



University of Pennsylvania  
**ScholarlyCommons**

---

Legal Studies and Business Ethics Papers

Wharton Faculty Research

---

2016

## The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act

Philip M. Nichols  
*University of Pennsylvania*

Follow this and additional works at: [https://repository.upenn.edu/lgst\\_papers](https://repository.upenn.edu/lgst_papers)



Part of the [Business Commons](#), and the [Law Commons](#)

---

### Recommended Citation

Nichols, P. M. (2016). The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act. *Harvard Journal on Legislation*, 53 203-246. Retrieved from [https://repository.upenn.edu/lgst\\_papers/22](https://repository.upenn.edu/lgst_papers/22)

This paper is posted at ScholarlyCommons. [https://repository.upenn.edu/lgst\\_papers/22](https://repository.upenn.edu/lgst_papers/22)  
For more information, please contact [repository@pobox.upenn.edu](mailto:repository@pobox.upenn.edu).

---

# The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act

## Abstract

The Foreign Corrupt Practices Act (the “Act”) may be one of the most misunderstood pieces of legislation within the federal corpus of laws. Its genesis is often ascribed to an almost reactionary moral indignation over the abuses of a presidential administration, whereas in reality Congress had more prosaic objectives, one of the more important of which was to preserve and enhance the strength of the global market. The Act has often been described as the first and for a time only law of its kind, even though in reality it joined a very similar Swedish law.<sup>1</sup> Most seriously, the Act has been analyzed through the prism of a mode of thought that could be called neomercantilism, a mode of analysis that this Article demonstrates is fundamentally erroneous.

Neomercantilism draws from the much older political theory of mercantilism, which sought to increase national wealth through managed trade. Mercantilism suffered from a fundamental misunderstanding of concepts such as wealth and trade; similarly, neomercantilism fails to understand the world as it actually exists. This Article identifies a basic fallacy in the neomercantilist mode of thought, namely that business can be thought of as siloed within national boundaries and that some sort of neomercantilist scorecard can be based on those siloed national champions.

Analysis of the Foreign Corrupt Practices Act redounds with neomercantilist thought. Scholars persistently speak of the Act as though it and only it applies to U.S. businesses, and as though U.S. businesses are constrained by no other transnational corruption laws.<sup>2</sup> Practitioners and policymakers often adopt the same mode of analysis.<sup>3</sup> Neither group is correct. The Foreign Corrupt Practices Act by its very definitions applies only to business firms or their affiliates that engage in some form of transnational activity.<sup>4</sup> The reality of transnational business activity, often labeled globalization, consists of networks of relationships that take little notice of national borders and which cannot be siloed. Moreover, Congress intended for the Act to be part of a global regime to control bribery.<sup>5</sup> That regime has been created and is now the relevant regulatory environment in which transnational business occurs. The Foreign Corrupt Practices Act is domestic legislation, an integral part of the federal law of the United States. Meaningful analysis of the Act, however, must take account of the contextual reality of the transnational business firms regulated by the law and of the global market that the law is intended to protect. To do otherwise not only lacks intellectual rigor but also risks losing the benefits to be accrued from a well-functioning global market.

This Article begins in Part II with the definition of corruption used by Congress in the Act. Part III explores Congress’ motives in enacting and amending the Act. Part IV demonstrates the use of neomercantilist thought in analyses of the Act, while Part V explains the fallaciousness of that thought from the perspectives of both business and regulatory reality. Part VI examines proposals to alter the Act, and shows how neomercantilist thought skews analysis of those proposals and fails to identify important issues.

## Disciplines

Business | Law

# ARTICLE

## THE NEOMERCANTILIST FALLACY AND THE CONTEXTUAL REALITY OF THE FOREIGN CORRUPT PRACTICES ACT

PHILIP M. NICHOLS\*

### TABLE OF CONTENTS

I.	INTRODUCTION .....	204
II.	A CIRCUMSCRIBED DEFINITION OF CORRUPTION .....	206
III.	ENACTMENT AND AMENDMENT OF THE FOREIGN CORRUPT PRACTICES ACT.....	208
	A. <i>Enactment of the Foreign Corrupt Practices Act to         Enhance the Global Market</i> .....	208
	B. <i>Amendments to the Foreign Corrupt Practices Act</i> .....	214
IV.	NEOMERCANTILIST THOUGHT IN DISCUSSION AND CRITICISM OF THE FOREIGN CORRUPT PRACTICES ACT .....	216
	A. <i>The Neomercantilist Motif in Scholarly Criticism of the         Foreign Corrupt Practices Act</i> .....	216
	B. <i>The Neomercantilist Motif in the Commentary of         Policymakers, Legal Practitioners, and Lobbyists</i> .....	217
V.	NEOMERCANTILISM AND THE NEOMERCANTILIST FALLACY ...	220
	A. <i>Mercantilism and the Mercantilist Fallacy</i> .....	220
	B. <i>Neomercantilism</i> .....	221
	C. <i>The Neomercantilist Fallacy</i> .....	223
	1. <i>The Neomercantilist Fallacy: Business is Not            Siloed</i> .....	223
	2. <i>The Neomercantilist Fallacy: A Regulatory Web</i> ...	230
VI.	THE NEOMERCANTILIST MOTIF DISTORTS ANALYSIS OF THE FOREIGN CORRUPT PRACTICES ACT .....	237
VII.	CONCLUSION .....	244

---

\* Associate Professor of Legal Studies and Business Ethics, The Wharton School of the University of Pennsylvania. J.D., Duke University, 1988; LL.M., Duke University, 1988; A.B., Harvard University, 1982. This paper was presented at a conference hosted by the University of Maryland's Center for the Study of Business Ethics, Regulation and Crime, at the annual conference of the Canadian Academy of Legal Studies in Business, at the annual conference of the Academy of Legal Studies in Business, and at workshops at the University of Michigan and the University of Pennsylvania. The author thanks participants in each for their helpful comments and criticism.

*This Article addresses a persistent failure in analysis of the Foreign Corrupt Practices Act, by scholars and policymakers alike. Many discussions of the Act approach it from a neomercantilist perspective. This approach contains three flaws. First, whereas neomercantilism envisions manipulation of the market to give advantage to national champion industries, the Foreign Corrupt Practices Act was adopted for the purpose of strengthening and enhancing the integrity of the global market. A neomercantilist perspective is contrary to the purpose of the Act. Second, this Article shows that neomercantilism fundamentally misunderstands the world of business—the modern equivalent of the mercantilist fallacy. Business firms form networks of relationships with little reference to political borders, whereas neomercantilism envisions a world in which business firms are siloed by national borders. By importing this fallacy, a neomercantilist perspective invariably yields a flawed analysis. Third, Congress asked that the Foreign Corrupt Practices Act become part of a global anticorruption regime, and that request has been robustly answered. By its own definitions the Act applies only to business actors engaged in transnational activities. These business actors will also be subject to the other elements of the global regime, as will their competitors. Neomercantilism cannot account for the Act's place in that regime. Legal analysis in general has difficulty in accounting for domestic business regulations that encompass transnational behavior. Law must overcome this difficulty or it risks becoming irrelevant to business. Analysis of the Foreign Corrupt Practices Act must avoid the neomercantilist approach, not just for the sake of intellectual rigor, but also to accrue the benefits of a sound market as envisioned by Congress.*

## I. INTRODUCTION

The Foreign Corrupt Practices Act (the “Act”) may be one of the most misunderstood pieces of legislation within the federal corpus of laws. Its genesis is often ascribed to an almost reactionary moral indignation over the abuses of a presidential administration, whereas in reality Congress had more prosaic objectives, one of the more important of which was to preserve and enhance the strength of the global market. The Act has often been described as the first and for a time only law of its kind, even though in reality it joined a very similar Swedish law.<sup>1</sup> Most seriously, the Act has been analyzed through the prism of a mode of thought that could be called neomercantilism, a mode of analysis that this Article demonstrates is fundamentally erroneous.

Neomercantilism draws from the much older political theory of mercantilism, which sought to increase national wealth through managed trade. Mercantilism suffered from a fundamental misunderstanding of concepts such as wealth and trade; similarly, neomercantilism fails to understand the world as it actually exists. This Article identifies a basic fallacy in the neomercantilist mode of thought, namely that business can be thought of as siloed within national boundaries and that some sort of neomercantilist scorecard can be based on those siloed national champions.

---

<sup>1</sup> See generally Michael Bogdan, *International Trade and the New Swedish Provisions on Corruption*, 27 AM. J. COMP. L. 665 (1979) (evaluating and criticizing the Swedish law).

Analysis of the Foreign Corrupt Practices Act redounds with neomercantilist thought. Scholars persistently speak of the Act as though it and only it applies to U.S. businesses, and as though U.S. businesses are constrained by no other transnational corruption laws.<sup>2</sup> Practitioners and policymakers often adopt the same mode of analysis.<sup>3</sup> Neither group is correct. The Foreign Corrupt Practices Act by its very definitions applies only to business firms or their affiliates that engage in some form of transnational activity.<sup>4</sup> The reality of transnational business activity, often labeled globalization, consists of networks of relationships that take little notice of national borders and which cannot be siloed. Moreover, Congress intended for the Act to be part of a global regime to control bribery.<sup>5</sup> That regime has been created and is now the relevant regulatory environment in which transnational business occurs. The Foreign Corrupt Practices Act is domestic legislation, an integral part of the federal law of the United States. Meaningful analysis of the Act, however, must take account of the contextual reality of the transnational business firms regulated by the law and of the global market that the law is intended to protect. To do otherwise not only lacks intellectual rigor but also risks losing the benefits to be accrued from a well-functioning global market.

