysis/giving-new-national-security-strategy-attention-it-deserves [https://perma.cc/3NXP-LJLK].

4. *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP'T JUST., (Oct. 20, 2020), https://www.justice.gov/opa/page/file/1223496/download [https://perma.cc/7FE2-ZUD2] [hereinafter U.S. DEP'T JUST.]. Detailing the link between Chinese government activities and U.S. national security, Federal Bureau of Investigations Director Christopher Wray noted that "[t]he Chinese government is determined to acquire American technology, and they[are] willing to use a variety of means to do that—from foreign investments, corporate acquisitions and cyberintrusions to obtaining the services of current or former company employees to get inside information." Alan Rappeport, *Justice Department Charges Chinese Company with Espionage*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/us/politics/chinese-company-espionage-charges.html [https://perma.cc/CJ7K-2P8V].

5. U.S. DEP'T JUST., *supra* note 4. According to Stanford Law School's FCPA Clearinghouse, China was accountable for the most improper payments between 2010 and 2019, with a total of fifty such payments. *Location of Improper Payments, 2012-2021**, STAN. L. SCH. (Mar. 31, 2021), http://fcpa.stanford.edu/ [https://perma.cc/ZW9J-MFPA].

6. U.S. DEP'T JUST., *supra* note 4.

7. *See generally* U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018), https://ustr.gov/issue-areas/enforcement/section-301-investigations [https://perma.cc/B5CL-2ZDQ].

In the U.S., one legislative tool that has been arguably effective in the fight against corruption is the Foreign Corrupt Practices Act (FCPA). Steven R. Peikin, Co-Director at the Division of Enforcement of the Securities Exchange Commission (SEC), once noted that "[t]he FCPA has been and remains an increasingly important tool in the ongoing fight against corruption worldwide."[8] Dubbed as "the most widely enforced anti-corruption law in the world,"[9] the FCPA was enacted in 1977 in response to the concern that "major American corporations were engaging in systematic bribery of foreign government officials."[10] Enactment of the FCPA was the first of its kind to prohibit U.S. businesses from bribing foreign public officials.[11] Recognizing the FCPA's utility in furtherance of anti-corruption initiatives and robust enforcement, federal agencies, including the DOJ and the SEC, have induced U.S. industries and key corporate players to implement stringent intra-company measures to ensure anti-corruption compliance.

The private defense industry, which comprises "an integral part of U.S. national defense" and security, is not exempt from regulatory scrutiny.[12] For example, Boeing and Lockheed Martin, the two U.S.-based defense contractors with largest annual revenues,[13] have company-wide anti-corruption programs in place.[14] These compliance programs' objective is to enable the businesses to compete "globally with honesty, integrity and in full compliance with all applicable laws and regulations," including the FCPA.[15] Such voluntary corporate compliance is premised on the

8. Steven Pelkin, Co-Director, Enf't Div., U.S. Sec. & Exch. Comm'n, Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act, Speech Before the New York University School of Law (Nov. 9, 2017) (transcript available at https://www.sec.gov/news/speech/speech-peikin-2017-11-09 [https://perma.cc/MMK5-PNSP]).

9. Ronald Douglas Johnson, Ambassador, U.S. Embassy in San Salvador, Remarks to the American Chamber of Commerce, San Salvador (Dec. 3, 2019) (transcript available at https://sv.usembassy.gov/remarks-to-the-american-chamber-of-commerce-san-salvador/ [https://perma.cc/PH5N-3GC3]).

10. O'Melveny & Myers LLP, Foreign Corrupt Practices Act: An O'Melveny Handbook 1 (7th ed. 2013). For the genesis of the FCPA, see *An Overview of the Foreign Corruption Practices Act*, U.S. Dep't Just. (Feb. 3, 2017), https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act [https://perma.cc/HG57-YJUT].

11. *See An Overview of the Foreign Corruption Practices Act*, *supra* note 10 (stating that "provisions of the FCPA now also apply to foreign firms and persons who cause . . . an act in furtherance of . . . corrupt payments").

12. Charles Mahoney, *Private Defense Companies Are Here to Stay—What Does That Mean for National Security?*, Conversation (May 31, 2017), http://theconversation.com/private-defense-companies-are-here-to-stay-what-does-that-mean-for-national-security-76070 [https://perma.cc/SH7A-FMR8].

13. *See Top 100 for 2020*, Def. News, http://people.defensenews.com/top-100/ [https://perma.cc/V3HL-SF23] (last visited Mar. 1, 2021).

14. For Boeing's programs, see *Ethics and Compliance*, Boeing, http://www.boeing.com/principles/ethics-and-compliance.page#globally [https://perma.cc/4RGG-CPHG] (last visited Mar. 1, 2021) [hereinafter Boeing]. For Lockheed Martin's programs, see *Anti-Corruption Program and Policies*, Lockheed Martin, https://www.lockheedmartin.com/us/who-we-are/ethics/anti-corruption.html [https://perma.cc/GUT9-AZXY] (last visited Mar. 1, 2021).

15. Boeing, *supra* note 14.

observation that "corruption erode[s] citizens' confidence in public institutions and political processes, undermine social trust and the legitimacy of state institutions,"[16] often harming consumers through inflated prices and lower quality products.[17] Corollary to their in-house anti-corruption program, top U.S. defense contractors generally require FCPA compliance from foreign business partners before engaging both domestic and even wholly foreign defense-related programs.[18] Defense contractors usually enforce FCPA compliance through contractual obligations.[19]

Although contractual application of the FCPA may be a necessary component of an efficient anti-corruption campaign to ensure national security in the U.S., it may nevertheless give rise to issues in conflict of laws, and necessarily implicate international law. Such issues and implication are unsurprising as the FCPA is a national enactment lacking the global recognition and jurisdictional scope that a multilateral treaty or agreement entails. Hence, the purpose of this Article is to analyze the issues associated with FCPA application by contract, particularly in the context of offshore defense programs ("Context").

While scholars have extensively analyzed the FCPA's regulated activities and its extraterritorial application to foreign corporations, there is a scarcity in scholarship exploring the increasing trend of U.S. business entities demanding strict enforcement of the FCPA in their contracts against foreign business counterparts. Leveraging their dominance in the defense industry, U.S. entities position themselves to dictate the terms vis-à-vis foreign counterparts, virtually rendering the provisions as a fixture in defense-oriented contracts.[20] While this practice may allude to vigorous implementation of FCPA obligations and reciprocated compliance by U.S. businesses, foreign entities condemn the practice as contracting out national sovereignty, especially where the basis of the FCPA's extraterritorial jurisdiction is tenuous and the foreign corporations' domestic legislations do not permit such extraterritorial application of an entirely alien statute.

Towards this objective, this Article begins, in Part I, by anatomizing the FCPA through certain examples of the statute's extraterritorial application within the Context. Next, in Part II, the Article briefly explores the effects of applying the FCPA by contract in the Context. The Article then analyzes,

16. MARIE CHÊNE, TRANSPARENCY INT'L, THE IMPACT OF CORRUPTION ON GROWTH AND INEQUALITY 8(2014), https://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf [https://perma.cc/CQ97-Y6PD].

17. *See Consequences of Private Sector Corruption*, U.N. OFF. DRUGS & CRIME (Dec. 2019), https://www.unodc.org/e4j/en/anti-corruption/module-5/key-issues/consequences-of-private-sector-corruption.html [https://perma.cc/Z6EQ-5CJP].

18. *See* Jeffrey R. Boles, *The Contract as Anti-Corruption Platform for the Global Corporate Sector*, 21 U. PA. J. BUS. REV. 807, 810 (2019) ("To address third-party risk more effectively, the tools of contract law offer the private sector a form of protection from potential corrupt and unethical conduct arising from their consultants or other agents.").

19. *See id.* at 820.

20. For actual examples of this practice, see *infra* Section I.B.2.b.

in Part III, how FCPA application by contract may generate conflict of laws and raise issues of international law. To demonstrate, the analysis specifically focuses on the Republic of Korea, a major defense partner of the U.S.,[21] and its anti-corruption regime. Building on the analysis, we argue, in Part III, that applying the FCPA in the Context is counter-productive to promoting effective cooperation among enforcement authorities. Moreover, the increasing reliance on FCPA enforcement through private contracts leads to corporations' infringement of their own state's national sovereignty. Based on these consequences, a more prudent application of the FCPA in the Context is establish a state-to-state bilateral agreement that explicitly addresses the subject of anti-corruption and relevant enforcement cooperation.

I. Anatomy of the FCPA

The FCPA consists of anti-bribery and accounting provisions.[22] Given the subject matter of this Article, the analysis focuses on the anti-bribery provisions. Under the anti-bribery provision of the FCPA, it is illegal for certain individuals and entities to offer, pay, or promise money, gifts or valuable objects to a foreign official with a corrupt purpose that aids or abets the payor in obtaining or retaining business.[23]

Such entities consist of issuers (i.e., issuers of securities registered pursuant to 15 U.S.C. § 78l or required to file reports under § 78(d)) or any officer, director, employee, agent, or stockholder acting on behalf of the issuer, using interstate commerce in connection with the payment of bribes, as well as business entities incorporated in the United States.[24] The FCPA also applies to any other person, including foreign persons or businesses, engaged in acts to further corrupt schemes including payment of bribes, while present in the U.S.[25] For purposes of the FCPA, a foreign official denotes "any officer or employee of a foreign government . . . including any person acting in an official capacity for or on behalf of any such government, department, agency or instrumentality."[26]

As surveyed above, jurisdiction under the FCPA may be conferred on the basis of nationality.[27] Hence, the FCPA is applicable to U.S. domestic

21. *See* Bureau E. Asian & Pac. Affs., *U.S. Relations with the Republic of Korea*, U.S. DEP'T ST. (Sept. 22, 2020), https://www.state.gov/r/pa/ei/bgn/2800.htm [https://perma.cc/Q7KK-8WM9].

22. For the anti-bribery provision, see Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd(a)(1)-(3) (1977). For the accounting provision, see *id.* § 78m.

23. *Id.* § 78dd(a)(1)-(3).

24. *Id.* §§ 78dd(a)(1), m(b)(2).

25. The relevant portion of the FCPA provides:

> It shall be unlawful for any issuer . . . or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of . . .a bribe to any foreign official in order to assist such issuer in obtaining or retaining business . . . .

Id. at § 78dd(a)(1).

26. *Id.* § 78(f)(1).

27. *See infra* note 168 and accompanying text.

concerns, as well as to nationals regardless of their presence in the U.S. Additionally, FCPA jurisdiction may be assumed based on territory when a non-U.S. person or business is physically present in the U.S. to further a corrupt scheme.[28]

A. Recent Trend of FCPA Enforcement: Increasing Strong-Handedness

Since enacting the FCPA, U.S.' reliance on its enforcement mechanism gradually increased, with a substantial uptick in the past two decades. This marked rise in FCPA enforcement emerged as a trend during President George W. Bush's administration and accelerated during the Obama administration, with more enforcement actions initiated in 2016 than any prior year except 2010.[29] The enforcement rate arguably regressed during the first year of the Trump administration, although thirty-one enforcement actions were still initiated in 2017.[30] The number of enforcement actions filed in 2018 and 2019 were twenty-six and thirty-two, respectively.[31] Moreover, increasing severity of penalties have coincided with an uptick in enforcement, with aggregate total sanctions reaching an unprecedented level of $11 billion.[32]

Furthermore, the FCPA has gradually developed a noteworthy set of enforcement tools and mechanisms. To elicit cooperation from the target individuals, the DOJ launched an FCPA Pilot Program in April 2016, for the purpose of "promot[ing] greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs."[33] Under the Pilot Program, a company may avoid criminal prosecution by the DOJ if it voluntarily discloses FCPA-related misconduct, fully cooperates in the ensuing investigation, and appropriately remediates its misconduct[34]–subject to the caveat that the

28. Under 15 U.S.C. § 78dd, a foreign person may be subject to the jurisdiction of the FCPA by having a nexus to the U.S. Nexus may be established when the foreign person is physically present in the territory of the U.S. *See* Daniel C.K. Chow, *China's Anti-Corruption Crackdown and the Foreign Corrupt Practices Act*, 5 TEX. A&M L. REV. 323, 338 (2018).

29. *See DOJ and SEC Enforcement Actions per Year*, STAN. L. SCH., http://fcpa.stanford.edu/statistics-analytics.html [https://perma.cc/NKP9-5E4E] (last visited Mar. 1, 2020).

30. *See id.*

31. *See id.*

32. Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEGAL ANALYSIS 153, 155 (2017).

33. Karen Woody, *Declinations with Disgorgement in FCPA Enforcement*, 51 U. MICH. J.L. REFORM 269, 284 (2018).

34. Even if there is no declination of prosecution, companies that self-disclose are eligible for "up to a 50% reduction" from the bottom of the applicable U.S. Sentencing Guidelines fine range, whereas companies that do not self-disclose are capped at a 25% discount. *See* Eric Cottrell & Annette Ebright, *Is Confession Good for the Corporate Soul?: DOJ Announces New Mitigation Credit for Self-Disclosure of FCPA Violations*, J.D. SUPRA (Apr. 11, 2016), https://www.jdsupra.com/legalnews/is-confession-good-for-the-corporate-50546/ [https://perma.cc/CB7P-57FD]; *see also* David A. Silva, *DOJ Adopts New*

SEC may disgorge any profits from the company's misconduct.[35]

In December 2016, Congress passed the Global Magnitsky Act,[36] which further expands the already potent jurisdictional reach of the FCPA to encompass activities with questionable nexus to the U.S.[37] In November 2017, Deputy Attorney General Rod J. Rosenstein announced the FCPA Corporate Enforcement Policy (CEP).[38] Under CEP, a company is presumed to receive declination from prosecution if, absent aggravating circumstances, it voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remedies the misconduct.[39] To qualify for benefits under the CEP, a company must also pay all disgorgement, forfeiture, and restitution resulting from its misconduct.[40] The CEP also emphasizes corporate cooperation to hold responsible individuals accountable.

In May 2018, the DOJ introduced a new policy against "piling on,"[41] reflecting the DOJ's internal policy initiative to improve coordination with other enforcement agencies to prevent imposing multiple penalties for the same conduct. One of the policy's goals is to provide "greater transparency

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FCPA Corporate Enforcement Policy, AM. BAR ASS'N (Mar. 22, 2018), https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2018/doj-adopts-new-fcpa-corporate-enforcement-policy/ [https://perma.cc/6MSD-NG4W]. To date, thirteen companies have received declinations from the DOJ in conjunction with the Pilot Program. *See Declinations*, U.S. DEP'T JUST. (Aug. 6, 2020), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations [https://perma.cc/6JH3-Q5GB].

35. *See* F. Joseph Warin, *2016 Year-End FCPA Update*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 19, 2017), https://corpgov.law.harvard.edu/2017/01/19/2016-year-end-fcpa-update/ [https://perma.cc/5CWE-P3B7].

36. *The US Global Magnitsky Act*, HUM. RTS. WATCH (Sept. 13, 2017), https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act [https://perma.cc/5Y9W-UVA6].

37. *See* Global Magnitsky Human Rights Accountability Act, Pub. L. 114-328, § 3(a), 130 Stat. 2533 (2017) (The act's sanction applies to "any foreign the President determines . . . is a foreign government official . . . responsible for . . . acts of significant corruption").

38. Rod. J. Rosenstein, Deputy Att'y Gen., U.S. Dep't Just., Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (transcript available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign [https://perma.cc/X852-UVER]). The policy, which has been incorporated into the U.S. Attorneys' Manual, is intended to improve upon and make permanent aspects of the FCPA Pilot Program. The new Corporate Enforcement Policy applies only to DOJ criminal prosecutions and affects neither declinations in cases in which there is no basis for prosecution nor SEC investigations. *See 9-47.000 Foreign Corrupt Practices Act of 1977*, U.S. DEP'T JUST., https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 [https://perma.cc/9224-ZCQ6] (last visited Mar. 2, 2021).

39. *See 9-47.000 Foreign Corrupt Practices Act of 1977*, *supra* note 38, § 9-47.120.

40. *See id.* § 9-47.120. The Corporate Enforcement Policy goes beyond the Yates Memo, requiring that, to receive full cooperation credit, companies must disclose all facts relating to involvement in the criminal activity by the company's officers, employees or agents, as well as facts relating to potential criminal conduct by third parties and their officers, employees and agents. *See* Cuneyt A. Akay at al., *DOJ Corporate Enforcement Policy Shift–Substantially Better?*, GREENBERG TRAURIG (Dec. 5, 2018), https://www.gtlaw.com/en/insights/2018/12/doj-corporate-enforcement-policy-shift-substantially-better [https://perma.cc/EMA9-YR2E].

41. Rosenstein, *supra* note 38.

and consistency in corporate enforcement."[42] In August 2018, the FCPA's application in the context of corporate mergers and acquisitions was even further expanded,[43] embracing a new policy that encouraged "law-abiding companies with robust compliance programs . . . to take over otherwise problematic companies" and "right the ship by applying strong compliance practices to the acquired company."[44]

Recent enforcements of the FCPA, driven by policies to cast wider jurisdictional reach, were not without merit. For example, the U.S. and foreign regulators displayed mutual cooperation in complying with the requisite security oversight and enforcement measures.[45] Following the footsteps of the FCPA and its widening authority, a large number of other countries enacted similar anti-bribery laws and regulations. In theory, such improved cooperation between regulatory authorities of the U.S. and another country against cross-border corruption should yield mutually beneficial results. The problem, however, still persists because such cooperation is largely conducted on an ad hoc basis with legal frameworks that are seldom established. Therefore, introducing a new treaty or explicit agreement between states will not only ensure stable cooperation, but also foster a sustainable long-term solution to conflicts arising from the application and enforcement of the FCPA by the U.S. and its foreign counterparts alike.

B. Extraterritorial Application of the FCPA

Extraterritorial application has been the FCPA's hallmark since its inception. Because of its expansive jurisdictional authority, the FCPA has been a constant source of contention between the U.S. and other sovereigns.

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42. *Id.*

43. According to the Deputy Assistant Attorney General Matthew Miner, the application of the FCPA policy to successor entities in mergers and acquisitions represents another step in the DOJ's effort to "foster a climate in which companies are fairly and predictably treated when they report misconduct . . . to increase self-reporting and individual accountability . . . ." *See* Matthew S. Miner, Deputy Assistant Att'y, U.S. Dep't Just., Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018) (transcript available at https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th [https://perma.cc/J4EB-77ET]).

44. *Id.* Miner emphasized that the FCPA policy will be applied to acquiring companies that uncover corrupt activities subsequent to the acquisition, as well as those that detect misconduct during the due diligence process prior to the acquisition. With respect to the latter, Miner stated that the DOJ encourages acquiring companies to seek the DOJ's guidance through the FCPA Opinion Procedures before proceeding with the acquisition. *See id.*

45. *See* SHEARMAN & STERLING LLP, CASES AND REVIEW RELEASE RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, FCPA DIGEST xxv (2018), https://www.shearman.com/-/media/Files/Perspectives/2018/01/January-2018-FCPA-Digest.pdf?la=EN&hash=C3F737934BC08D279B3A1FDEAEC68202DCFDC3D4 [https://perma.cc/SM25-7XBV] ("[T]he case of *Telia*, in which U.S., Dutch, and Swedish regulators cooperated in the investigation and landed a $965 million global settlement" shows that the amount of international cooperation regarding FCPA prosecutions is increasing).

1. Various Tools of Extraterritorial Application

The DOJ wields various tools to authorize extraterritorial application of FCPA. Perhaps alluded by textual interpretations of the FCPA's title itself (i.e., ambiguity on what "foreign" includes in the Foreign Corrupt Practice Act), FCPA enforcement by the DOJ and the SEC has been extended to non-U.S. persons. Specifically, the FCPA applies to non-U.S. agents and employees of domestic concerns, as well as U.S. nationals living elsewhere in the world, even with minimal or no territorial linkage with the U.S.[46] Since the 1998 amendments, the DOJ has used the FCPA to prosecute non-U.S. persons who are neither U.S. residents nor doing business in the U.S.[47] The DOJ has reaffirmed that it can exercise jurisdiction over acts that transpire outside the U.S. based on their effects in the U.S.[48] However, despite "the government's willingness to enforce the FCPA even where the conduct has little direct connection to the United States," companies and individuals under belief that they are not subject to U.S. enforcement find themselves under investigation in the U.S.[49]

Furthermore, U.S. authorities have applied the FCPA extraterritorially when a foreign subsidiary of a U.S. parent company engaged in a culpable act or omission in violation of the FCPA. The "knowledge" standard applies to non-U.S. subsidiaries of U.S. parent companies. When applying the FCPA to these non-U.S. subsidiaries, the DOJ and the SEC enforcement require a parent-subsidiary relationship, which presumes that the U.S. parent had "knowledge" of the corrupt purpose of the payment at issue.[50] In this context, knowledge of conduct or circumstance encompasses actual awareness of such conduct or circumstance, or a "firm belief that such circumstance exists or that such result is substantially certain to occur."[51]

The accounting provisions of the FCPA are more specific with respect

46. *See* discussion *supra* Part I.

47. *See* Peter W. Schroth, *The United States and the International Bribery Conventions,* 50 AM. J. COMPAR. L. SUPP. 593, 603–04 (2002). Note, however, that foreign officials who receive bribes from U.S. persons can neither be prosecuted under the FCPA, nor for conspiracy to violate the FCPA. *See, e.g.*, United States v. Blondek, 741 F. Supp. 116, 119–20 (N.D. Tex. 1990) (refusing to allow prosecution of foreign officials for FCPA violations or conspiracy to violate the FCPA). Thus, there is arguably no necessary territorial nexus between a corrupt act and the United States under the FCPA. *See* 15 U.S.C. §§ 78dd-1(g), 2(a) (providing alternative bases of jurisdiction for issuers and domestic concerns).

48. *See* DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 4–15 (2d ed. 1995). In some cases, it seems as though the DOJ enforces the FCPA regardless of whether any means of interstate commerce was used. *See* 15 U.S.C. §§ 78dd-1(g), 2(a); *see also* Schroth, *supra* note 47, at 603 (detailing the minimal contact with the United States required for prosecution under the FCPA).

49. O'MELVENY & MYERS LLP, *supra* note at 10, at 11.

50. *See* U.S. DEP'T JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 27 (2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [https://perma.cc/935D-DTUE] [hereinafter RESOURCE GUIDE].

51. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 550 (2011).

to the parent-company responsibility for non-U.S. subsidiaries.[52] The parent company's compliance with FCPA requirements is presumed if the parent uses "good faith efforts to use such influence . . . ."[53] Notwithstanding this standard, it is possible for courts to pierce the corporate veil and determine that the subsidiary is an "alter ego" of the parent that dominated the affairs of its subsidiary.[54] In this instance, the parent can be held liable. Nevertheless, the SEC seems willing to prosecute cases in which the parent's involvement in its subsidiary's affairs falls well below domination.[55] For example, non-U.S. subsidiaries and joint ventures of U.S. companies may fall under FCPA jurisdiction if there are U.S. persons on their boards of directors. Following the current trend of enforcement, such persons are at "tremendous risk" of FCPA liability if they are aware of corruption.[56]

Other tools for extraterritorial application of the FCPA are also available for recipients of improper payment. The recipients are not covered by the explicit language of the FCPA, but they may still be subject to their home country's own domestic law and other pertinent U.S. laws. For example, the DOJ has invoked other applicable laws, such as anti-money laundering statutes, to prosecute foreign officials who received improper payments but cannot be prosecuted under the FCPA.[57] Secondly, the extraterritorial jurisdictional scope of the FCPA has further expanded because of the increased tendency to treat State-Owned Enterprises (SOE), enterprises where governments serve as shareholders, as a governmental apparatus. In fact, a large portion of FCPA cases now involve foreign SOE as partners to business transactions with U.S. corporations.[58] In these cases, U.S. regulatory agencies and courts read the FCPA expansively to include U.S. corporation's business activity with foreign SOEs. While some SOE are de facto government agencies in nature, which makes the application of the FCPA both appropriate and necessary, others are essentially non-governmental agencies with inconsequential governmental shareholding, where the government does not exercise regulatory control nor possesses investor rights. Currently, the definition of SOE still varies and fluctuates

52. They provide that if an issuer holds 50% or less of the voting power with respect to the subsidiary firm, then the issuer must "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances," to cause the subsidiary firm to comply with the FCPA books and records and internal accounting controls provision. *See* 15 U.S.C. § 78(m).

53. *Id.* § 78m(b)(2).

54. *See* Marcela E. Schaefer, *Agency Theories Under the Foreign Corrupt Practices Act: Should a Parent Company Be Liable for the Misdeeds of Its Subsidiary?*, 94 N.Y.U L. REV. 1654, 1665 (2019).

55. One example of this would be if the U.S. company consolidates its subsidiaries' financial statements, and if the subsidiary improperly recorded payments in its financial statements that may violate the books 55218, 2007 WL 1074505 (Jan. 31, 2007).

56. *See* O'MELVENY & MYERS LLP, *supra* note 10, at 11.

57. *See id.* at 103.