This Article begins in Part II with the definition of corruption used by Congress in the Act. Part III explores Congress' motives in enacting and amending the Act. Part IV demonstrates the use of neomercantilist thought in analyses of the Act, while Part V explains the fallaciousness of that thought from the perspectives of both business and regulatory reality. Part VI examines proposals to alter the Act, and shows how neomercantilist thought skews analysis of those proposals and fails to identify important issues.

---

<sup>2</sup> See, e.g., Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 380 (1986); William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 137–38 (2011); Stephen Hagenbuch, *Taming “Instrumentality”: The FCPA’s Legislative History Requires Proof of Government Control*, U. CHI. LEGAL F. 351, 351 (2012); Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1448 (2008); Matthew J. Spence, *American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts*, 114 YALE L.J. 1185, 1189 n.22 (2005); Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1658 (2006).

<sup>3</sup> See, e.g., *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 37 (2011) (statement of George J. Terwilliger, III, Partner, White & Case LLP); *Examining Enforcement of the Foreign Corrupt Practices Act: Hearings Before the Subcomm. on Crime & Drugs of the S. Judiciary Comm.*, 111th Cong. 20 (2010) (statement of Sen. Amy Klobuchar, (MN), Member, Subcomm. on Crime & Drugs of the S. Judiciary Comm.).

<sup>4</sup> See *infra* note 14 and accompanying text.

<sup>5</sup> See *infra* notes 63–66 and accompanying text.

## II. A CIRCUMSCRIBED DEFINITION OF CORRUPTION

Discussions of corruption, whether empirical, doctrinal, or theoretical, necessarily often begin by defining the object of their analysis. Indeed, some discussions of corruption consist almost entirely of attempts to define the term.<sup>6</sup> Notwithstanding the Supreme Court's disturbingly simplistic definition, the term "corruption" avails itself of many definitions.<sup>7</sup> Arnold Heidenheimer, drawing on the literatures of political science and of sociology, suggests three broad categories of definitions.<sup>8</sup> Ulrich von Alemann, drawing primarily on European scholarship, suggests five thematic groups of attempts to definitionally understand corruption.<sup>9</sup> Clearly, corruption eludes easy definition.

In spite of the difficulties in defining corruption, its definition can be of critical importance. In *Citizens United v. Federal Election Commission's* review of campaign finance legislation, for example, the Court acknowledged that the government does have a cognizable interest in protecting the democratic process from corruption or even the appearance of corruption.<sup>10</sup> The Court went on, however, to use a novel and extremely narrow definition of corruption, which excludes most forms of corrupt behavior.<sup>11</sup> The Court's logic has been vehemently criticized for failing to take into account society's broader perception of corruption and for failing to protect the democratic process from—indeed, for rendering it prone to—systemic degradation and

<sup>6</sup> See, e.g., Arnold A. Rogow & H. D. Lasswell, *The Definition of Corruption*, in POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS 54 (Arnold J. Heidenheimer ed., 1970).

<sup>7</sup> See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 359 (2010) (limiting actionable corruption to "quid pro quo corruption" and stating that "influence over or access to elected officials does not mean that these officials are corrupt"); see also Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. FORUM 61, 64–65 (2012) (criticizing the Court's definition of corruption).

<sup>8</sup> Those categories are market-based, public interest-centered, and public office-centered types of definitions. See Arnold J. Heidenheimer, *Introduction to Part 1*, in POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS 3–6 (Arnold J. Heidenheimer ed., 1970); see also Maryvonne Génaux, *Social Sciences and the Evolving Concept of Corruption*, 42 CRIME L. & SOC. CHANGE 13, 13–16 (2004) (discussing the continued relevance of Heidenheimer's categorization).

<sup>9</sup> Those themes are social decline, deviant behavior, logic of exchange, measurable perceptions, and shadow politics. See Ulrich von Alemann, *The Unknown Depths of Political Theory: The Case for a Multidimensional Concept of Corruption*, 42 CRIME L. & SOC. CHANGE 25, 26 (2004).

<sup>10</sup> 558 U.S. at 356.

<sup>11</sup> See *id.* at 357; see also Deborah Hellman, *Defining Corruption and Constitutional Democracy*, 111 MICH. L. REV. 1385, 1387–88 (2013) (describing effects of the Court's very narrow definition of corruption and noting that "[t]here are, however, other ways to understand corruption"); Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1705 (2013) ("*Citizens United* narrowed its definition of quid pro quo corruption, squeezing away the constitutional grounds for many longstanding forms of campaign finance regulation.").

failure.<sup>12</sup> Michael Kang suggests that the redefinition of corruption by the Court will be *Citizen United*'s "lasting significance."<sup>13</sup>

Definitions are of critical importance to an accurate analysis of the Foreign Corrupt Practices Act. The definition of corruption used by the Act can be found in the Act itself, which precisely defines the conduct that falls within its ambit:

[An] offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official for purposes of [either:] (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.<sup>14</sup>

As forcefully demonstrated by *Citizens United*, definitions of corruption bound the scope of any legislation intended to deal with corruption. Any analysis of the Foreign Corrupt Practices Act, therefore, requires sensitivity to its definition of corruption. Three important qualifications must be drawn from parsing the definition contained in the Act. First, despite its name, the Foreign Corrupt Practices Act concerns itself with only one iteration of corrupt behavior—bribery. Second, the Act limits itself to bribery that is related to business and business transactions. Third, the Act is concerned with bribery that occurs outside of the United States or that relates to a transaction that extends beyond the United States. By its very definition, the Act is only relevant if a business firm is in some way active outside of the United States. A business firm that does not participate in commercial activities outside of

---

<sup>12</sup> See Stephen M. Feldman, *The Interpretation of Constitutional History, or Charles Beard Becomes a Fortune-teller (With an Emphasis on Free Expression)*, 29 CONST. COMMENT. 323, 340–41 (2014) (arguing that the change in the definition of corruption undermines democracy); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 31 (2012) (describing criticisms of the Court's definition); Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1268 (2012) (describing and criticizing the effects of the change in definition); Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 763 (2014) (describing controversies engendered by the Court's definition).

<sup>13</sup> Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 4 (2012) ("*Citizen United*'s lasting significance . . . is its doctrinal consequences for the definition of corruption as a basis for campaign finance regulation."); see Hellman, *supra* note 11, at 1388 ("The constitutional permissibility of most campaign finance cases has turned on how the Court understands corruption.")

<sup>14</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2012). See generally Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. INT'L L. 345, 360–61 (2000) (discussing the statutory definition).

the United States, that does not expose itself to the jurisdiction of other countries and of international regimes, would not be relevant to a discussion of the Foreign Corrupt Practices Act.

### III. ENACTMENT AND AMENDMENT OF THE FOREIGN CORRUPT PRACTICES ACT

Understanding these three conditions of its definition is critical in crafting appropriate analyses of the Foreign Corrupt Practices Act. So too is understanding why the legislation was enacted and eventually amended. Congress very clearly intended for the Act to enhance the integrity and functionality of the global market. The Act, therefore, must be analyzed through the lens of that objective.

#### A. *Enactment of the Foreign Corrupt Practices Act to Enhance the Global Market*

The Foreign Corrupt Practices Act was enacted in 1977, in the aftermath of a congressional investigation into abuse of power by the administration of President Richard Nixon.<sup>15</sup> The abuse of power and the subsequent investigation, intertwined under the sobriquet “Watergate,” profoundly shocked the United States and continue to affect political attitudes to this day.<sup>16</sup> Although most of the nation’s attention was focused on the misbehaviors of the federal government, congressional hearings discovered that many large U.S. business firms had paid bribes to foreign officials as well.<sup>17</sup>

The proximity of the enactment of the Foreign Corrupt Practices Act to Watergate has given rise to a convenient narrative: national revulsion at the gross misconduct of the presidential administration facilitated the enactment of a law criminalizing the bribery of foreign officials.<sup>18</sup> It is quite likely that

---

<sup>15</sup> See Philip M. Nichols, *Are Facilitating Payments Legal?*, 54 VA. J. INT’L L. 127, 130 (2013) (“The Foreign Corrupt Practices Act was enacted in 1977, following a period of tumultuous political revelations known collectively as ‘Watergate.’”).

<sup>16</sup> See ARTHUR G. NEAL, NATIONAL TRAUMA AND COLLECTIVE MEMORY: EXTRAORDINARY EVENTS AND THE AMERICAN EXPERIENCE 124 (2d ed., 2005) (describing the extraordinary angst and political re-evaluation caused by the Watergate revelations).

<sup>17</sup> See Beverley Earle, *Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What Is To Be Done?*, 33 CORNELL INT’L L.J. 483, 487 (2000). *But see* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 911–12 (2010) (pointing out that the U.S. Congress was actively investigating overseas bribery before the Watergate revelations).