58. *See* Kevin Y. Wang, *Valuable Nepotism: The FCPA and Hiring Risks in China*, 49 COLUM. J.L. & SOC. PROBS. 459, 479–80 (2016); James D. Fry, *China's Version of the US Foreign Corrupt Practices Act and the OECD Anti-Bribery Convention: Comparing Ravens and Writing Desks*, 24 KING'S L.J. 60, 66–68 (2013); United States v. Alcatel-Lucent France, S.A., et al., No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010).

on a case-specific basis.[59] In any event, the current definition of SOE envisages a wide spectrum of entities maintaining relationships of varying degrees with their respective governments. Under these circumstances, U.S. businesses' transaction with employees of other foreign corporations may trigger FCPA jurisdiction if the foreign corporation qualifies as an SOE based on its broad definition. If the FCPA's jurisdictional influence continues seeping into the burgeoning area of SOEs, conflicts between the law enforcement agencies of the U.S. and their foreign counterparts are likely to further erupt. As such, the developing jurisprudence of SOEs is another area where the FCPA's broad, extraterritorial application is controversial.

The FCPA defines a foreign official as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of [the same]."[60] Implicit in the definition is the possibility that if a U.S. citizen is bribed to obtain a benefit, that act may fall outside the original intent of a statute enacted to deal with *foreign*—rather than U.S. *domestic*—corruption. However, the statute facially does not include U.S. citizens who work for foreign governments or operate as instrumentalities due to the "any employee" language.[61] Moreover, the definitional remit of the terms "government," "department," or "agency" seems to be rather clear.[62] The statute also stipulates what "public international organization" means,[63] but it neglects to elucidate what "instrumentality" means.[64] Indeed, the term "instrumentality" can carry a broad meaning, and therefore may result in FCPA applying to impugned activities involving officials with other non-governmental foreign entities.

Extraterritorial enforcement of the FCPA leads to overlapping application of the criminal law of multiple jurisdictions. This is an inevitable outcome because many crimes covered by the FCPA are also criminalized in other jurisdictions. This overlap is not surprising amongst various laws and regulations due to the effects of globalization, and such a phenomenon does not necessarily raise a particular problem, at least from a legal perspective. Problems, however, do arise when one country purports to implement a law capable of expanding extraterritorial jurisdiction in a way that undermines proper jurisdictional bases of international law.

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59. *See, e.g.*, *TPP Full Text*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/TPP-Final-Text-State-Owned-Enterprises-and-Designated-Monopolies.pdf [https://perma.cc/7HJQ-JXRY] (last visited June 12, 2021).

60. 15 U.S.C. § 78dd(f) (1977).

61. *Id.*

62. *Id.* § 78dd(f)(1).

63. The term "public international organization" is defined as:

> (i) an organization that is designated by Executive order pursuant to Section 1 of [the International Organizations Immunities Act]; or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

Id. § 78dd-2(h)(2)(i)-(ii).

64. *See id.*

To be clear, the problem is not just simply due to overlapping jurisdiction and extraterritorial application per se. Rather, the question is how, and under what circumstances, such extraterritorial application actually becomes problematic. As the following Section demonstrates, the unique breadth and scope of the FCPA raise interesting issues in this regard, evidenced by varying sector perspectives.

2. *Conflicting Views on Extraterritorial Application*

Unsurprisingly, extraterritorial application of the FCPA has been the source of contention in both domestic and international spheres. As the scope of application further broadens, the relevant debates will only intensify.

a. Critics' Views

It is particularly important to observe arguments in the context of foreign legislation and international relations discourse. For one, most critics raise the fairness issue because the FCPA requires actors to maintain a higher standard abroad than at home, under U.S.' domestic anti-bribery legislation. This disparity may reflect the fact that the FCPA does not simply address a generic ethical issue, but rather the particular congressional interest of deterring international bribery as part of Congress' foreign policy challenge.[65] Consequently, there are notable differences in accountability depending on whether the allegedly rogue behavior occurs domestically or abroad.

Critics also cite the good-faith exception in FCPA cases as main concerns. This exception means that if U.S. corporations reasonably conduct relationship-building processes with an official of a foreign government, then the FCPA does not apply. Because determining such situations is dependent on context and culture, it is difficult to identify said situations with reliable levels of predictability. Therefore, such exception is questionable since "culture remains a critical differentiator as opinions vary on what conduct falls inside and outside of that label."[66]

Additionally, some legal ethicists warn of potential consequences stemming from broadening the definition of bribery within the FCPA. They claim that the FCPA's definition of bribery is more inclusive than that of the U.S.' domestic anti-bribery laws.[67] It is thus argued that

> . . . courts should read into the FCPA a more specific and manifest intent closer to what is necessary to prove domestic bribery or illegal gratuities. . . . The rationale underlying judicial interpretation of domestic bribery argues

65. *See e.g.*, *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N (Nov. 17, 2020), https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml [https://perma.cc/4KZJ-JKN3].

66. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 423 (1999).

67. *See* Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOB. STUD. L. REV. 1, 8–9 (2006).

> for something more than winks and nods. But the language of the FCPA indicates Congress sought to punish more than the most inept.[68]

Moreover, practicing attorneys William Carpenter and Thomas Stutsman have opined that "an increasing number of . . . businesses have fallen victim to the federal government's attempts to expand FCPA liability beyond its statutory confines, overzealous enforcement has resulted in many cases presenting potentially meritorious defenses."[69] Similarly, the U.S. Chamber of Commerce and the New York City Bar panel pointed out that the FCPA offsets competitive advantages of certain U.S. segments[70] and concluded that a call to narrow or limit the enactment's scope and enforcement should be in order. Since the extraterritorial enforcement of anti-corruption laws aimed at foreign bribery remains in an embryonic stage, many practitioners also emphasize that their clients' foreign competitors are still outside the reach of the FCPA in a variety of industries.[71] Accordingly, in the current global enforcement environment, the effect of vigorous FCPA enforcement on the U.S.' economic interest remains questionable.[72]

Other critics highlight that a declination with disgorgement spawns more problems than solutions because the current declination regime is "sending two opposing messages: the government is shirking enforcement of the FCPA in favor of declinations, but at the same time requiring disgorgement of allegedly ill-gotten gains. . . . [T]he novel pretrial diversion scheme of declination with disgorgement creates more problems than it solves, both practically and theoretically . . . ."[73] As such, the regime is not "the optimal course of action despite the ease with which it creates resolutions for companies and the government."[74]

Finally, the Second Circuit judgment of *U.S. v. Hoskins* is at odds with the DOJ's and the SEC's FCPA Resource Guide, which states that "the United States generally has jurisdiction over all conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States."[75] The judgement contra-

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68. Nate Wright, *Domestic vs. Foreign Corrupt Practices: For Bribery, an International Mind Is More Guilty*, 28 GEO. J. LEGAL ETHICS 989, 989 (2016).

69. William G. Carpenter & Thomas P. Stutsman, *Corporate Liability Under the FCPA: Identifying Defense Opportunities*, BENCH & BAR MINN., July 2014, at 24, 28 (2014).

70. *See* Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEGAL ANALYSIS 153, 156 (2018); Dan Froomkin, *U.S. Chamber of Commerce Battles Anti-Bribery Statute*, HUFF POST NEWS (Dec. 6, 2017), https://www.huffpost.com/entry/chamber-of-commerce-foreign-corrupt-practices-act_n_919617 [https://perma.cc/244L-TRRD].

71. *See* Philip M. Nichols, *The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act*, 53 HARV. J. ON LEGIS. 203, 216–19 (2016).

72. *See id.* at 216–19.

73. Woody, *supra* note 33, at 311.

74. *Id.*

75. Colin R. Jennings, *Second Circuit Rejects Expansive Use of Conspiracy for FCPA*, NAT'L L. REV. (Aug. 26, 2018), https://www.natlawreview.com/article/second-circuit-rejects-expansive-use-conspiracy-fcpa [https://perma.cc/3HZ7-2WB7].

dicts the DOJ position that the U.S. government may hold non-resident foreign nationals liable for conspiring to violate the FCPA.[76] Thus, *Hoskins*' holding is significant because it narrows the DOJ's traditional jurisdictional reach over non-resident foreign nationals.

b. Proponents' View

At the other end of the discourse, several voices of advocacy and approval persist for the recent trend of FCPA enforcement. For example, a scholar observed that:

> The [FCPA] . . . was enacted for many reasons, one of the most important of which was enhancing the integrity of the global market. Protecting the integrity of a market is a legitimate and worthwhile goal: in addition to fundamental concepts such as fairness and diversity, antitrust law anticipates a well-functioning market that allows for "the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use."[77] The same benefits can be accrued through proper administration of the [FCPA].[78]

Moreover, some supporters expect the FCPA to encourage other countries to follow suit. Likewise, it also seems probable that greater foreign enforcement of anti-bribery laws would tend to level the playing field and benefit U.S. companies. To encourage greater enforcement abroad, it may be necessary to convince foreign political coalitions that anti-bribery measures are in their best interest, or at least not seriously adverse to them. By identifying the ways in which domestic firms may gain from the enforcement of laws such as the FCPA, it may become possible for other governments hoping to pass or to enforce similar laws to garner support.

Additionally, on February 2017, the new head of the DOJ's fraud division, Trevor McFadden, referred to the FCPA as "an important tool in this country's fight against corruption."[79] He then observed that "[t]he FCPA has been vigorously enforced over time, and that this enforcement has evolved over time."[80] Thus, he thought it "safe to say that this enforcement will continue to evolve, long after the FCPA is over the hill."[81]

Many business executives also favor vigorous enforcement of the FCPA. For example, Mark Simon, a Hong Kong-based American executive and a former government affairs manager at a private shipping firm,

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76. For discussion on and analysis of this case, see *infra* note 119 and accompanying text.

77. Nichols, *supra* note 71, at 244 (quoting Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987).

78. *Id.* at 205.

79. Richard Messick, *Trump Official: Fighting Foreign Bribery "Solemn Duty" of Justice Department "Regardless of Party Affiliation"*, GLOB. ANTICORRUPTION BLOG (Feb. 17, 2017), https://globalanticorruptionblog.com/2017/02/17/trump-doj-appointee-on-fcpa/ [https://perma.cc/4PLA-SALH].

80. Trevor N. McFadden, Deputy Assistant Att'y Gen., U.S. Dep't Just., Remarks at Global Investigations Review Conference in Washington D.C. (Feb. 16, 2017) (transcript on file with author).

81. *Id.*

stresses that the FCPA is "a real gift for Americans" because it provides a legitimate reason not to engage in bribery.[82] Simon continues, moreover, that the FCPA helps reduce corruption in other countries because governments "know that the Americans are going to be watching and if we keep losing contracts and the supply of goods and services/government bids, we are going to ask questions and those questions become public in that country."[83] Also, Dmytro Shymkiv, the former CEO of Microsoft in Ukraine, said "[t]he FCPA is the best thing to fight corruption," prohibiting executives from paying bribes or performing favors for government officials, which eventually "creates a culture of zero tolerance and leniency . . . . Every year, Microsoft does an internal audit of its business in corruption-prone countries, using the FCPA guidelines and principles, and while it means more paperwork, 'you know there are double eyes on everything.'"[84]

In particular, a recent study revealed that, for the first time in nearly a decade, U.S. regulators brought more actions against foreign companies than they did against U.S. companies.[85] This shift demonstrates that the FCPA alone does not place U.S. companies at risk. Besides, there is growing consensus that the Trump administration deployed the anti-corruption statute as a mechanism to advance its "America First" agenda.[86]

Finally, survey data that suggests divided business opinions about the FCPA and its impact reveal additional complications in FCPA enforcement. When asked anonymously through a survey between 2015 and 2016, 84% of international respondents "agreed" with the statement that anti-corruption laws, including the FCPA and others enacted by countries such as the United Kingdom (U.K.), "improve the business environment for everyone"; 57% agreed that the laws "make it easier for good companies to do business in high risk markets"; and 68% agreed that the laws "serve as a deterrent to corrupt competitors."[87] These results suggest that despite the costs of compliance and variable cross-national enforcement of anti-bribery laws,

82. Max de Haldevang, *One of the US's Greatest Gifts to the Global Economy Is Under Threat from Trump*, YAHOO FIN. (Mar. 13, 2017), https://uk.finance.yahoo.com/amphtml/news/one-us-greatest-gifts-global-100030880.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAD-SiY4eqV8-9waIFBDQ5As1yXXRSLDYN5ORbzv7CHCa2_kt0xNMwjH38qsuwRyQRF4ctlctiVXEg-hvl7w1j8WhMByZQovFBvjFqTXghqRj-25YoCsHx8dpQMOlBji39t18uasq BBb9vqPLzIjo_8M1JQ8zqRSr6gOXXICLjLFM [https://perma.cc/N8H3-2HAM].

83. *Id.*

84. *Id.*

85. *See* Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 459 (2012); *America's Legal Forays Against Foreign Firms Vex Other Countries*, ECONOMIST (Jan. 17, 2019), https://www.economist.com/business/2019/01/19/americas-legal-forays-against-foreign-firms-vex-other-countries [https://perma.cc/XYE3-5DHE].

86. *See* Ronak D. Desai, *Anticorruption Enforcement in Asia Shows the FCPA Remains Strong Under Trump*, FORBES (July 31, 2018), https://www.forbes.com/sites/ronakdesai/2018/07/31/anticorruption-enforcement-in-asia-proves-fcpa-is-alive-under-trump/#3ca83087304e [https://perma.cc/38PX-QFNC].

87. JOHN BRAY, CONTROL RISKS, INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION: SURVEY 2015/2016, at12 (2016), http://rai-see.org/wp-content/uploads/2016/01/corruption-survey-2016.pdf [https://perma.cc/75XV-8JRP].

not all firms conceive these laws to be a net negative, and many firms do recognize important positives.

In all, arguments posed by both critics and proponents have merit. A variety of problems surely arise from broadening the FCPA's application and enforcement, which may prove burdensome on U.S. corporations as well as foreign corporations, because of the potential harsh penalties. Conversely, the FCPA has obviously alerted U.S. and foreign corporations alike to behave in conformity with legal implications and attendant penalties arising from possible violation of FCPA. It is thus safe to assume that the current FCPA enforcement regime has certainly influenced other states and their corporate players to transform their laws and regulations to mirror those of the U.S.[88] These findings and assumptions raise the question not of which of the two sides is correct, but rather of how to strike a balance between competing views, merits, and concerns. Following a survey of the benefits and costs of extraterritorial application of the FCPA, we now turn to more Context-oriented issues and respective analyses.

C. FCPA Enforcement Action Involving a Defense Contractor: BAE Case

In the context of the defense industry, one of the most iconic FCPA enforcement cases involved British Aerospace Systems (BAE) .[89] BAE is "an international defense, aerospace and security company" headquartered in the U.K.[90] The company is a top global defense contractor in terms of revenue.[91] BAE Systems also has a wholly-owned U.S. subsidiary named BAE Systems, Inc., with its headquarters in Rockville, Maryland.[92]

In February 2010, BAE pleaded guilty to one charge of defrauding the U.S. government by conspiring to make false statements regarding the company's ongoing compliance with the FCPA.[93] As a result, BAE was sentenced to pay a $400 million criminal fine,[94] one of the ten largest criminal fines in the history of FCPA enforcement to date.[95]

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88. Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, AM. BAR ASS'N (Nov. 8, 2018), https://www.americanbar.org/groups/international_law/publications/international_law_news/2013/the_increasing_risk_multijurisdictional_bribery_prosecution_why_having_fcpa_compliance_program_no_longer_enough/ [https://perma.cc/MH52-75EG].

89. *See BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine*, U.S. DEP'T JUST. (Mar. 1, 2010), https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine [https://perma.cc/C3DJ-YVDE] [hereinafter *BAE PLC*].

90. *Company Information*, BAE SYS., https://www.baesystems.com/en-uk/company-information [https://perma.cc/B7NX-QPNU] (last visited Mar. 4, 2021).

91. *See Top 100 for 2020*, *supra* note 13 (looking to the numbers reported in 2017).

92. *About Us*, BAE SYS., https://www.baesystems.com/en-us/our-company/bae-systems-inc/about-us [https://perma.cc/M7K2-93LY] (last visited Mar. 5, 2021).

93. *See BAE PLC*, *supra* note 89.

94. *Id.*

95. *Largest U.S. Monetary Sanctions by Entity Group*, STAN. L. SCH., http://fcpa.stanford.edu/statistics-top-ten.html [https://perma.cc/M3KU-V2CS] (last visited Mar. 5, 2021).

Concerning the genesis of BAE's false statements regarding FCPA compliance, John Weston, the Chief Executive Officer of BAE at the time, wrote to the Secretary of Defense in 2000 that the company is "committed to conducting business in compliance with the anti-bribery standards [of] . . . the U.S. FCPA."[96] According to the DOJ information, however, BAE failed to duly honor such undertaking and "was not intending to create sufficient mechanisms for its non-U.S. business to ensure compliance with the FCPA . . . ."[97] BAE's non-compliance with the FCPA was uncovered by the DOJ's investigation that the company, among others, had made "substantial payments" to certain "marketing advisors" of its choice through "various offshore shell entities beneficially owned by BAE" even though "there was a high probability that part of the payments would be used in order to ensure that BAE was favored in the foreign government decisions regarding the sales of defense articles."[98]

Particularly important to note is that BAE was not charged with a violation of the FCPA. As aforementioned, the DOJ pressed charges against BAE not because the defense contractor had failed to comply with the anti-bribery provisions of the FCPA per se, but because it had conspired to make false statements regarding its corporate FCPA compliance program.[99] In addition, BAE's questionable payments did not involve any culpable conduct on the part of BAE's U.S. subsidiary, BAE Systems, Inc.[100] Therefore, on the issue of whether viable jurisdictional grounds existed for the DOJ to prosecute BAE under the FCPA, "the jurisdictional nexus to allege a violation of the anti[-]bribery provisions may have been quite weak . . . ."[101] Ultimately, however, BAE entered into a plea agreement with the DOJ,[102] and no signs indicate that BAE raised the jurisdictional defense when faced with the DOJ's resolve "to combat overseas corruption in international business and enforce U.S. export control laws."[103] This outcome is in conformity with the observable, ongoing trend that, as Professor Matthew Stephenson aptly points out, the "FCPA is aggressively enforced but rarely litigated—most actions are brought against corporate entities that settle with the government."[104]

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96. Kevin T. Abikoff & John F. Wood, *U.S. and U.K. Authorities Reach Ground-Breaking Settlement with BAE Systems*, HUGHES HUBBARD & REED LLP (Feb. 24, 2010), https://www.hugheshubbard.com/news/fcpa-alert-u-s-and-u-k-authorities-reach-ground-breaking-settlement-with-bae-systems [https://perma.cc/SCM9-23WA].

97. *See* United States v. BAE Sys., No. 1:10-CR-00035 (D.D.C. Feb. 4, 2010).

98. *Id.*

99. *See id.*

100. *See id.*

101. Smith F. Charles & Brittany D. Parling, *"American Imperialism": A Practitioner's Experience with Extraterritorial Enforcement of the FCPA*, 2012 U. CHI. LEGAL F. 237, 246 (2012).

102. *See generally* Letter from Nathaniel B. Edmonds, Att'y, U.S. Dep't Just., and Patrick T. Murphy, Att'y, U.S. Dep't Just., to Lawrence Byrne, Att'y, BAE Sys., U.S.v. BAE System plc (Feb. 4, 2010) [hereinafter Plea Agreement] (on file with author).

103. *BAE PLC*, *supra* note 89.

104. Matthew Stephenson, *Some Preliminary Thoughts on US v. Hoskins and Its Implications for FCPA Enforcement*, GLOB. ANTICORRUPTION BLOG (Sept. 4, 2018), https://globalanticorruptionblog.com/2018/09/04/some-preliminary-thoughts-on-us-v-hos-

1. Latest FCPA Enforcement Involving a Defense Contractor

a. Airbus Case

More recently, the DOJ penalized Airbus for the defense contractor's conspiracy to violate the anti-bribery provision of the FCPA.[105] Airbus is a top, global defense contractor in terms of annual business revenue.[106] Interestingly, Airbus is neither an issuer nor a domestic concern under the FCPA. According to the latest financial statement of Airbus, it is a limited-liability company belonging to the European Society (*Societas Europaea*) with its seat (*statutaire zetel*) in Amsterdam, Netherlands.[107] Moreover, Airbus is listed on the European stock exchanges in Paris, Frankfurt, and Barcelona, among others.[108]

According to the DOJ, from 2008 to 2015, Airbus engaged in a corrupt scheme through which the company paid massive bribes to government officials in China and multiple other states to obtain "improper business advantages and to win business" not only from stated-owned or controlled entities, but also from private companies situated overseas.[109] In its scheme, Airbus retained certain business partners in China and other jurisdictions to facilitate the payment of bribes to government officials in connection with the sale of Airbus aircraft.[110] The DOJ identified, inter alia, that Airbus employees' transmission of related e-mails while on U.S. soil constituted overt acts in furtherance of its corrupt scheme.[111] In addition, certain public officials from state-owned or controlled Chinese airlines participated in Airbus-sponsored events held in several U.S. states, including Hawaii and Utah.[112]

Based on criminal information filed in the District of Columbia in late January 2020, Airbus was charged with conspiracy to violate the anti-brib-

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kins-and-its-implications-for-fcpa-enforcement/ [https://perma.cc/423V-ULD2]. A recent example of this ongoing enforcement trend under the FCPA involved Samsung Heavy Industries Company Ltd, a South Korean shipbuilding entity. Samsung entered into a deferred prosecution agreement with the DOJ and agreed to pay more than $75 million in global penalties to resolve the DOJ's investigation into the company's violations of the FCPA arising out of a bribery scheme involving officials in Brazil. *See FCPA Winter Review 2020*, MILLER & CHEVALIER (Feb. 20, 2020), https://www.millerchevalier.com/publication/fcpa-winter-review-2020#SHI [https://perma.cc/E6PF-HYXZ].

105. *See Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case*, U.S. DEP'T JUST. (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case [https://perma.cc/85D8-MD4] [hereinafter *Airbus*].

106. Amanda Macias, *American Firms Rule the $398 Billion Global Arms Industry: Here's a Roundup of the World's Top 10 Defense Contractors, By Sales*, CNBC (Jan. 10, 2019), https://www.cnbc.com/2019/01/10/top-10-defense-contractors-in-the-world.html [https://perma.cc/Z3KC-JSAM].

107. *See Financial Report & Annual Reports*, AIRBUS CORP. (Mar. 23, 2020), https://www.airbus.com/investors/financial-results-and-annual-reports.html [https://perma.cc/J3PR-PFFW].

108. *Id.*

109. *Airbus*, *supra* note 105.

110. *Id.*

111. *See* United States v. BAE Sys., No. 1:10-CR-00035 (D.D.C. Feb. 4, 2010).

112. *See id.*

ery provision of the FCPA.[113] Like BAE, the company subsequently entered into a deferred prosecution agreement with the DOJ in connection with the information and agreed to pay $3.9 billion in global penalties to resolve the FCPA-related charges.[114] This penalty is considered one of the largest in the history of FCPA enforcement to date.[115]

D. *Hoskins* and Its Implications

The FCPA is well known for the dearth of judicial review of its provisions.[116] Recently, however, a U.S. federal court of appeals in New York faced an opportunity to rule on whether the FCPA may extraterritorially apply to a foreign person with no discernable ties to the U.S.[117] In *Hoskins,* the government charged Lawrence Hoskins, a British national who worked for a foreign subsidiary of Alstom S.A., with violations of the FCPA. The central question before the Second Circuit was if a person can "be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal."[118]

In its opinion, the appellate court noted that the FCPA is structured in such a way that it is not meant to apply to any suspected conduct of "nonresident foreign nationals outside American territory without an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies . . . ."[119] In other words, jurisdiction under the FCPA may only be asserted over certain categories of persons.[120] The categories are:

> (1) American citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad;
>
> (2) most American companies, regardless of whether they violate the FCPA domestically or abroad;
>
> (3) agents, employees, officers, directors, and shareholders of most American companies, when they act on the company's behalf, regardless of whether they violate the FCPA domestically or abroad;
>
> (4) foreign persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States.[121]

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113. *See id.*
114. *See id.*
115. Harry Cassin, *Airbus Shatters the FCPA Top Ten*, FCPA BLOG (Feb. 3, 2020), https://fcpablog.com/2020/02/03/airbus-shatters-the-fcpa-top-ten/ [https://perma.cc/KF4M-8UZ7].
116. *See* Mike Koehler, *A Foreign Corrupt Practices Act*, 22 MICH. ST. INT'L L. REV. 961, 1043 (2014).
117. *See* United States v. Hoskins, 902 F.3d 69, 69 (2d Cir. 2018).
118. *Id.* at 76.
119. *Id.* at 84.
120. *See id.* at 85.
121. *Id.*

The court also noted that "the structure of the FCPA . . . was a limitation created with *surgical precision* to limit its jurisdictional reach."[122]

Additionally, the court found that the legislative history of the FCPA supported its conclusion on the judicial ambit of the statute. Namely, "[t]he strands of the legislative history demonstrate . . . a desire to leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside United States territory."[123] According to Judge Gerard Lynch, "the extraterritorial effects of the FCPA require[s the court] . . . to exercise particular caution before extending its reach . . . expressly declared by the statutory text."[124] The Second Circuit cautioned that a contrary ruling would "transform the FCPA into a law that purports to rule the world."[125]

Accordingly, considering the narrowly prescribed categories of possible defendants under the statute, "a nonresident foreign national who was not an agent of a United States company" nor an officer, director, employee or stocker of a domestic concern may not be prosecuted under the FCPA as a principal, even if he said person "allegedly participated in a foreign bribery scheme."[126] In the case at hand, the fact that Hoskins "did not travel" to the United States led the court to deny jurisdiction over him under the FCPA.[127] This was so even though, as the government argued, he "repeatedly e-mailed and called . . . U.S.-based coconspirators" regarding the underlying bribery scheme "while they were in the United States."[128] Apparently, the phone calls and e-mails from outside the U.S. were insufficient to qualify as culpable acts within the meaning of § 78dd-3 of the FCPA.[129] Therefore, because Hoskins's actions occurred outside the U.S., there was no viable legal basis for the court to assume jurisdiction and find him directly liable for an FCPA violation.