<sup>18</sup> See, e.g., H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 2 (1998) (suggesting that enactment occurred “[i]n the maelstrom of moral outrage at the political and corporate abuses revealed in the course of the Watergate affair”); Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J.L. & BUS. 229, 233 n.10 (2005) (suggesting that enactment “was clearly an attempt to codify a moral reaction to the outrage over the corporate scandals that followed the Watergate fiasco”); Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat*



the mood of the nation did contribute to the passage of the bill.<sup>19</sup> In a thoughtful discussion of the history of the Act, however, Mike Koehler finds that moral concerns were only one of four policy considerations that contributed to its enactment.<sup>20</sup> Other considerations included damage to the United States' relationships with countries in which bribes had been paid, possible erosion of the United States' position as a global leader, and—most pertinently—the significant damage that bribery could cause to the global marketplace.<sup>21</sup> The value of moral probity, respectful foreign relations, and steady global leadership should not be minimized.<sup>22</sup> The observations and commentary of legislators and the experts they called upon when debating enactment of the Act, however, suggest that Congress was deeply concerned with the effect that bribery has on the global economic system.

In those debates, legislators and witnesses viewed bribery as presenting an existential threat to international business. The Senate Report that accompanied the Senate version of the Act described bribery as “fundamentally destructive of th[e] basic tenet” of business and stated that it threatened “the very stability of overseas business.”<sup>23</sup> The Secretary of the Treasury testified that the “preservation of the free enterprise system” was at stake.<sup>24</sup> An Assistant Secretary of the Treasury similarly testified that bribery puts “a market economy . . . into jeopardy.”<sup>25</sup>

The legislative history reveals an impressive understanding within Congress of the manners in which bribery can degrade the global market and economy. The House Report that accompanied the House Bill stated that bribery “short circuits the marketplace.”<sup>26</sup> It does so “by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon

*Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORNELL INT'L L.J. 731, 743 (2000) (attributing enactment to a “post-Watergate morality”).

<sup>19</sup> See William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 379–80 (2013) (“The United States might never have passed the FCPA had it not been for the Watergate scandal.”).

<sup>20</sup> See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 79 OHIO ST. L.J. 929, 938 (2012).

<sup>21</sup> See *id.* at 938–49.

<sup>22</sup> See Kevin E. Davis, *Why does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 498–501 (2012) (describing the moral motivations for enactment, and pointing out that the United States had a vital interest in being perceived as a moral leader during the Cold War); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 358–59 (2012) (discussing the extent to which bribery of foreign officials created a foreign policy problem for the United States).

<sup>23</sup> S. REP. NO. 95-114, at 4 (1977).

<sup>24</sup> *Lockheed Bribery: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 11 (1975) (statement of William E. Simon, Sec'y of the Treasury).

<sup>25</sup> *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 94th Cong. 83 (1976) (statement of Gerald L. Parsky, Assistant Sec'y of the Treasury).

<sup>26</sup> H.R. REP. NO. 95-640, at 4 (1976).

unloading marginal products.”<sup>27</sup> In the opening statement of the Senate Hearing on Foreign and Corporate Bribes, the Chair stated that “[t]he practice of bribing foreign officials has corrupted . . . the free market system, under which the most efficient producers with the best products are supposed to prevail.”<sup>28</sup> Numerous other legislators and witnesses commented on the distortions that bribery introduces into the competitive underpinnings of markets. Senator Tower lauded “vigorous, honest competition where price, quality, and service commingle with demand and supply to regulate economic transactions,” which bribery “poisons” and “destroy[s].”<sup>29</sup> The Chair of the Securities Exchange Commission condemned bribery as “erod[ing] . . . the free, competitive and effective marketplace.”<sup>30</sup> Ralph Nader, a consumer advocate, quoted the Chair of Pitney-Bowes in condemning bribery for “subvert[ing] the laws of supply and demand” and added that bribes “short-circuit competition based on classical ideas of product quality, service and price, and free markets are replaced by contrived markets.”<sup>31</sup>

These observations, made almost forty years ago, are amply supported by research on corruption over the last fifteen years. There is no doubt that corruption distorts economies and the free market system. Selçuk Akçay succinctly summarizes empirical research on the effects of corruption:

[Corruption] reduces economic growth, retards long-term domestic and foreign investments, enhances inflation, depreciates national currency, reduces expenditures for education and health, increases military expenditures, misallocates talent to rent-seeking activities, pushes firms underground, distorts markets and the allocation of resources, increases income inequality and poverty, reduces tax revenues, increases child and infant mortality rates, distorts the fundamental role of the government (on enforcement of contracts and protection of property rights), and undermines the legitimacy of government and of the market economy.<sup>32</sup>

Indeed, Congress had much reason for concern about international business bribery.

<sup>27</sup> *Id.*

<sup>28</sup> *Foreign and Corporate Bribes: Hearings on S. 3133 Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 1 (1976) [hereinafter *Foreign and Corporate Bribes*] (statement of Sen. William Proxmire (WI), Chair, S. Comm. on Banking, Hous. & Urban Affairs).

<sup>29</sup> 122 CONG. REC. 30322 (1976) (statement of Sen. Tower).

<sup>30</sup> *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Prot. & Finance of the H. Comm. on Interstate & Foreign Commerce*, 95th Cong. 196 (1977) [hereinafter *Unlawful Corporate Payments Act of 1977*] (statement of Harold M. Williams, Chair, Sec. & Exch. Comm’n).

<sup>31</sup> *Foreign and Corporate Bribes*, *supra* note 28, at 19 (Statement of Ralph Nader, Consumer Advocate).

<sup>32</sup> Selçuk Akçay, *Corruption and Human Development*, 26 CATO J. 29, 29–30 (2006).

Bribery changes the bases on which business decisions are made. In a properly functioning market, consumers decide which good or service to purchase by considering price and quality.<sup>33</sup> In a corrupted system, on the other hand, bribe-taking consumers do not consider the price or quality of goods or services but instead make decisions based on the size and quality of a bribe.<sup>34</sup> At best, a process distorted in this way will produce lower quality goods and services.<sup>35</sup> At worst, the process will result in large-scale misallocation of resources.<sup>36</sup>

Empirical studies bear out these predictions: studies find that corruption does inflict substantial damage on the global economic process.<sup>37</sup> Bribery distorts the decision-making process by creating incentives for bribe-takers to delay, obfuscate, or hide information.<sup>38</sup> Studies associate corruption with depressed economic growth, lower rates of investment, inflation, and currency depreciation.<sup>39</sup> Studies find a link between corruption and disproportionate military spending,<sup>40</sup> and between levels of corruption and the ratio of both public education spending and public health spending to gross domestic product.<sup>41</sup>

In addition to understanding the many ways in which bribery distorts the mechanics of markets, Congress also recognized that bribery undermines

<sup>33</sup> See Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983).

<sup>34</sup> *Id.*

<sup>35</sup> See Shouyong Shi & Ted Temzelides, *A Model of Bureaucracy and Corruption*, 45 INT'L ECON. REV. 873, 874 (2004).

<sup>36</sup> See, e.g., A. Cooper Drury, Jonathan Kriekhaus & Michael Lusztig, *Corruption, Democracy, and Economic Growth*, 27 INT'L POL. SCI. REV. 121, 123 (2006) (“[P]olicymakers may promote initiatives . . . not to satisfy social need, but because such projects increase opportunities for bribes.”); René Véron et al., *Decentralized Corruption or Corrupt Decentralization? Community Monitoring of Poverty-Alleviation Schemes in Eastern India*, 34 WORLD DEV. 1922, 1925 (2006) (warning of “less effective and less well targeted” decisions).

<sup>37</sup> See generally Drury, Kriekhaus & Lusztig, *supra* note 36, at 122 (listing and discussing empirical studies).

<sup>38</sup> See Abhijit V. Banerjee, *A Theory of Misgovernance*, 112 Q.J. ECON. 1289, 1292 (1997).

<sup>39</sup> See, e.g., Fahim A. Al-Marhubi, *Corruption and Inflation*, 66 ECON. LETTERS 199, 199 (2000) (finding a significant positive relationship between corruption and inflation); Mohsen Bahmani-Oskooee & Abm Nasir, *Corruption, Law and Order, Bureaucracy, and Real Exchange Rate*, 50 ECON. DEV. & CULTURAL CHANGE 1021, 1026 (2002) (finding that countries with corruption “tend to experience a real depreciation in their currency”); Pak Hung Mo, *Corruption and Economic Growth*, 29 J. COMP. ECON. 66, 76 (2001) (finding that a one percent increase in the amount of corruption decreases growth in gross domestic product by almost three-quarters of a percent); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 705 (1995) (“[N]egative association [exists] between corruption and investment, as well as growth, [which] is significant in both a statistical and an economic sense . . . .”); Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1, 8 (2000) (“An increase in the corruption level from that of Singapore to that of Mexico would have the same negative effect on inward [foreign investment] as raising the tax rate by eighteen to fifty percentage points.”).

<sup>40</sup> See Sanjeev Gupta, Luiz de Mello & Raju Sharan, *Corruption and Military Spending*, 17 EUR. J. POL. ECON. 749, 750–51 (2001).

<sup>41</sup> Paolo Mauro, *Corruption and the Composition of Government Expenditure*, 69 J. PUB. ECON. 263, 272–74 (1998).

confidence in markets and other business institutions. The House Report that accompanied the Act flatly stated that bribery “erodes public confidence in the integrity of the free market system.”<sup>42</sup> The Senate Report urged strong action “to restore public confidence in the integrity of the American business system.”<sup>43</sup>

Not surprisingly, studies have found that corruption is strongly linked to mistrust of government and other institutions.<sup>44</sup> Bribery “undermines the very legitimacy of democratic government. If payoffs are a routine part of life, ordinary people will despair of the very idea that they, together with their fellow citizens, can control their destinies through the democratic rule of law.”<sup>45</sup> Bribery in particular undermines trust in business institutions.<sup>46</sup> Studies around the world have found corruption to be the single greatest contributor to mistrust of government and market institutions.<sup>47</sup>

Degradation of trust in government and market institutions would substantially damage the global business environment. Trust facilitates economic relationships and decreases the costs associated with economic transactions.<sup>48</sup> Some developmental scholars therefore consider trust to be a critical factor in supporting healthy economic growth.<sup>49</sup> Conversely, distrust bred by corruption tends to drive economic activity into the informal sector, where it is less inclusive and less productive.<sup>50</sup>

The experts testifying in congressional hearings on the Act even understood that bribery increases business costs.<sup>51</sup> For example, the General Coun-

<sup>42</sup> H.R. REP. NO. 95-640, at 4 (1977).

<sup>43</sup> S. REP. NO. 95-114, at 4 (1977).

<sup>44</sup> See, e.g., Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 486 (1989); Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31, 45 (Kimberly Ann Elliott ed., 1997).

<sup>45</sup> Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 694 (2000).

<sup>46</sup> See Bernard S. Black & Anna S. Tarassova, *Institutional Reform in Transition: A Case Study of Russia*, 10 SUP. CT. ECON. REV. 211, 230 (2003).

<sup>47</sup> See, e.g., Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J.L. & TRADE AMS. 179, 184 (1996); Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 28 (1995); Ji-Young Kim, “Bowling Together” Isn’t a Cure-All: *The Relationship between Social Capital and Political Trust in South Korea*, 26 INT’L POL. SCI. REV. 193, 199 (2005); Natalia Melgar, Maximo Rossi & Tom W. Smith, *The Perception of Corruption*, 22 INT’L J. PUB. OPINION RES. 120, 120 (2009).

<sup>48</sup> See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1477 (2005).

<sup>49</sup> See Black & Tarassova, *supra* note 46, at 230 & n.22 (summarizing research).

<sup>50</sup> See, e.g., Philip M. Nichols, *United States v. Lazarenko: The Trial and Conviction of Two Former Prime Ministers of Ukraine*, 2012 U. CHI. LEGAL F. 41, 58–60 (2012) (discussing relationship between corruption and parallel institutions); Claire Wallace & Rossalina Latcheva, *Economic Transformation Outside the Law: Corruption, Trust in Public Institutions and the Informal Economy in Transition Countries of Central and Eastern Europe*, 58 EUR.-ASIA STUD. 81, 98–100 (2006).

<sup>51</sup> See *Unlawful Corporate Payments Act of 1977*, *supra* note 30, at 28 (statement of Gordon Adams, Director of Military Research, Council on Economic Priorities) (“In the long run, this practice can reduce trade and investment opportunities, thus limiting a company’s growth.”).

sel to the Overseas Private Investment Corporation, a government agency tasked with promoting outward investment, astutely noted that “[a]lthough such payments may result in short-run advantages, in the long run they are likely to cause serious problems to the investor.”<sup>52</sup> In the 1960s and 1970s, some scholars argued that corruption acted as a means of circumventing bureaucratic obstacles.<sup>53</sup> The “grease money” notion still occasionally appears in contemporary scholarship.<sup>54</sup> Theory, however, has evolved, as has the ability to measure operational costs imposed by bribery, and both suggest that the payment of bribes imposes high business costs.<sup>55</sup>

Speculation that bribery enhances efficiency was premised on a belief that bribery existed exogenously to the relationship between the bribe-giver and the bribe-taker.<sup>56</sup> This notion, however, is categorically wrong: bribery becomes the essence of their relationship.<sup>57</sup> Using this more accurate understanding of the embedded, dynamic relationship between a bribe and the actors, Daniel Kaufmann and Shang-Jin Wei developed a theoretical model which predicted that bribes create more, not fewer, costs and generate more time dealing with bureaucracy.<sup>58</sup> Since Kaufmann and Wei, several other empirical studies, using different data sets and methodologies, have found that the payment of bribes increases rather than decreases the cost of and time spent interacting with government.<sup>59</sup> Bribery increases business costs.

<sup>52</sup> *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int’l Econ. Policy of the H. Comm. on Int’l Relations*, 94th Cong. 6 (1975) (statement of Michael F. Butler, Vice President & General Counsel, Overseas Private Investment Corporation).

<sup>53</sup> James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT’L L. 407, 425 (1999).

<sup>54</sup> See, e.g., Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT’L L.J. 287, 310 (2000) (using the term); Charles B. Weinograd, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT’L L. 509, 517 (2010) (describing bribes that “are intended merely to lubricate wheels that bureaucratic friction would otherwise grind to a halt”).

<sup>55</sup> Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 331–34 (2012).

<sup>56</sup> See Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 L. & POL’Y INT’L BUS. 47, 49 (1999) (criticizing the old method of analysis).

<sup>57</sup> See, e.g., Beverley Earle & Anita Cava, *Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and Their Impact on India and Multinational Corporations*, 31 U. HAW. L. REV. 59, 84 (2009) (describing conversations with corporate counsels of bribe-paying firms); David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C<sup>2</sup> Principles (Combating Corruption)*, 33 CORNELL INT’L L.J. 593, 595 (2000); Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT’L L. 861, 887 (2010) (describing conversations with leaders of bribe-paying firms).

<sup>58</sup> Daniel Kaufmann & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?* 5 (World Bank Pol’y Res., Working Paper No. 2254, 1999), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=629191](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629191) [<http://perma.cc/T4F4-P2H2>].

<sup>59</sup> See, e.g., Donato De Rosa, Nishaal Gooroochurn & Holger Görg, *Corruption and Productivity: Firm-Level Evidence from the BEEPS Survey 3–6* (World Bank Pol’y Res., Working Paper No. 5348, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1630232](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630232) [<http://perma.cc/2TBZ-EXTB>]; Alejandro Gaviria, *Assessing the Effects of Corruption and Crime on*

The popular, convenient account of the genesis of the Foreign Corrupt Practices Act ascribes its enactment to the moral outrage felt by a nation betrayed by its leaders. Reality is more complex. Although many members of Congress undoubtedly shared the nation's indignation, Congress had far more pragmatic concerns. Bribery degrades the integrity and functionality of the global market. Congress legitimately enacted the Foreign Corrupt Practices Act to limit that degradation and to enhance the quality of the global market. Meaningful analysis of the Foreign Corrupt Practices Act must be respectful of this objective.

### B. Amendments to the Foreign Corrupt Practices Act

Congress first amended the Foreign Corrupt Practices Act in 1988, eleven years after its enactment.<sup>60</sup> Several of the amendments were technical in nature and simply made the Act clearer and easier to apply.<sup>61</sup> The amendments also created an exception for bribes paid to secure nondiscretionary government action—the “facilitating payment” exception.<sup>62</sup>

Both the Executive and the Congress also expressed their beliefs that minimizing the deleterious effects of bribery required a multinational regime. Prior to the Act's amendment, President Carter emphasized his “deep[ ] commit[ment] to the principles of the Act” and reported that his administration sought “multilateral agreement in the United Nations.”<sup>63</sup> The Department of Commerce elaborated:

---

*Firm Performance: Evidence from Latin America*, 3 EMERGING MKTS. REV. 245, 267 (2002); Jakob Svensson, *The Cost of Doing Business: Firms' Experience with Corruption*, in UGANDA'S RECOVERY: THE ROLE OF FARMS, FIRMS, AND GOVERNMENT 319, 319–20 (Ritva Reinikka & Paul Collier eds., 2001).

<sup>60</sup> Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1415, 1424 (1988). The amendments also raised the level of scienter required for liability to be imposed for the actions of third parties, and increased the size of penalties imposed for violations of the Act. See Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 428–29 (2012).

<sup>61</sup> Among other technical changes, the amendment expanded the definition of bribery, expanded the definition of foreign public officials, imposed jurisdiction based on the nationality principle and on connection to the United States, and clarified penalties. See Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 511–12 (2000).

<sup>62</sup> See Nichols, *supra* note 15, at 129–34 (describing the facilitating payment exception). Congress added the facilitating payment exception largely at the request of businesses, who complained that the criminalization of facilitating payments placed them at a disadvantage with respect to businesses that were free to make such payments. See Jon Jordan, *The OECD's Call for an End to “Corrosive” Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 891–93 (2011). The evidence offered to support these claims was primarily anecdotal. See Barry Richman, *Can We Prevent Questionable Foreign Payments?*, BUS. HORIZONS 14, 16 (June 1979); see also Bill Shaw, *Foreign Corrupt Practice Act: Amendments of 1988*, 14 MD. J. INT'L L. & TRADE 161, 164 (1990) (noting and describing conflicting claims to evidence).