E. Application of FCPA by Contract

In the context of international teaming arrangements, it appears that major U.S. defense contractors generally require a binding provision on FCPA and anti-corruption compliance as part of the underlying arrangement, even when counterparties may have no direct or obvious nexus with

122. *Id.* at 84 (emphasis added).
123. *Id.* at 93–94.
124. *Id.* at 84.
125. *Id.* at 92.
126. *Id.* at 90–91.
127. *Id.* at 72.
128. *Id.*
129. As one author points out, "[t]he Second Circuit's approach appears to presume that classes of actors not specified by the charging statute are not liable." *See* Jack C. Smith, *Grappling with Gebardi: Paring Back an Overgrown Exception to Conspiracy Liability*, 69 DUKE L.J. 465, 470, 502 (2019). Based on this presumption, the Second Circuit found that Hoskins was "incapable of violating the FCPA *directly*." *See id.* at 502 (emphasis in original).

the U.S.[130] Such requirement usually mandates the non-U.S. teaming partner to represent, warrant, or covenant that (1) they are familiar with the FCPA and other anti-corruption regulatory requirements; (2) the foreign partner will neither "offer[ ], pay[ ], give[ ], or promise[ ], directly or indirectly, to any foreign political party or official thereof, or to any candidate for foreign political office, for the purposes of . . . influencing . . . or inducing" said person or entity to commit or omit an unlawful act or to otherwise obtain or retain business; and (3) the partner will indemnify the U.S. defense contractor in the event of reneging on their representation, warrant, or covenant relating to anti-corruption compliance or for violating pertinent laws and regulations.[131] The teaming arrangement also requires non-U.S. partners to establish and maintain an internal, company-wide compliance program that meets the requirements of the FCPA and local

130. For instance, Lockheed Martin Corporation's *General Provisions for International Subcontracts/Purchase Orders* contain the following provision on compliance with the FCPA:

> (a) SELLER shall comply with applicable laws and regulations relating to anti-corruption, including, without limitation, (i) the United States Foreign Corrupt Practices Act (FCPA) (15 U.S.C. §§78dd-1, et. seq.) irrespective of the place of performance . . . [c]ompliance with the requirements of this clause is a material requirement of this Contract.

General Provisions for International Subcontracts/Purchase Orders Under a U.S. Government Prime Contract, LOCKHEED MARTIN CORP. (2019), https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/suppliers/corpdocs/2019/2019corpdoc02int.pdf [https://perma.cc/V9EG-ALJ5].

Also, Raytheon's *International General Terms and Conditions of Purchase* include a clause on what is defining their "Anti-Corruption Requirements as follows":

> (b) Seller acknowledges that its actions may subject it and Buyer to liability under the United States Foreign Corrupt Practices Act, 15 U.S.C. § 78 et seq. (the "FCPA"), the U.K. Bribery Act 2010, the anti-corruption laws, regulations, and policies of Seller's home country, the United States of America, and/or the anti-corruption laws, regulations, and policies of any other country with jurisdiction over the activities performed pursuant to this Purchase Order (together and individually hereinafter referred to as the "Anti-Corruption Requirements").
> (c) Seller warrants that no compensation payable hereunder has been used, nor will be used, for any activity or purpose where a reasonable belief exists that the Anti-Corruption Requirements would be violated or that Seller or Buyer would be exposed to liability under the Anti-Corruption Requirements.

International General Terms and Conditions of Purchase, RAYTHEON TECH. CORP. (2019), https://www.raytheon.com/sites/default/files/suppliers/rtnwcm/groups/corporate/documents/image/rtn_279814.pdf [https://perma.cc/5KDM-9ES8].

In addition, Airbus America's *General Terms of Purchase* provide in relevant part:

> Supplier shall comply, and shall cause all Items to comply, with all applicable laws and regulations in any relevant jurisdiction, including to those relating to: all applicable anti-corruption and anti-bribery laws, including legislation implementing the Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and other anti-corruption/anti-bribery conventions and the Foreign Corrupt Practices Act ("FCPA") (15 U.S.C. §§78dd-1, et seq.), regardless of whether Supplier is within the jurisdiction of the United States.

Purchase Order Terms and Conditions–Airbus Commercial–US Law, AIRBUS (2021), https://www.airbus.com/be-an-airbus-supplier/bootc.html [https://perma.cc/ZX6R-RBGP].

131. Such violation may also enable U.S. entities to terminate the teaming arrangement.

anti-corruption regulations, as well as implement appropriate policies, training, and reasonable internal controls for ongoing anti-corruption compliance oversight and implementation.[132]

This form of application of the FCPA "by contract" seeks to ensure that teaming partners are aware of the requirements and duly adhere to the anti-corruption laws and regulations of the U.S. and of applicable foreign jurisdictions while bidding for public tenders in that offshore jurisdiction to enter into a definitive contract with the foreign, governmental end-user. Despite laudable intentions, however, exterritorial enforcement of FCPA may give rise to conflict of laws issues that the next Section of this Article will analyze.

F. A Recent Example—Specific Context of Korea

In light of the escalating nuclear threats from North Korea, the Republic of Korea (ROK) heightened its efforts to increase collaboration with the U.S. in improved defense technologies.[133] Against this backdrop, the ROK defense contractors are increasingly partnering with U.S. industry partners to bid for eligible local defense projects.[134] In the context of such collaboration, as already explained, the participating U.S. entity may require FCPA compliance as an indispensable component of the teaming arrangement. As our analysis below demonstrates, however, such contractual requirement is most likely to give rise to conflict of law issues and unintended jurisdictional ramifications.

II. Legal Analysis

A. Concept of Jurisdiction and Conflict of Laws

According to Black's law dictionary, the term "jurisdiction" is defined, inter alia, as (1) "a government's general power to exercise authority over all persons and things within its territory"; or (2) "a court's power to

132. *See International General Terms and Conditions of Purchase*, *supra* note 130.

133. John Grady, *South Korea Looking to Collaborate More with U.S. in Defense Technology*, USNI NEWS (Nov. 21, 2016), https://news.usni.org/2016/11/21/south-korea-us-defese-tech [https://perma.cc/RP4W-5FJM]. For instance, Hanwha Systems, a ROK defense contractor specialized in various defense electronics solutions and products, has teamed up with Raytheon to bid for ROK's Mode-5 Identification Friend or Foe project. *See* Jeff Jeong, *South Korean Military to Upgrade 'Friend or Foe' ID Capability*, DEF. NEWS (Sept. 23, 2018), https://www.defensenews.com/global/asia-pacific/2018/09/24/south-korean-military-to-upgrade-friend-or-foe-id-capability/ [https://perma.cc/T7XG-QCYH]. Also, Lockheed Martin and Korea Aerospace formed a consortium to prepare and submit a definitive proposal for the U.S. Air Force's $16 billion T-X fighter jet program. *See Lockheed Martin, KAI Submit Final Proposal for USAF T-X Program*, DEF. NEWS (Aug. 20, 2018), http://www.defenseworld.net/news/23220/Lockheed_Martin__KAI_Submit_Final_Proposal_for_USAF_T_X_Program#.XLwRV1Wn6K1[https://perma.cc/49HJ-2MQQ].

134. For a comparative analysis between the U.S. and the ROK regarding teaming agreements in the KSS-III project, the first indigenous submarine project in the ROK, see generally Joseph I.Y. Cho, *Antitrust Implications of Defense Development Projects in South Korea: The Case of the KSS-III Project*, 25 KOREAN J. DEF. ANALYSIS 37 (2013).

decide a case or issue a decree."[135] This set of definitions is consistent with the taxonomy of jurisdiction under the Restatement (Fourth) of Foreign Relations Law. Under the Restatement, a state's jurisdiction consists of: (1) "jurisdiction to adjudicate, i.e., the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals"; and (2) "jurisdiction to enforce, i.e., the authority of a state to exercise its power to compel compliance with law."[136]

The Restatement thus enumerates adjudicative jurisdiction and enforcement jurisdiction, two principles of jurisdiction recognized in public international law.[137] Of particular relevance to U.S. practice with respect to enforcement jurisdiction, the Restatement provides that "(1) [t]he United States exercises jurisdiction to enforce in its own territory"; and "(2) [t]he United States exercises jurisdiction to enforce in the territory of other states with the consent of those other states."[138]

It thus appears that, in the context of U.S. foreign relations law, the concept of enforcement jurisdiction, in practice, is centered on territoriality. As discussed above, enforcement of the FCPA reaches U.S. nationals including certain issuers and domestic concerns, independent of their physical presence within the U.S.[139] This doctrine and its implementation are consistent with the nationality or active personality principle under which a state is "entitled to exercise jurisdiction over its nationals, even when they are found outside the territory."[140] This form of extraterritorial enforcement of the FCPA is consistent with the statutory language of the enactment itself and also with the principle of nationality.

The FCPA, however, additionally applies and may be enforced against non-U.S. nationals or businesses. As encapsulated in § 78dd-3 of the FCPA, such enforcement is subject to the caveat that the non-U.S. national or business be engaged in an act of corruption while present in U.S. territory.[141] According to the *Hoskins* court, the requirement of territoriality under this particular prong of the FCPA requires a foreign individual's actual presence on American soil, such as a business trip to the U.S.[142] Placing international calls or sending electronic mails from outside the

135. *Jurisdiction*, BLACK'S LAW DICTIONARY 383 (2d ed. 2001).

136. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 101 (AM. L. INST. 2017).

137. *See* Menno T. Kamminga, *Extraterritoriality*, OXFORD PUB. INT'L L. (Sept. 2020), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040 [https://perma.cc/4MGF-4SGQ].

138. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 101, *supra* note 136.

139. *See* RESOURCE GUIDE, *supra* note 50, at 11. This jurisdictional structure is consistent with Article 42(2) of the Organisation for Economic Co-operation and Development (OECD) Convention under which a State Party may establish jurisdiction over offenses when they are committed by a national of that State Party. *See* OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS 5 (2019), https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [https://perma.cc/NQU9-E6KP].

140. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 104 (2d ed. 2008).

141. *See* RESOURCE GUIDE, *supra* note 50, at 11.

142. United States v. Haskins, No. 16-1010-cr, slip op. at 9 (2d Cir. Aug. 24, 2018).

U.S. are deemed insufficient grounds for jurisdiction.[143] This holding of the *Hoskins* court is synchronous with the aforementioned U.S. practice with respect to enforcement jurisdiction. In other words, in order for the U.S. to extend jurisdiction over a non-U.S. national under the FCPA, the element of territoriality must be present and satisfied. The corollary to this principle is that when exercising jurisdiction over a non-U.S. national in a foreign territory, even consent from the foreign state to exercise jurisdiction cannot suffice to enforce jurisdiction under the FCPA.

In practice, however, territoriality under § 78dd-3 of the FCPA has been interpreted rather broadly and enforced aggressively by the DOJ. For instance, the DOJ has posited "that a foreign non-issuer commits an act while in U.S. territory if it 'causes an act to be done' in the United States . . . even if the company itself is not physically present . . . in U.S. territory."[144] Examples of such acts include wire transfers from corporate accounts outside the U.S. to financial institutions in the U.S.;[145] a "transfer [of funds] through a correspondent account in the [U.S.]";[146] and transmittal of e-mails while in the territory of the U.S.[147] Considering the DOJ's record of pursuing aggressive enforcement policies, coupled with the fact that most FCPA enforcement activities against corporate entities ultimately end with settlements,[148] inclusion of FCPA compliance clauses in the Context may be tantamount to providing the DOJ with yet another effective tool to chase after non-U.S. concerns and individuals that are not necessarily subject to the U.S. government's jurisdiction. This forecast is especially problematic especially due to the possibility of a clash between the FCPA

143. *See* United States v. Amaro Goncalves, et al., No 09-cr-00335-RJL, at ¶¶ 8, 33 (D.D.C. Apr. 16, 2010) (indictment). *See generally* United States v. Amaro Goncalves, et al., No. 09-cr-00335-RJL (D.D.C. June 6, 2011) (docket entry).

> During the trial, Judge Leon granted a motion to dismiss one substantive FCPA count against one defendant, Pankesh Patel. Patel, a citizen of the United Kingdom, was charged under Section 30C of the FCPA based on acts that were undertaken "while in the territory of the United States" . . . . One of the counts rested on Patel's sending a document from the United Kingdom to Washington. Judge Leon held that this was not sufficient to satisfy the requirement that Patel have undertaken an act "while in the territory of the United States."

JAMES J. BENJAMIN, JR., AKIN GUMP STRAUSS HAUER & FELD, RECENT DEVELOPMENTS IN FCPA LAW AND PRACTICE 14 (2012).

144. Michael S. Diamant et al., *FCPA Enforcement Against U.S. and Non-U.S. Companies*, 8 MICH. BUS. ENTREPRENEURIAL L. REV. 353, 361–62 (2019) (quoting 18 U.S.C. § 2 (1982)).

145. *See* RESOURCE GUIDE, *supra* note 50, at 11.

146. *See* Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, *in* GEO. WASH. U. L. SCH., at 6 (GW Legal Stud. Rsch. Paper No. 586, 2011). For example, in a case involving Samsung Heavy Industries Company Ltd, the DOJ alleged jurisdiction on the basis of Samsung's use of correspondent accounts in the U.S. *See FCPA Winter Review 2020*, *supra* note 104.

147. *See Airbus*, *supra* note 105.

148. *See* SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT, FCPA DIGEST 14 (2019), https://digital.shearman.com/i/1324333-shearman-sterling-s-recent-trends-and-patterns-in-the-enforcement-of-the-foreign-corrupt-practices-act-fcpa-fcpa-digest/0?_ga=2.47070503.1674723614.1624389869-122885086.1624389869 [https://perma.cc/XYC7-65UE].

and the equivalent law of the foreign jurisdiction, creating a conflict of laws.

The subject of conflict of laws can become especially complicated in the Context. This is because the parties to a contractual instrument are free to choose the governing law.[149] Supply contracts between participating entities in the Context usually select either the law of one of the non-U.S. party, or the law of a neutral jurisdiction such as the United Kingdom and Switzerland.[150] When an actual or alleged breach of the FCPA compliance clause by the non-U.S. party occurs, such breach may enable the DOJ to intervene and assume criminal jurisdiction over the non-U.S. entity. In furtherance of such enforcement initiative, the clause may somehow satisfy the territorial threshold under the FCPA by establishing the entity's physical presence in the territory of the U.S. Meanwhile, the same breach may also give rise to a dispute between the contracting parties, usually in the form of international arbitration, under their mutually chosen governing law. In the process of arbitration, a controversy as to whether the FCPA actually applies to the non-U.S. party may arise,[151] and unless the parties had agreed otherwise, such controversy will be assessed and determined under the rubric of the mutually chosen governing law.[152] In this overall scheme, therefore, the ensuing dispute settlement process and its ultimate outcome may involve a normative clash between U.S. law and the governing law on whether the FCPA may apply to non-U.S. individuals or entities.[153]

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149. For instance, in the ROK, which is a civil law country with a codified system of law, party autonomy in the context of transnational contracting is enshrined under Article 25(1) of the Conflict of Laws Act, which enables the parties to choose the law applicable to the underlying contract or any part thereof. For a primer on the Act, see Kwang Hyun Suk, *New Conflict of Laws Act of the Republic of Korea*, 1 J.S. KOR. L. 197, 197–223 (2001).

150. *See* Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 484–86 (2014); Philip R. Wood, *Ten Points for Choosing the Governing Law of an International Business Contract*, INT'L BAR ASS'N (Feb. 13, 2020), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=1a3ef62c-4d40-4b25-8002-00e6b9e8224c [https://perma.cc/HBR2-H4H4].

151. Of particular relevance here is if "the parties' chosen law may be overridden to the extent of its inconsistency with mandatory laws of the place of performance." *See* Michael Hwang & Kevin Lim, *Corruption in Arbitration—Law and Reality*, 8 ASIAN INT'L ARB. J. 1, 38 (2012). In this regard, it is noted that defense projects in the Context are usually performed within the territory of the ROK. Against this backdrop, under Article 7 of the Conflict of Laws Act, the possibility of contracting parties' choice of law being overridden is provided for as "[p]rovisions of mandatory law of [t]he Republic of Korea which in view of their legislative purpose must be applied irrespective of the governing law, shall be applicable even if a foreign law is designated as governing law by this Act." Gukjesabeop [Conflict of Laws Act], art. 7 (S. Kor.), *translated in* Kwang Hyun Suk, *supra* note 149, at 205.

152. The typical governing law clause in a Context contract usually stipulates that the underlying contract be interpreted in accordance with the governing law as if the contract were wholly performed in the territory of the governing law.

153. For instance, in the International Court of Arbitration, the tribunal found that the FCPA is primarily aimed at remediating public trust in American entities whose integrity has been questioned by a series of foreign bribery scandals. Therefore, it is not appropriate to apply the FCPA when it comes to corporate entities outside the U.S.

B. Rationale Behind the Extraterritorial Application of FCPA by Contract

It appears that major U.S. defense contractors routinely advocate for the inclusion of an FCPA compliance clause in an overseas transaction within the Context as "[t]he arms, defense and military industry has the highest percentage of bribery related enforcement actions relative to the number of firms in the industry."[154] Another reason may relate to Federal Acquisition Regulation (FAR) 52.203-13 containing the "Contractor Code of Business Ethics and Conduct" (CBEC).[155] Under this particular FAR provision, the prime contractor must "have a written code of business ethics and conduct and make a copy of the code available to each employee engaged in performance of the contract" within thirty days after a contract award by the U.S. government.[156] The contractor is further obliged to "exercise due diligence to prevent and detect criminal conduct"[157] and to make a timely disclosure if the contractor "has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed . . . [a] violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations . . . ."[158] Moreover, the contractor is obligated to flow-down the CBEC to any subcontractor if the value of the subcontract equals or exceeds $5,500,000 and the period of performance exceeds 120 days.[159]

However, the U.S. defense contractors' request for FCPA compliance in the Context (presumably based on the CBEC) may be unwarranted or overreached for the following reasons. First, it appears that the CBEC only applies to certain contracts awarded by the U.S. government, but not by any foreign sovereign or public entity. Even assuming arguendo that the scope of CBEC is broad enough to subsume wholly offshore programs, FAR makes it clear that the CBEC will be inapplicable if the contract in question is to be "performed entirely outside the United States."[160] Such will be the case for most government or publicly funded contracts in the Context. Second, as previously elaborated, the flow-down of CBEC is mandated when it comes to certain designated subcontractors. It is, however, doubtful if such flow-down requirement also operates as a viable legal ground for flowing-up the CBEC to a foreign prime contractor in the Context. Lastly, in light of *Hoskins*, it is now relatively clear that the FCPA is inapplicable to a for-

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While the battle against corruption is a worthy objective, the tribunal found that it does not justify the extraterritorial application of the FCPA in furtherance of said objective. *See* Morocco v. Fr., Case No. 9333 (Int'l Ct. Arb. 1998).

154. Thomas Larned & James Ervin, *National Security and FCPA Investigations* (Oct. 8, 2014), CORP. COMPLIANCE INSIGHTS (Oct. 8, 2014), https://www.corporatecomplianceinsights.com/national-security-fcpa-investigations/ [https://perma.cc/WFK3-3Q94].

155. 48 C.F.R. § 52.203-13 (2020).

156. *Id.* § 52.203-13(b)(1).

157. *Id.* § 52.203-13(b)(2).

158. *Id.* § 52.203-13(b)(3)(i)(A).

159. *Id.* § 52.203-13(d)(1).

160. *Id.* § 52.203-14(d)(2).

eign national or concern with no demonstrable nexus to the U.S. In the Context, mandating FCPA compliance will be ineffective unless there is a reasonable specter of the foreign partner with established physical presence in the U.S. in furtherance of the underlying defense program, or otherwise assuming an agency or employment relationship with any U.S. entity involved.[161]

C. Principles of International Law on National Jurisdiction

Coping with corruption has become a global concern, and in particular, bribery of government officials causes serious harm to the international community at large. The need to curb such harm explains the policy rationale for robust application of the FCPA and growing attention to anti-corruption conventions sponsored by the Organisation for Economic Co-operation and Development (OECD),[162] and the United Nations (U.N.).[163] At the same time, the application of FCPA to foreign corporations (or U.S.-listed companies that are essentially foreign corporations) invites inevitable problems concerning extraterritorial application of domestic law.[164] Depending upon how one defines "minimal contact" between foreign corporations and the U.S., the legality of the FCPA's extraterritoriality under international law is determined. Over the years, scrutiny and controversies surrounding the jurisdictional legitimacy of the FCPA have mushroomed.[165] Views on this issue are divided, depending on which aspect of the enactment and companies' activities are under probe.[166]

Under customary international law, there are five principles through which a state can establish jurisdiction to prescribe and enforce national law: (1) the nationality principle, (2) the territoriality principle, (3) the passive nationality principle, (4) the protective principle, and (5) the universality principle.[167] All these principles require proper nexus between the person or entity at issue, and the state exercising such jurisdiction.[168] The question is whether the FCPA meets the conventional stan-

161. *See* United States v. Hoskins, 902 F.3d 69, 69 (2d Cir. 2018).

162. *See generally* OECD, *supra* note 139.

163. *See generally* United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

164. *See* James Crawford, Brownlie's Principles of Public International Law 456–57 (8th ed. 2012); Malcolm Shaw, International Law 472–73 (7th ed. 2014).

165. *See* Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts Within the Pacific Community*, 16 Hastings Int'l & Compar. L. Rev. 295, 296 (1993); Chad Stockel, *Sherman's March on Japan: U.S. v. Nippon Paper and the Extraterritorial Reach of Criminal Antitrust Law*, 9 Transnat'l L. & Contemp. Probs. 399, 406 (1999); Gary Born & David Westin, International Civil Litigation in United States Courts 601 (2d ed. 1992).

166. *See* Nichols, *supra* note 71, at 208–11; Ryngaert, *supra* note 140, at 104.

167. *See* Jordan J. Paust, International Criminal Law: Cases and Materials 121 (1996); Crawford, *supra* note 164, at 458–64; Christopher Staker, International Law 294–303 (Malcolm D. Evans ed., 2018).

168. *See* Staker, *supra* note 167, at 294–303.

dard of such nexus. Criticism has been persistently presented.[169] While efforts to deter global bribery should be enhanced, one states' adoption and enforcement of unilateral legislation against other states (and their corporations) in the absence of a legitimate nexus may face opposition for the legislation's violation of international law principles of jurisdiction.

D. "Contracting Out" National Jurisdiction by Individual Corporations

Consider a recent example involving the Republic of South Korea (ROK) in this regard. Like its U.S. counterpart, the ROK also has an anti-corruption regime in place.[170] The most representative anti-graft ROK enactment is the Improper Solicitation and Graft Act.[171] Under this statute, it is illegal for a public official to accept financial or other advantages, regardless of the official's duties or whether any quid pro quo is involved.[172] If a public servant has received financial or other advantages[173] exceeding KRW 1million (about $ 825) at a time or KRW 3 million in a fiscal year from the same person, both the servant and the provider of graft will be criminally prosecuted.[174] However, if the value of alleged graft is less than KRW 1 million, then both parties may instead be subjected to an administrative fine.[175]

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169. *See* Salbu, *supra* note 66, at 449; Lauren A. Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 457–58 (2012).

170. For instance, in the ROK, the following laws and regulations govern bribery of domestic or foreign government officials: the Criminal Code, the Act Concerning Aggravated Punishment of Specific Crimes, the Act on the Aggravated Punishment of Specific Economic Crimes, the Act on the Creation and Operation of the Anti-Corruption and Civil Rights Commission and the Prevention of Corruption, and the Act on Prohibition of Improper Solicitation and Provision/Receipt of Money and Valuables. *See Chambers Global Practice Guides: Anti-Corruption 2018: Korea Chapter*, KIM & CHANG (Jan. 5, 2018), https://www.kimchang.com/en/insights/detail.kc?sch_section=5&idx=17824 [=https://perma.cc/MX6Y-TN5X]; *see also Anti-Corruption Regulation Survey of 41 Countries 2017-2018*, JONES DAY (Apr. 2018), https://www.jonesday.com/en/insights/2018/04/anticorruption-regulation-survey-of-41-countries-2 [https://perma.cc/C2NW-SKKZ]; Sang Beck Kim, *Dangling the Carrot, Sharpening the Stick: How an Amnesty Program and Qui Tam Actions Could Strengthen Korea's Anti-Corruption Efforts,* 36 NW. J. INT'L L. & BUS. 235, 242–45 (2016).