<sup>63</sup> U.S. DEPT. COMM., REPORT OF THE PRESIDENT ON EXPORT PROMOTION FUNCTIONS AND POTENTIAL EXPORT DISINCENTIVES 10 (1980).

The United States has urged that multilateral international action is essential to solve these problems; that host countries have a strong interest in eliminating practices that raise the cost of goods and services they purchase, distort development programs, and undermine public confidence in government; and that the major trading powers have a strong interest in eliminating extortion and bribery which distorts international trade and investment and implicate their nationals in conduct which corrupts the decision making process of foreign governments. Accordingly, the United States has continued to support the adoption of an international agreement which would establish a framework for cooperation among nations to control bribery and extortion involving government officials with respect to international commercial activities.<sup>64</sup>

In amending the Act, Congress embraced and sharpened this position. The Act includes instructions to the President:

It is the sense of Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section.<sup>65</sup>

Congress's reasoning for specifically nominating the Organization of Economic Cooperation and Development is not elaborated upon in the legislative history; the nomination was simply added by the Senate in the reconciliation between the two chambers.<sup>66</sup> Nonetheless, the specific direction regarding the Organization proved fruitful.<sup>67</sup>

The Executive Branch took Congress's instructions seriously, and the organs of the U.S. government worked with their counterparts in Europe and East Asia to create an international anticorruption regime.<sup>68</sup> In 1998, Congress amended for the last time the Foreign Corrupt Practices Act, making minor adjustments so that the Act would comply with that regime.<sup>69</sup>

<sup>64</sup> *Id.* at 9–10.

<sup>65</sup> Foreign Corrupt Practices Act Amendments of 1988 § 5003(d) (codified as amended at 15 U.S.C. § 78dd.-1).

<sup>66</sup> H.R. REP. NO. 100-576, at 924 (1988).

<sup>67</sup> See *Combating the Bribery of Foreign Public Officials: Hearings Before the S. Comm. on Foreign Relations*, 105th Cong. 3 (1998) (statement by Stuart E. Eizenstat, Under Secretary of State for Economic, Business & Agricultural Affairs) (explaining that working with the Organization of Economic Cooperation and Development played a central role in government policy).

<sup>68</sup> See Robert Plotkin & Nicholas Lewis, *International Financial Institutions and the Global War on Corruption*, 33 BANKING & FIN. SERVS. POL'Y REP. 1, 1–2 (2014) (stating that the United States worked with partners to create a global regime).

<sup>69</sup> International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 1–6, 112 Stat. 3302 (1998). Among other technical changes, the amendment expanded the definition of “bribery,” expanded the definition of “foreign public official,” imposed jurisdic-

Congress enacted the Foreign Corrupt Practices Act to support and enhance the functioning of the global market. Congress amended the Act with a call to other countries to participate in the enhancement of the global market, and again amended the Act to conform with the mandates of the resulting international regime. The context in which the Foreign Corrupt Practices Act should be analyzed, therefore, is as a market-enhancing tool. Many commentators, however, approach the Act from a different and ultimately unproductive perspective.

#### IV. NEOMERCANTILIST THOUGHT IN DISCUSSION AND CRITICISM OF THE FOREIGN CORRUPT PRACTICES ACT

As a highly visible and significant piece of domestic legislation, the Foreign Corrupt Practices Act has inspired substantial critical discussion. Some of that discussion revolves around predictable nodes such as constitutionality, criminal procedure, or legal theory. This Article does not evaluate the merits of any position in that discussion. Rather, this paper criticizes a philosophy that seems to undergird much of the discussion and criticism of the Foreign Corrupt Practices Act. That philosophy could be called the neomercantilist motif.

##### A. *The Neomercantilist Motif in Scholarly Criticism of the Foreign Corrupt Practices Act*

Scholarly literature persistently speaks of the Foreign Corrupt Practices Act as if it only affects U.S. business firms, and as if U.S. business firms are affected only by it.<sup>70</sup> These characterizations treat business as if it were siloed by political boundaries. Michael Bazylzer's description typifies these characterizations:

Another important federal law regulating the practice of *American* business in the international marketplace is the Foreign Corrupt Practices Act of 1977 (FCPA). The [Act] prohibits the payment of bribes by *American* businesses to officials of foreign governments on the grounds that such activities hurt rather than help *our* foreign commerce. The executive branch, through the Justice Department, enforces the Act by bringing suit against the *American* offender.<sup>71</sup>

---

tion based on the nationality principle and on connection to the United States, and clarified penalties. See George, Lacey & Birmele, *supra* note 61, at 511–12.

<sup>70</sup> Many of the sources cited in this article use the term “American” to describe persons or firms associated with the United States. The use of the term “American” to describe residents of the United States is widespread in the United States and in some parts of the world but is resisted in others, particularly in Latin America or other parts of North America. See H. L. Mencken, *Names for Americans*, 22 AM. SPEECH 241, 241 (1947). This article uses the term “U.S.” when possible but does not presume to alter quoted sources.

<sup>71</sup> Michael J. Bazylzer, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 380 (1986) (emphasis added).



Bazyler is hardly alone; William Bratton and Michael Wachter similarly describe “corporate corruption” by “American” companies paid “abroad in pursuit of shareholder value at home.”<sup>72</sup> The Act is described as “only appl[ying] to activities abroad committed by U.S. businesses and nationals.”<sup>73</sup> The impetus for enactment has been described as restoration of “public confidence in the integrity of the *American* business system.”<sup>74</sup>

The silo concept of business probably leads to another oft-found trope in the scholarly analysis of the Foreign Corrupt Practices Act: that it renders U.S. businesses less competitive in the global marketplace. This claim is often made simply and shortly. Stephen Hagenbuch, for example, asserts that vague definitions in the Act have “harmed U.S. competitiveness.”<sup>75</sup> As China has grown in economic stature, scholars have taken to asserting that the Act places U.S. businesses at a disadvantage in China.<sup>76</sup>

Given the purposes in enacting the Foreign Corrupt Practices Act, scholarly focus on the competitiveness of a business is at a minimum misplaced. This Article will go on to show that it is also misguided and makes erroneous assumptions. Scholars, however, are not alone. Many policymakers, legal practitioners, and especially lobbyists employ a similar mode of thought in discussing the Act.

### B. *The Neomercantilist Motif in the Commentary of Policymakers, Legal Practitioners, and Lobbyists*

Policymakers, legal practitioners, and lobbyists do analyze the Foreign Corrupt Practices Act, and they too emphasize the effect on the competitiveness of U.S. businesses. Some policymakers, of course, have a broader perspective of the Act. The former Chief of the Justice Department’s Criminal Division, for example, frames the Act as part of “the creation of a global consensus that corruption is unacceptable, that it harms the least well-off of us the most” and links corruption to global social and economic ills.<sup>77</sup> Simi-

---

<sup>72</sup> William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 137–38 (2011).

<sup>73</sup> Matthew J. Spence, *American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts*, 114 YALE L.J. 1185, 1189 n.22 (2005); see also Priya Cheria Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1448 (2008) (“The FCPA fundamentally stands for the proposition that—notwithstanding local customs or business pressures to the contrary—U.S. businesses and persons should not bribe foreign officials or foreign political parties.”).

<sup>74</sup> Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1658 (2006) (emphasis added).

<sup>75</sup> Stephen Hagenbuch, *Taming “Instrumentality”: The FCPA’s Legislative History Requires Proof of Government Control*, 2012 U. CHI. LEGAL F. 351, 353 (2012).

<sup>76</sup> E.g., Murphy, *supra* note 18, at 255; Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operating in China*, 7 J. INT’L BUS. & L. 13, 35–36 (2008).

<sup>77</sup> Mark Brzezinski, *Obama’s Foreign Bribery Crackdown*, WASH. POST (May 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052704154.html> [<http://perma.cc/B2HB-N6N9>].

larly, in a speech given to the General Assembly of the United Nations, President Obama emphasized “that countries are more likely to prosper when governments are accountable to their people. So we are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights.”<sup>78</sup>

Other policymakers, however, emphasize instead the effect of the Foreign Corrupt Practices Act on U.S. businesses. In hearings before a Senate Subcommittee, for example, Senator Klobuchar mentioned that she lost sleep at night worrying about “an uneven playing field that is hurting American business while we balance the obvious need to have this law on the books and to enforce it and to go after egregious bribery.”<sup>79</sup> Representative Jim Sensenbrenner is blunter, and raises the shibboleth of jobs: “this Committee is well suited to examine the impact of the FCPA and to ask hard questions about whether the act is succeeding in its mission or is needlessly hurting American job creation.”<sup>80</sup>

Legal practitioners embrace the same mode of analysis. A partner in a large practice, for example, uses almost the same language as Representative Sensenbrenner, suggesting that the Foreign Corrupt Practices Act “hurts the creation of jobs and the ability of U.S. companies to compete with companies elsewhere that do not have to concern themselves with uncertainties of the terms and requirements of the FCPA.”<sup>81</sup> The Director of White Collar Crime Policy of the National Association of Criminal Defense Lawyers uses a similar analysis, suggesting that the Act places “U.S. companies and individuals . . . at a severe competitive disadvantage.”<sup>82</sup>

Lobbying organizations have vigorously embraced this mode of analysis. The United States Chamber of Commerce<sup>83</sup> has made “changing the FCPA one of its top priorities.”<sup>84</sup> The Chamber of Commerce criticizes the Act as “a stumbling block for America’s ability to compete in today’s global

<sup>78</sup> Barack Obama, Remarks by the President at the Millennium Development Goals Summit in New York, New York (Sept. 22, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york> [<http://perma.cc/SN4Q-C4EV>].