171. *See generally* Bujeongcheongtag Mich Geumpumdeung Susuui Geumjie Gwanhan Beoblyul [Improper Solicitation and Graft Act] (S. Kor.) [hereinafter Improper Solicitation and Graft Act].

172. *See id.* at art. 8.

173. Such advantages include money and goods. *See id.* at art. 2(3).

174. Such criminal prosecution will entail imprisonment for not more than three years or by a criminal fine not exceeding ? 30 million. *Id.* This penal scheme is contrary to the Korean Criminal Code under which criminal liability for bribery is foisted on individuals, not on corporations. *See Expansive Korean Anti-Corruption Law Comes into Force*, LATHAM & WATKINS (Sept. 12, 2016), https://www.lw.com/thoughtLeadership/LW-korean-anti-corruption-law-comes-into-force [https://perma.cc/S52N-RFYU].

175. Such fine will be assessed and imposed at two to five times the monetary value of the money or goods related to the violation. *See* Improper Solicitation and Graft Act, *supra* note 171, at art. 23(5).

At this point, it may be useful to consider the below hypothetical to observe how the above ROK statutory scheme and the FCPA apply and play out in practice.

Hypothetical: Company A is a major ROK defense contractor specializing in defense electronics. It is a purely Korean company with no branch office or subsidiary in any part of the U.S. In a bid to partake in a sizable defense research and development project in the ROK, Company A entered into a teaming agreement with Company B, a major U.S. defense contractor. Under the agreement, Company A assumed the role as the prime contractor for the research and development project, while Company B was a core foreign subcontractor to Company A. The agreement contains a FCPA provision. During the project, a mid-level Company A employee provided extravagant meals, including alcoholic beverages and entertainment, to the ROK contract officers using a corporate card on a total of three occasions. The Korean government discovered the employee's provision of meals and entertainment through an internal audit initiative aimed at the government officials in question.

In this Hypothetical, Company A's employee's provision of treats and entertainment to certain public officials is most likely a violation of the Improper Solicitation and Graft Act. This is because the employee's act was related to an impending government bid for which Company A undertook preparatory work, and therefore, arguably to gain an improper business favor from foreign government officials. Depending on the value of such entertainment and meals, the public servants and the employee are prosecutable either by criminal or administrative penalties. In this case, Company A may also be liable for a criminal fine for its failure to properly oversee its employee.[176] In sum, from a jurisdictional perspective, it is not in dispute that ROK authorities, including the prosecutor's office and the courts, are entitled to assume and exercise criminal jurisdiction in this case, which took place solely on Korean soil, under the Improper Solicitation and Graft Act and other related enactments.[177]

In this regard, it is presumed that the FCPA applies to the Hypothetical case by virtue of "contract." Whether the U.S.' DOJ will actually choose to exercise jurisdiction in this type of scenario is difficult to know. Nevertheless, one relevant variable in gauging the possibility of such prosecutorial choice may be "the extent of anti[-]bribery enforcement in a foreign jurisdiction."[178] In other words, the level of vigilance exercised by local authorities regarding domestic anti-bribery enforcement may determine whether FCPA enforcement in that jurisdiction is warranted.[179] Such variable, however, cannot be deemed determinative, as relevant data reveals that FCPA

176. Under Article 24 of the Improper Solicitation and Graft Act, this is the case "unless the corporation exercised due care and supervision to prevent such violation." *Expansive Korean Anti-Corruption Law Comes into Force*, *supra* note 174.

177. For the list of such other enactments, see generally Improper Solicitation and Graft Act, *supra* note 171.

178. Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 CORNELL INT'L L.J. 470, 486 (2016).

179. *Id.*at 486. In this regard, the OECD, in its Phase Four report, noted:

enforcement targets both developed countries (presumably with high levels of anti-bribery enforcement) and developing countries (presumably with lower levels of anti-bribery enforcement).[180]

The outcome may be different if Company A's employee had provided graft to public officials outside ROK. Even so, ROK authorities may still assume criminal jurisdiction over the rogue employee under Korea's Foreign Bribery Prevention in International Business Transactions Act.[181] At the same time, the U.S.' DOJ may also launch its own investigation based on FCPA jurisdiction afforded by contract. This situation likewise involves a clash of jurisdictions between two different sovereign systems of law.

1. The Problem with Contracting Out National Jurisdiction

In practice, the biggest area of concern for Korean defense contractors before accepting an FCPA clause in the Context is that they are not familiar nor knowledgeable about the FCPA, an entirely foreign statute. In addition, compliance with the FCPA may be an onerous burden for private entities to invest in hefty financial expenditures in order to comply.[182] Such fiscal ramifications renders the FCPA one of the most feared statutes in the U.S. and abroad.[183] In fact, there is no obvious way of incentivizing these con-

> [T]he decrease in foreign bribery enforcement since the Phase [Three] evaluation of Korea in 2011 is a cause for concern, especially in view of the size of the Korean economy, its export-oriented nature, and the geographical and industrial sectors in which Korean companies operate, which represent high corruption risks. Korea should therefore promptly take necessary steps to more proactively detect and enforce its anti-bribery legislation.

OECD, IMPLEMENTING THE OECD ANTI BRIBERY CONVENTION: PHASE 4 REPORT 70 (2018), https://www.oecd.org/daf/anti-bribery/United-States-Phase-4-Report-ENG.pdf [https://perma.cc/7VSK-VKCT].

180. *See id.* In addition, FCPA enforcement based on prosecutorial perception of corruption indexes may be flawed because such indexes "may not indicate changes in actual corruption," while missing "corruption that is not perceived." Emily Willborn, *Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors*, 22 MINN. J. INT'L L. 422, 451 (2013).

181. Gugjesang-geolaee iss-eoseo Oeguggongmuwon-e Daehan Noemulbangjibeob [Foreign Bribery Prevention in International Business Transactions Act], art. 3 (S. Kor.). Enacted in 1999, the Foreign Bribery Prevention in International Business Transactions Act (FBCA) is not a frequently invoked criminal statute in the ROK. Under Article 3(1) of the FBCA, it is an offense for any person to give, offer or promise a bribe (any improper advantage) to a foreign public official in connection with an international business transaction with intent to obtain any improper advantage for such transaction. *Id.* at art. 3(1). However, under Article 3(2) of the FBCA, an exception exists when the provision of gift or money is considered legitimate under the local law applicable to the foreign public official. *Id.* at art. 3(2); *see also Anti-Corruption Regulation Survey of 41 Countries 2017-2018*, *supra* note 170.

182. For instance, during the FCPA settlement with U.S. authorities, Walmart reportedly spent "more than $900 million in costs from compliance enhancements and internal investigations into foreign bribery law violations in Mexico, Brazil, China and India." Dylan Tokar, *Analysis: Walmart's Spend-and-Tell Strategy Paid Off in Bribery Settlement*, WALL ST. J. (June 26, 2019), https://www.wsj.com/articles/analysis-walmarts-spend-and-tell-strategy-paid-off-in-bribery-settlement-11561585841 [https://perma.cc/4FYM-FMLS].

183. Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1613 (2017).

tractors to gain exposure to and comply with the FCPA unless the U.S. statute is somehow incorporated into Korea's legislative regime, thereby becoming directly applicable to the contractors' ordinary business activities. Further compounding the concern is the ambiguity of the FCPA's extraterritorial applicability to participating Korean entities in the Context. Of course, where the FCPA clause is violated by a Korean entity for contract default, such breach may give rise to a private cause of action involving money damages, contract termination, and other viable remedies as agreed on between the contracting parties.[184] In light of *Hoskins*, however, the FCPA arguably may be inapplicable to the Context unless the Korean defense contractor is classified as the U.S. defense contractor's agent, joint venture partner operating as the U.S. entity's agent,[185] or any comparable person or entity that may represent the U.S. entity's business internationally, such as "employees, officers, directors, or shareholders."[186]

In addition, all Korean defense contractors must submit a signed pledge of integrity under Article 6 of the Defense Acquisition Program Act to participate in a ROK defense project.[187] A key provision from this pledge states that it must contain "[m]atters regarding prohibition . . . of giving and receiving of valuables, entertainment, etc. . . . [and] supply of specific information on defense acquisition programs."[188] In the event that the pledge is not honored, the violator may be penalized in the form of contract cancellation, termination, or debarment by the ROK government for a period of up to one year.[189] Whether this type of anti-corruption violation may open the floodgates for the U.S. government to investigate FCPA violations, by virtue of the Korean contractor having signed an FCPA clause, remains uncertain. In light of *Hoskins*, however, it is predictable that a contractor violating the ROK pledge of integrity will not result in the U.S. regulators' assumption of jurisdiction over the Korean contractor unless the same contractor constitutes an agent of a U.S. domestic concern

184. Another possible reason that the U.S. defense contractors insist on an FCPA compliance clause may be that private individuals or entities are unable to bring suit under the FCPA. The U.S. courts have found that "no private right of action is available under the Foreign Corrupt Practices Act" since the legislation "was primarily designed to protect the integrity of American foreign policy and domestic markets . . . ." *See* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990). In light of this established jurisprudence, including an FCPA clause in the Context, it is presumably convenient for a U.S. contractor to bring suit against its foreign counterpart in the event of an actual or alleged breach of the clause.

185. As evidenced by the *Hoskins* case, the DOJ has "aggressively prosecuted foreign joint venture partners claiming that the foreign partner was a co-conspirator with the U.S. entity." *See* Edwin J. Broecker, *Jurisdictional "Victory" for Foreign National in FCPA Case*, BUS. L. ALERT (Sept. 5, 2018), https://www.lexology.com/library/detail.aspx?g=D92915b9-37bd-4482-a601-3c14ace3c8f1 [https://perma.cc/E4Y5-9E99]. Following *Hoskins*, however, it is predicted that it will be difficult for the DOJ to continue with this enforcement trend unless the agency can prove that the foreign shareholder is an agent of the U.S. counterpart, as opposed to the joint venture itself.

186. United States v. Hoskins, 902 F.3d 69, 69 (2d Cir. 2018).

187. Bangwui Saeub Beob [Defense Acquisition Program Act] art. 6 (S. Kor.).

188. *Id.*

189. *Id.*

or issuer.[190]

2. Assessment Under Sovereignty Rules of International Law

The unique situation of private "contracting out" of national jurisdiction in relation to the FCPA raises several novel issues. It introduces a new dimension of extraterritorial application of domestic law. Extraterritorial application of a foreign state's statute against entities and persons in other countries has always sparked contention under international law. The conventional circumstances, however, exist in which the foreign government applies its own laws to foreign entities and persons. Governments do not envision a situation where a foreign entity voluntarily chooses to subject itself to the jurisdiction of foreign states based on some contract provision. Instead, governments exercise extraterritorial jurisdiction through its own domestic laws or derogation from jurisdictional principles of international law. If such decision falls under the right of the private entities, there will not be a legal problem—it may raise a policy concern, but not a legal one. If, however, the private entity forfeits the core element of the national sovereignty, such as jurisdictional rules under international law, the question becomes whether a private entity can indeed contractually relinquish the right, and even if it can, whether such decision binds the national state. In accordance with the legal theory from the right of diplomatic protection, however, an individual is precluded from waiving the right that belongs to his or her national state.[191]

Viewed from this perspective, robust application of the FCPA through contract provisions, included at the request of U.S. contractors for fear of FCPA violations, may cause long-term legal problems. Such provisions may be subject to the prospective challenge of nullity because it may go against the *ordre public* in the foreign jurisdiction concerned. Embedded legal uncertainties of this sort might render key statutory schemes purporting to cope with global corruption, such as FCPA, vulnerable to unnecessary legitimacy questions.

III. Suggestions for Sustainable Long-Term Solutions

A. Concluding Multilateral Conventions or Bilateral Agreements

Given that most representative, foreign bribery enactments, including the FCPA and the U.K. Bribery Act,[192] contain "a multitude of different

190. However, this argument is subject to the caveat that *Hoskins* "may be overturned or limited by *en banc* review or a petition for certiorari to the U.S. Supreme Court." *Second Circuit Holds the FCPA Does Not Extend to Non-U.S. Persons Under Conspiracy and Accomplice Liability Theories Absent U.S. Nexus*, DAVIS POLK (Aug. 31, 2018), https://www.davispolk.com/files/2018-08-31-second-circuit-holds-the-fcpa-does-not-extend-to-non-u.s.-persons-absent-u.s.-nexus.pdf [https://perma.cc/9ZHJ-9DNR].

191. John Dugard, *Articles on Diplomatic Protection*, U.N. AUDIOVISUAL LIBR. INT'L L. (2006), https://legal.un.org/avl/ha/adp/adp.html [https://perma.cc/YE76-ZZ6L].