<sup>79</sup> *Examining Enforcement of the Foreign Corrupt Practices Act: Hearings Before the S. Subcomm. on Crime & Drugs of the S. Judiciary Comm.*, 111th Cong. 20 (2010) (statement of Amy Klobuchar, Member, Subcomm. on Crime & Drugs of the S. Judiciary Comm.).

<sup>80</sup> *Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 2 (2011) (statement of Jim Sensenbrenner, Chair, Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary).

<sup>81</sup> *Id.* at 37 (statement of George J. Terwilliger, III, Partner, White & Case LLP).

<sup>82</sup> *Id.* at 52 (statement of Shana-Tara Regon, Director of White Collar Crime Policy, National Association of Criminal Defense Lawyers).

<sup>83</sup> The United States Chamber of Commerce is a private organization not associated with the government.

<sup>84</sup> Mark V. Vlasic & Peter Atlee, *Democratizing the Global Fight Against Corruption: The Impact of the Dodd-Frank Whistleblower Bounty on the FCPA*, 36 FLETCHER F. WORLD AFF. 79, 87 (2012).

economy.”<sup>85</sup> A lawyer representing the Chamber editorialized that “American businesses will begin to cede global markets to less ethical foreign competitors, making America less competitive and costing jobs.”<sup>86</sup> The Chamber even claimed that a Congressional Research Survey “estimate[d] that the FCPA’s anti-bribery provisions have cost up to \$1 billion annually in lost U.S. export trade.”<sup>87</sup> Gideon Mark, however, points out that the Congressional Research Service made no such claim and instead merely pointed out that critics claimed exports in that amount had been lost.<sup>88</sup>

It may be tempting to discount the rhetoric of a lobbying organization such as the United States Chamber of Commerce as biased and therefore of little consequence.<sup>89</sup> In terms of actors analyzing the Act, however, the Chamber must not be discounted. The United States Chamber of Commerce is “widely regarded as the most powerful lobby in Washington.”<sup>90</sup> The Chamber has demonstrated that it can effectuate change in other arenas.<sup>91</sup> The modes of thought used by the Chamber merit at least as much scrutiny as the thinking of policymakers and practitioners. And as with many scholars, the focus of the analysis of policymakers, practitioners, and lobbyists is misplaced and misguided. Each of these analysts engages in a mode of thinking that can fairly be described as neomercantilist. When applied to rules such as the Foreign Corrupt Practices Act, neomercantilist thought is inherently fallacious.

<sup>85</sup> Susan Rose-Ackerman & Sinéad Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433, 434 (2012) (quoting Press Release, U.S. Chamber Inst. for Legal Reform, House Hearing is an Important Step Toward Modernizing FCPA (June 14, 2011)).

<sup>86</sup> Michael B. Mukasey, *Correct the Foreign Corrupt Practices Act*, USA TODAY (Apr. 29, 2012), <http://www.usatoday.com/news/opinion/story/2012-04-29/Foreign-Corrupt-Practices-Mukasey/54631334/1> [<http://perma.cc/P7RS-5G3T>].

<sup>87</sup> ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6 (2010), [http://www.instituteforlegalreform.com/uploads/sites/1/restoringbalance\\_fcpa.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/restoringbalance_fcpa.pdf) [<http://perma.cc/QLH7-LM2U>].

<sup>88</sup> Mark, *supra* note 60, at 495 n.405; see Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 288–90 (1999) (criticizing rigor of claims regarding competitiveness).

<sup>89</sup> See, e.g., Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1212 n.277 (discounting a study commissioned by the Chamber of Commerce as biased).

<sup>90</sup> Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1469 (2008). Journalists who observe political life in the United States agree. See Dan Eggen & T.W. Farnam, *GOP House Leaders See Corporate Donations Surge*, WASH. POST (Jan. 22, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012107038.html> [<http://perma.cc/R4Y2-FUEY>] (describing the Chamber as “one of Washington’s most powerful lobbying groups”); *Corporate Lobbying: The Chamber of Secrets*, THE ECONOMIST (Apr. 21, 2012), <http://www.economist.com/node/21553020> [<http://perma.cc/EP3D-X6KB>] (describing the Chamber of Commerce as “by far the most muscular business lobby group in Washington”).

<sup>91</sup> See John P. Freeman, *Protecting Judicial Independence*, 6 CHARLESTON L. REV. 511, 531 (2012) (condemning the Chamber’s success in interfering with the democratic election of state judges).

## V. NEOMERCANTILISM AND THE NEOMERCANTILIST FALLACY

A. *Mercantilism and the Mercantilist Fallacy*

Neomercantilism draws from but is not necessarily descended from mercantilism. The term “mercantilism” refers to a mode of political thought that dominated Europe between the end of the feudal period and the beginning of the Industrial Revolution.<sup>92</sup> Obviously, any creed that endured for such a long period in such a complex and diverse setting manifested itself in equally complex and diverse ways.<sup>93</sup> The various manifestations of mercantilism across Europe, however, embraced a similar objective and employed a similar tool to achieve that objective.<sup>94</sup> Mercantilists aspired to elevate the power of their nations relative to other nations.<sup>95</sup> They attempted to do so by accumulating more gold and silver than other countries.<sup>96</sup> Mercantilist nations managed trade for that purpose:

A crucial element of mercantilist thinking was that the production of all goods ought primarily to take place, when at all possible, in the country itself . . . . [T]he government ought to pursue an active economic policy to stimulate export and nurture domestic industries that competed with foreign firms in the same industry while limiting imports.<sup>97</sup>

Mercantilism thus represented the antithesis of later liberal attitudes towards markets and economic activity; mercantilism in fact constituted a close alliance between the state and businesses.<sup>98</sup> Mercantilist policies included the creation of trade monopolies and the military occupation of foreign mar-

<sup>92</sup> E. RAY CANTERBERY, *A BRIEF HISTORY OF ECONOMIC THOUGHT: ARTFUL APPROACHES TO THE DISMAL SCIENCE* 33 (2d ed. 2011). Mercantilism made virtually no inroads outside of Europe. Abdul Azim Islahi, *Mercantilism and the Muslim States: Lessons from the History* 3 (Munich Personal RePEc Archive, No. 22964, 2008), [http://mpra.ub.uni-muenchen.de/22964/1/MPRA\\_paper\\_22964.pdf](http://mpra.ub.uni-muenchen.de/22964/1/MPRA_paper_22964.pdf) [<http://perma.cc/ZGU2-ZNVX>].

<sup>93</sup> See E.K. HUNT, *HISTORY OF ECONOMIC THOUGHT: A CRITICAL PERSPECTIVE* 38 (2d ed. 2002) (stating that mercantilists were sophisticated thinkers who must be evaluated in the context of the tumultuous transition from feudalism to markets). A brief history of mercantilist thought can be found in HUNT, *id.* at 24–38; a much longer history can be found in LARS MAGNUSSON, *MERCANTILISM: THE SHAPING OF AN ECONOMIC LANGUAGE* (1994).

<sup>94</sup> See AGNAR SANDMO, *ECONOMICS EVOLVING: A HISTORY OF ECONOMIC THOUGHT* 19 (2011) (arguing that even though disparate, the basic commonalities of mercantilism render it an identifiable school of thought).

<sup>95</sup> See CANTERBERY, *supra* note 92, at 35. Agnar Sandmo points out that during much of the period in which mercantilism prevailed, the concept of nation had not fully developed and often was personalized in the form of a ruler or monarch. SANDMO, *supra* note 94, at 19.

<sup>96</sup> R.J. BARRY JONES, *CONFLICT AND CONTROL IN THE WORLD ECONOMY: CONTEMPORARY ECONOMIC REALISM AND NEO-MERCANTILISM* 10 (1986).

<sup>97</sup> SANDMO, *supra* note 94, at 19–20.

<sup>98</sup> See CANTERBERY, *supra* note 92, at 33.

kets—usually under the pretense of “colonization”—so that other European nations could not trade with them.<sup>99</sup>

Mercantilist theories complemented and supported political thought in Europe from the Renaissance to the Enlightenment.<sup>100</sup> After several centuries of dominance, however, their influence waned under the critical observations of persons with broader perspectives on trade and wealth, and particularly under the criticisms of Adam Smith.<sup>101</sup>

Adam Smith roundly criticized mercantilism in *The Wealth of Nations*, devoting an entire chapter to explaining the fallacies of the doctrine.<sup>102</sup> His most damning and lengthy observation criticized mercantilism’s confusion of money and wealth: “I thought it necessary, though at the hazard of being tedious, to examine at full length this popular notion, that wealth consists in money, or in gold and silver . . . [T]he wealth of a country consists not in its gold and silver only, but in its lands, houses and consumable goods of all kinds.”<sup>103</sup> This fundamental misunderstanding became known as “the mercantilist fallacy.”<sup>104</sup>

### B. Neomercantilism

As E.K. Hunt has noted, political and economic systems tend to repeat themselves.<sup>105</sup> While the proponents of mercantilism no longer dominate political discourse, many of the tenets of mercantilist thought can still be discerned in policy debate and indeed in articulated policy.<sup>106</sup> Because of their similarity to the mercantilist thought several centuries past, this mode of thought is often called neomercantilism.<sup>107</sup>

---

<sup>99</sup> See *id.* at 34–37.

<sup>100</sup> See E. DAMSGAARD HANSEN, *EUROPEAN ECONOMIC HISTORY: FROM MERCANTILISM TO MAASTRICHT AND BEYOND* 59 (2001).

<sup>101</sup> See MAGNUSSON, *supra* note 93, at 138–42 (discussing the decline of mercantilism).

<sup>102</sup> *Id.* at 25 (stating that Smith criticized mercantilism for confusing money with wealth); J.A. La Nauze, *The Substance of Adam Smith’s Attack on Mercantilism*, in *ADAM SMITH: CRITICAL ASSESSMENTS* 55, 56 (John Cunningham Wood ed., 1984) (stating that Smith criticized mercantilism for confusing money, especially in metal form, with wealth); see ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 187–98 (Adam & Charles Black 1863) (1776).

<sup>103</sup> SMITH, *supra* note 102, at 197.

<sup>104</sup> See Jacob H. Hollander, *The Development of the Theory of Money from Adam Smith to David Ricardo*, 25 Q.J. ECON. 429, 438–40 (1910).

<sup>105</sup> HUNT, *supra* note 93, at 39.

<sup>106</sup> See Stephen F. Diamond, *The PetroChina Syndrome: Regulating Capital Markets in the Anti-Globalization Era*, 29 IOWA J. CORP. L. 39, 89–90 (2003) (identifying neomercantilism as one of four principal modes of political thought that has emerged since the end of the Cold War).

<sup>107</sup> See Björn Hettne, *The Concept of Neomercantilism*, in *MERCANTILIST ECONOMICS* 235, 236 (Lars Magnusson ed., 1993).

Neomercantilist thought embraces a goal similar to that historically embraced by mercantilism: national prosperity through management of trade.<sup>108</sup> Whereas, however, mercantilism arose in a period in which the embodiment of a nation usually manifested itself in a monarch or ruler, neomercantilism has arisen as the concept of nation becomes broader and more democratic.<sup>109</sup> Countries no longer perceive wealth as the accumulation of gold but instead as the accumulation of trade surpluses and the domination of global markets by national businesses.<sup>110</sup>

Although neomercantilist thought has probably existed in some form since the waning of mercantilism, it has exerted its most powerful influence following the Second World War. In 1970, Harald Malmgren warned:

Today, we are seeing a resurgence of mercantilism, whereby governments meet domestic economic demands with conscious policies of manipulation, passing the costs of these policies as much as possible onto other countries. This neo-mercantilism is a profoundly disruptive force in international relations.<sup>111</sup>

Currently, commentary on neomercantilism tends to focus on developing and emerging economies;<sup>112</sup> neomercantilism is not the official policy of the

<sup>108</sup> See Clive Potter & Mark Tilzey, *Agricultural Policy Discourses in the European Post-Fordist Transition: Neoliberalism, Neomercantilism and Multifunctionality*, 29 *PROGRESS IN HUM. GEOGRAPHY* 581, 591 (2005).

<sup>109</sup> Werner Raza, *European Union Trade Politics: Pursuit of Neo-Mercantilism in Different Arenas?*, in *STRATEGIC ARENA SWITCHING IN INTERNATIONAL TRADE NEGOTIATIONS* 67, 68–69 (Wolfgang Blaas & Joachim Becker eds., 2007).

<sup>110</sup> See Paolo Guerrieri & Pier Carlo Padoan, *Neomercantilism and International Economic Stability*, 40 *INT'L ORG.* 29, 30 (1986) (“The most pervasive definition of neomercantilism is the pursuit of a current account surplus; namely, a persistent excess of exports over imports.”). Countries utilize a variety of tools in pursuit of neomercantilist goals. Common tools include manipulation of currency exchange rates, regulation of capital flow, and state promotion of exports. Markus Kröger, *Neo-Mercantilist Capitalism and Post-2008 Cleavages in Economic Decision-Making Power in Brazil*, 33 *THIRD WORLD Q.* 887, 887 (2012). Neomercantilist strategies, however, can also find expression in monetary policy, industrial policy, tax structure, labor rules, and any other rules through which a government can affect markets. See R.J. BERRY JONES, *CONFLICT AND CONTROL IN THE WORLD ECONOMY: CONTEMPORARY ECONOMIC REALISM AND NEO-MERCANTILISM* 168–201 (1986).

<sup>111</sup> Harald B. Malmgren, *Coming Trade Wars? (Neo-Mercantilism and Foreign Policy)*, *FOREIGN POL'Y* 115, 120 (1970). In 2012, Lucio Baccaro and Valentina Mele continue to warn of the “twin challenges of protectionism . . . and neomercantilism.” Lucio Baccaro & Valentina Mele, *Pathology of Path Dependency? The ILO and the Challenge of New Governance*, 65 *INDUS. & LAB. REL. REV.* 195, 220 (2012).

<sup>112</sup> See, e.g., Robert L. Kuttner, *Development, Globalization, and Law*, 26 *MICH. J. INT'L L.* 19, 28 (2004) (noting China’s mixture of capitalism and neomercantilism); Paul Lansing & Joseph Gabriella, *Clarifying Gray Market Gray Areas*, 31 *AM. BUS. L.J.* 313, 329–30 (1993) (noting Japan’s historical practice of neomercantilism, developed from European system).

United States.<sup>113</sup> Nonetheless states, including the United States, may be tempted to engage in neomercantilist practices.<sup>114</sup>

### C. *The Neomercantilist Fallacy*

This Article is not concerned with whether the government of the United States has adopted neomercantilist policies. Rather, this Article criticizes neomercantilist thought in discussions and criticisms of the Foreign Corrupt Practices Act. With respect to the type of activity contemplated in the Foreign Corrupt Practices Act's definition of corruption, neomercantilist thought is inherently fallacious. Just as mercantilism fundamentally misunderstood the actual world, so too does neomercantilism. Neomercantilism perceives a world in which businesses are siloed by nationality. This perception does not accord with business reality. The neomercantilist fallacy is especially evident when viewed through the lens of the neomercantilist motif in discussion and criticism of the Foreign Corrupt Practices Act.

#### 1. *The Neomercantilist Fallacy: Business is Not Siloed*

The mercantilist model is premised on an unspoken but critical assumption: that the locus of a business can be identified with particularity and that business transactions occur between identifiable business firms within identifiable locations.<sup>115</sup> Neomercantilism attempts to increase national wealth by focusing on "national" business firms.<sup>116</sup> Critics and analysts of the Foreign Corrupt Practices Act echo this, referring to "American" business firms and the effects of the Act on those firms.<sup>117</sup> Large business firms, however, are rarely if ever siloed by political boundaries. The absence of siloing by political boundaries is evident whether one examines either capital investment or business activity. Neomercantilism also fails to understand the regulatory environment in which business firms actually exist, a failure that is aptly demonstrated through the global anticorruption regime.

---

<sup>113</sup> See Michael Beckley, *China's Century? Why America's Edge Will Endure*, 36 INT'L SEC. 41, 78 (contrasting the United States' neoliberal policies with China's neomercantilist policies and suggesting the superiority of neoliberalism).

<sup>114</sup> Howard W. Barnes, *The Roots of Neomercantilism* 10–11 (Ctr. for Int'l Bus. Educ. and Research, Working Paper No. 92-12, 1992).

<sup>115</sup> Charles E. Ziegler & Rajan Menon, *Neomercantilism and Great-Power Energy Competition in Central Asia and the Caspian*, 8 STRATEGIC STUD. Q. 19, 19 (describing neomercantilism as "economic nationalism").

<sup>116</sup> Christopher M. Dent, *The New International Political Economy of East Asia and the Developmental State*, in DEVELOPMENTAL STATES: RELEVANCY, REDUNDANCY, OR RECONFIGURATION 79, 85 (Linda Low ed., 2004).

<sup>117</sup> See *supra* notes 70–91 and accompanying text.

a. *Capital Investment*

Business firms do generate and accumulate wealth. But business firms do not exist in isolation; almost all firms are embedded in a dynamic network of capital relationships. Many entities exogenous to the business firm, such as lenders or holders of debt or equity, have claims on some of the wealth generated by business firms. These capital relationships are not siloed within the borders of a country. As Stijn Claessens and Sergio Schmukler explain:

Financial globalization has increased significantly during the last decade. The increased integration of financial systems has involved greater cross-border capital flows, tighter links among financial markets, and greater presence of foreign financial firms around the world. Indeed, many of the standard aggregate measures of financial globalization such as gross capital flows, stocks of foreign assets and liabilities, and degree of co-movement of asset returns suggest that international financial integration has become widespread and reached unprecedented levels.<sup>118</sup>

The extraordinary fluidity of capital raises a critical question about neomercantilism and its criticism of the Foreign Corrupt Practices Act. Where does the wealth generated by a business firm go?