192. Bribery Act 2010, c. 23 (Eng.) [hereinafter Bribery Act].

standards" in areas of affirmative defenses and others,[193] adopting a "global standard which would ultimately serve to provide an effective deterrent against international bribery"[194] seems desirable at this critical juncture. Indeed, the OECD Bribery Convention made an initial effort in this regard.[195] Not only did the convention reflect on the situation of the late 1990s, thereby failing to keep up with subsequent developments, it also largely reiterated the basic principles, such as the contracting parties' obligation to punish bribery of foreign officials. Few specific guidelines are provided to the states.[196] Hence, states follow the FCPA footsteps on the one hand, while also elaborating their domestic laws through various manners. As a result, wide variations and inconsistencies are observed during actual applications of anti-bribery laws.[197] In reality, therefore, the convention does not appear to provide the hub of guidelines that states rely on. Additionally, one noteworthy problem with this convention is that the OECD has been incapable of robust enforcement activities under its own convention.[198]

Given the problem posed by lax enforcement measures outlined in the OECD Bribery Convention, a more effective method to resolve jurisdictional issues in the Context may be achievable through a bilateral instrument. Within the defense industry where the Context is positioned, the U.S. and the ROK have yet to enter into a Reciprocal Defense Procurement Memorandum of Understanding.[199] Outside the defense industry, however, the U.S. and the ROK entered into a bilateral free trade agreement (FTA) in 2012.[200] Interestingly, the FTA contains an anti-corruption provi-

193. Lindsey Hills, *Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to Create Universal Legislation to Combat Bribery Around the Globe*, 13 RICH. J. GLOB. L. & BUS. 469, 470 (2014).

194. Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practice Act*, 6 PAC. RIM L. & POL'Y J. 549, 579 (1997).

195. *See generally* OECD, *supra* note 139.

196. *See id.*

197. *See* Hills, *supra* note 193, at 478.

198. *See id.* at 470.

199. The U.S. has entered into a Reciprocal Defense Procurement Memorandum of Understandings (RDP MOUs), which is generally considered a military free trade agreement, with more than twenty countries including Japan and Turkey. *See Reciprocal Defense Procurement and Acquisition Policy Memoranda of Understanding*, DEF. PRICING & CONTRACTING, https://www.acq.osd.mil/dpap/cpic/ic/reciprocal_procurement_memoranda_of_understanding.html [https://perma.cc/KQV7-YDTX] (last visited Mar. 5, 2021). According to the Department of Defense, "[t]he purpose of an RDP MOU is to promote rationalization, standardization, and interoperability of conventional defense equipment with allies and other friendly governments. These MOUs provide a framework for ongoing communication regarding market access and procurement matters that enhance effective defense cooperation." *See* Amy G. Williams, *Negotiation of a Reciprocal Defense Procurement Memorandum of Understanding with the Ministry of Defense of Latvia*, DEP'T DEF. (Apr. 12, 2016, 8:45 AM), https://www.federalregister.gov/documents/2016/04/13/2016-08485/negotiation-of-a-reciprocal-defense-procurement-memorandum-of-understanding-with-the-ministry-of [https://perma.cc/8G6V-368A].

200. For the latest final text of the FTA, see generally U.S.-Korea Free Trade Agreement, Kor.-U.S., Jan. 1, 2019, 125 Stat. 428, 112 P.L. 41. While the FTA is inapplicable in certain areas of national security and defense, in so far as the Context is concerned,

sion which provides that:

> Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:
>
> (a) a public official of the Party or a person who performs public functions for the Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
>
> (b) any person *subject to the jurisdiction of* the Party intentionally to offer or grant, directly or indirectly, to a public official of the Party or a person who performs public functions for the Party any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
>
> (c) any person *subject to the jurisdiction of* the Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, 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; and
>
> (d) any person *subject to the jurisdiction of* the Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs (a) through (c).[201]

Hence, under Article 21(6) of the FTA, in matters pertaining to international trade or investment, the United States and the ROK are each obligated to adopt and maintain the legal basis and measures to ensure that corporate entities and natural persons subject to each country's jurisdiction are held criminally accountable when they engage in an act of bribery vis-à-vis (foreign) public officials. More specifically, under Article 21(6), the bribery must be made by a person, who is subject to the parties' jurisdiction. Unfortunately, the FTA does not define the term "subject to the jurisdiction of."[202] A useful point of reference in this regard, however, is found in the Cuban Assets Control Regulations of the United States (Cuban Regulation).[203] Under this particular set of regulations, the term "person subject to the jurisdiction of the United States" includes:

> (a) Any individual, wherever located, who is a citizen or resident of the United States;
>
> (b) Any person within the United States as defined in § 515.330;

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foreign entities are allowed to participate in designated programs as foreign subcontractors.

201. *Id.* at art. 21(6)(2) (emphasis added).

202. *See id.*

203. 31 C.F.R. § 515 (1963).

> (c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and
>
> (d) Any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c) of this section.[204]

The Cuban Assets Control Regulations thus contains an illustrative list of individuals and/or legal entities that may be subject to the jurisdiction of the United States. Furthermore, under § 515.330 of the regulations,

> (a) the term "person within the United States," includes:
>
> (1) Any person, wheresoever located, who is a resident of the United States;
>
> (2) Any person actually within the United States;
>
> (3) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and
>
> (4) Any corporation, partnership, association, or other organization, wherever organized or doing business, which is owned or controlled by any person or persons specified in paragraphs (a)(1) or (a)(3) of this section.[205]

Given that Article 21(6) lacks a working definition of the term "person subject to the jurisdiction of," it would be helpful to incorporate the definitions of the Cuban Regulation into the text of the FTA, in order to ensure that the FTA is applied uniformly in the U.S. and the ROK alike. This addition, supplemented with written adjustments as needed, will provide the U.S. and the ROK with a relatively clear guideline on what constitutes the remit of jurisdiction within the realm of anti-bribery enforcement activities. It is also envisaged that once adopted, such definition will have lasting impact by not only illuminating uncertainties surrounding the issue of jurisdiction in the context of anti-bribery enforcement, but also by minimizing any conflict of laws issues that may arise in the Context.

On the other hand, Article 21(6) of the FTA is devoid of any specific clause addressing the issue of jurisdictional overlaps between the U.S. and the ROK in prosecuting individuals for foreign anti-bribery cases. In other words, while Article 21(6) assumes that each party codifies and implements its own statutory schemes and measures related to the criminal offense of anti-bribery, the provision is silent on what happens when both countries assume jurisdiction over a particular offense. As a remedy, borrowing and incorporating an existing clause from the OECD Bribery Convention to such effect may prove fruitful.[206] Specifically, Article 4(3) of the OECD convention provides in pertinent part: "When more than one Party has jurisdiction over an alleged offence described in this Convention, the

204. *Id.* § 515.329.
205. *Id.* § 515.330.
206. OECD, *supra* note 139, at 5.

Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."[207] In addition, Article 47 of the U.N. Convention Against Corruption provides the following passage regarding the feasibility of transferring criminal proceedings:

> States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.[208]

Given that there is an extradition treaty[209] and also a bilateral treaty on mutual legal assistance in criminal matters[210] between the U.S. and the ROK, incorporating a clause similar to those above in the FTA will help the enforcement authorities of both countries concentrate their prosecution efforts, thereby averting, to the extent possible, any conflict in exercising anti-bribery jurisdiction in the Context. For instance, Article 2 of the extradition treaty between Korea and the U.S. provides:

> 1. An offense shall be an extraditable offense if, at the time of the request, it is punishable under the laws in both Contracting States by deprivation of liberty for a period of more than one year, or by a more severe penalty.
>
> 3. For the purposes of this Article, the totality of the conduct alleged against the person whose extradition is sought shall be taken into account, and an offense shall be an extraditable offense:
>
> (a) whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology;
>
> (b) whether or not the constituent elements of the offense differ under the laws in the Contracting States, provided that the offenses under the laws of both States are substantially analogous; and
>
> (c) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.
>
> 4. If the offense was committed outside of the territory of the Requesting State, extradition shall be granted in accordance with this Treaty if the laws

207. *Id.*

208. United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

209. *See generally* Extradition Treaty with the Republic of Korea, Kor.-U.S., June 9, 1998,1998 U.S.T. LEXIS 248 [hereinafter Extradition Treaty].

210. *See generally* Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters, Kor.-U.S., Jan. 12, 1995, 1993 U.S.T. LEXIS 135 [hereinafter Treaty of Mutual Legal Assistance].

> of the Requested State provide for punishment of an offense committed outside of its territory in similar circumstances or if the offense has been committed by a national of the Requesting State. If the laws in the Requested State do not so provide, the executive authority of the Requested State may, in its discretion, grant extradition, provided that the requirements of this Treaty are met. Extradition may be refused when the offense for which extradition is sought is regarded under the law of the Requested State as having been committed in whole or in part in its territory and a prosecution in respect of that offense is pending in the Requested State.[211]

The above provision sets forth cooperative arrangement between the two countries to extradite criminals who committed crimes in a requesting state. Bribery arguably meets the requirements of the above provision. If that is the case, Korea and the United States may well resort to this treaty provision for punishment of crimes of bribery conducted outside the territory or of a person fleeing the jurisdiction of one country and residing in the other country. With respect to extradition of the national, Article 3 provides: [not a block quote]

> Article 3: Nationality
>
> 1. Neither Contracting State shall be bound to extradite its own nationals, but the Requested State shall have the power to extradite such person if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution.[212]

Therefore, if a requested person is a national of the Requested State, then that person can still be extradited. Alternatively, the person should be indicted for the crime by the requested state. Regardless of the two possibilities, punishment can be delivered for the crime of bribery using this Extradition Treaty.

Likewise, the ROK-U.S. Mutual Legal Assistance Treaty also sets forth a broad range of cooperation in criminal matters. Article 1 of the treaty provides:

> 1. The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the prevention, investigation, and prosecution of offenses, and in proceedings related to criminal matters.
>
> 2. Assistance shall include:
>
> a. taking the testimony or statements of persons;
>
> b. providing documents, records, and articles of evidence;
>
> c. serving documents;

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211. Extradition Treaty, *supra* note 209, at art. 2.
212. *Id.* at art. 3.

d. locating or identifying persons or items;

e. transferring persons in custody for testimony or other purposes;

f. executing requests for searches and seizures;

g. assisting in forfeiture proceedings; and

h. any other form of assistance not prohibited by the laws of the Requested State.[213]

As one of the serious crimes, bribery is also covered by this provision,[214] meaning that the two states can exchange assistance regarding various materials, evidence, documents, and witness statements between each other. This may well serve as another tool for bilateral cooperation in relation to anti-bribery activities.

Conclusion

Coping with corruption is a new but critical task concerning the global community at large. Specifically, bribery of foreign government officials is a serious cause of concern across multiple states. In the battle against corruption, the FCPA is arguably an important contribution to the global fight on. At the same time, robust application of the FCPA by U.S. authorities has led to various legal issues and problems, such as ambiguous statutory terms and uncertainty with regards to the statute's jurisdictional scope. In addition, using the FCPA for diplomatic strategic gains has occasionally ignited tension with other states.

One area of robust FCPA application is the defense sector, where a vast amount of public budget is at stake and outside monitoring is regulated due to the sensitive nature of the industry. Moreover, contractors of the industry work closely under governmental oversight amidst a complex web of applicable laws and regulations and a labyrinth of security protocols, creating an environment conducive to FCPA enforcement. The exclusive environment in which defense contractors operate renders the defense industry an attractive target of the FCPA. As such, the FCPA has been consistently enforced against defense contractors and their transactions.

As we have noted, one peculiarity found in many defense contracts is the inclusion of a provision that binds both U.S. and non-U.S. parties to the FCPA. Notwithstanding the FCPA's importance and prominent stature, such a provision in a private contract increases the risk of usurping the jurisdictional sovereignty of the foreign state to which the non-U.S. contractor belongs. This is problematic because the outer bounds of a state's national jurisdiction can only be determined by the state, and thus may be adjusted or given up only by the state as the very holder of the sovereign right. Exacerbating the problem is the fact that the FCPA has been applied

213. Treaty on Mutual Legal Assistance, *supra* note 210, at art. 1.
214. *See id.*

and enforced in an extraterritorial manner on more than a handful of occasions.

If a foreign entity is asked or forced to "contract out" the home states' national jurisdiction based on a commercial contract incorporating comprehensive FCPA jurisdiction—all without knowledge, let alone without consent of the affected state itself—these circumstances may raise an important legal problem. While the legal validity of such a provision may not be challenged as a legitimate exercise of party autonomy, it may nonetheless add a layer of legal perplexity to this important, but controversial, U.S. legislation. To avoid such confusion and controversy when applying the FCPA in the Context, states should establish bilateral agreements that specifically address the subject of anti-corruption and relevant enforcement cooperation needed to sustain a global application of the FCPA.