Neomercantilist critics of the Foreign Corrupt Practices Act equate the wealth of the United States with the competitiveness of discrete U.S. companies.<sup>119</sup> Chris Sanchirico, however, asks a very pertinent question: “to what extent are these ‘US’ companies owned by non-US investors?”<sup>120</sup> Ultimately, he cannot answer that question, in part because the capital market is extremely liquid and in part because foreign investment in U.S. business firms<sup>121</sup> may occur through brokerages or transfer agents who themselves are located in the United States.<sup>122</sup> After an exhaustive review of the available information, however, Sanchirico suggests that commonly held theories of

---

<sup>118</sup> Stijn Claessens & Sergio L. Schmukler, *International Financial Integration Through Equity Markets: Which Firms from Which Countries Go Global?*, 26 J. INT’L MONEY & FIN. 788, 788–89 (2007); see Matthew C. Turk, *Reframing International Financial Regulation After the Global Financial Crisis: Rational States and Interdependence, Not Regulatory Networks and Soft Law*, 36 MICH. J. INT’L L. 59, 66–76 (2014) (noting that “since the 1960s, there has been a steady trend of cross-border integration of financial markets” and providing a lengthy history of “the crazy-quilt of international regulatory institutions, dynamism of international financial integration, and variety of financial crises”). For further discussion of the term “globalization,” see *infra* notes 134–141 and accompanying text.

<sup>119</sup> See *supra* notes 70–91 and accompanying text.

<sup>120</sup> Chris William Sanchirico, *As American as Apple Inc.: International Tax and Ownership Nationality*, 68 TAX L. REV. 207, 210 (2015).

<sup>121</sup> Sanchirico places quotation marks around the term “U.S.” when referring to these business firms because he finds the location of the beneficiaries of these firms to be indeterminate. See *id.* at 210–11. Although this article accepts Sanchirico’s conclusions, this article will continue to use the term U.S. when discussing firms domiciled in the United States.

<sup>122</sup> *Id.* at 273.



non-U.S. investment probably underestimate the amount of foreign investment in the United States and that the amount of foreign investment is probably extensive.<sup>123</sup>

Sanchirico does not ask, but the obverse question is just as important: to what extent do U.S. investors benefit from investment in “non-U.S.” businesses? The precise answer to this question is as elusive as the answer to Sanchirico’s original question. In any case, however, the value of capital relationships abroad is enormous; the Bureau of Economic Analysis estimates that as of the third quarter of 2014, more than twenty-four trillion dollars was invested abroad by entities in the United States.<sup>124</sup>

Corporate inversions illustrate the difficulty in distinguishing between “U.S.” and “foreign” firms from the perspective of beneficial capital relationships. A corporate inversion occurs when a corporation incorporated under the laws of the United States either merges with or becomes a subsidiary of a business firm incorporated outside of the United States and then nominally relocates its headquarters outside of the United States, usually for purposes of lowering effective taxes.<sup>125</sup> A corporate inversion has no effect on the operation of a firm.<sup>126</sup> A corporate inversion does not affect a corporation’s ability to sell shares on U.S. exchanges or to raise other forms of capital in the United States.<sup>127</sup> Indeed, “[f]rom an economic point of view, the only change is that the publicly traded entity suddenly became ‘foreign.’”<sup>128</sup> Burger King, for example, employed an inversion in 2014 and relocated its nominal headquarters to Canada, rendering Burger King a foreign corporation.<sup>129</sup> Not one of the Burger King restaurants, however, moved overseas as a consequence of the inversion; there are still more than seven thousand Burger King restaurants in the United States.<sup>130</sup> Moreover, the ben-

<sup>123</sup> *Id.* at 233–37; see Marcel Fratzscher, *Capital Flows, Push Versus Pull Factors and the Global Financial Crisis*, 7 J. INT’L ECON. 341, 341 (2011) (noting that despite predictions that capital flow into the United States would dwindle after the financial collapse, “capital of domestic and foreign investors flow[ed] massively into the US assets between July 2008 and April 2009”).

<sup>124</sup> *U.S. Net International Investment Position: End of Third Quarter 2012*, BUREAU OF ECON. ANALYSIS, <http://www.bea.gov/newsreleases/international/intinv/intinvnewsrelease.htm> [<http://perma.cc/N53F-G7YP>] (last modified Sept. 29, 2015).

<sup>125</sup> Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1621 (2006).

<sup>126</sup> See *id.* (“Inversion deals are little more than a shuffling of corporate papers . . . . [They] do[ ] not require any substantive change in the company’s operations, such as a relocation of factories, employees, or even corporate headquarters.”); Tyler M. Dumler, *Changing Less to Make More: The Causes and Effects of Lowering the Corporate Tax Rate*, 13 U.C. DAVIS BUS. L.J. 88, 96 (2012) (“[T]he result is an operationally unaltered corporation.”).

<sup>127</sup> Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 329 (2004).

<sup>128</sup> Omri Marian, *Jurisdiction to Tax Corporations*, 54 B.C. L. REV. 1613, 1655 (2013).

<sup>129</sup> Samuel C. Thompson Jr., *The Cat-and-Mouse Inversion Game With Burger King*, 144 TAX NOTES 1317, 1318 (2014).

<sup>130</sup> BURGER KING, BURGER KING WORLDWIDE REPORTS FOURTH QUARTER AND FULL YEAR 2013 RESULTS 1, 2 (Feb. 13, 2014), <http://investor.rbi.com/~media/Files/B/BurgerKing->

eficial capital structure of Burger King did not change in a meaningful way.<sup>131</sup> The wealth of neither Canada nor the United States has meaningfully been affected by changes to the “U.S.-ness” or “Canadianess” of Burger King.<sup>132</sup> What neomercantilists might score as a loss has, in reality, almost no effect on wealth in the United States or Canada.

The liquidity of capital undermines the empirical vitality of nationalist concepts such as neomercantilism, and the precision of a neomercantilist analysis. Neomercantilism—like mercantilism—postulates zero-sum competition: some firms “win” and investors in those firms are enriched, some firms do not win and investors in those firms are not enriched.<sup>133</sup> Neomercantilism embraces a goal of enriching domestic constituents, through “winning” in the global market. When a U.S. firm wins, however, it is not at all clear that domestic constituents are those who are enriched. Moreover, even if the zero-sum hypothesis were true, when that U.S. firm wins in the place of a non-U.S. firm, it would be quite likely that many U.S. constituents lose an opportunity for enrichment. Neomercantilist analyses simply do not reflect the reality of global capital liquidity.

#### *b. The Reality of the Business Context*

Neomercantilist premises also bear little resemblance to the actual world that transnational business inhabits. Neomercantilist critics of the Foreign Corrupt Practices Act appear ignorant of globalization. The term “globalization” is widely used in legal literature but only poorly defined.<sup>134</sup> David Law, drawing on a variety of sources, notes that globalization:

typically refers to both a process of change and a resulting set of conditions: it is a process by which “technological, economic, and political innovations . . . have drastically reduced the barriers to economic, political, and cultural exchange,” resulting in not only “increasing transnational flows and increasingly thick networks of

---

IR/documents/legacy-filings/fourth-quarter-and-full-year-2013-results.pdf [http://perma.cc/KX4R-B6KM].

<sup>131</sup> Thompson, *supra* note 129, at 1317.

<sup>132</sup> The U.S. government will collect less money in tax payments from Burger King, which is the reason companies undertake inversions. Joshua Simpson, *Analyzing Corporate Inversions and Proposed Changes to the Repatriation Rule*, 68 N.Y.U. ANN. SURV. AM. L. 673, 678–79 (2013).

<sup>133</sup> Ziegler & Menon, *supra* note 115, at 20 (“In contrast to the variable-sum logic of liberalism, neomercantilism rests on the zero-sum premise . . .”).

<sup>134</sup> See Carl Landauer, *Regionalism, Geography, and the International Legal Imagination*, 11 CHI. J. INT’L L. 557, 571 (2011) (describing “an immense amount of debate over the definition as well as the stakes of globalization”); Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 LAW & CONTEMP. PROBS. 117, 121 (2013) (“[T]he term still operates as a conundrum, as a term depicting an analytical and conceptual framework grounded in several disciplines and discourses at once, and as such resists a clear definition.”).

interdependence,” but also an expansion of the “scale on which power is organized and exercised.”<sup>135</sup>

The boundaries of any particular business entity do not necessarily coincide with boundaries that designate countries, and the relationships in which businesses engage often pay scant attention to those borders as well. “Globalization entails increasingly numerous transnational interactions.”<sup>136</sup>

Steve Kobrin observes a fundamental failure in legally-oriented analyses of transnational business to comprehend the reality of transnational business: whereas the law conceives of “a transnational firm as ‘stringing together corporations created by the laws of different states,’” a perspective oriented in business reality “emphasize[s] control exercised by the center over the enterprise as a whole.”<sup>137</sup> Kobrin and others have written extensively on businesses’ abilities to organize and to form relationships in the world as it exists rather than the world envisioned by law:

Borders are “transcended” rather than crossed, relations become increasingly “supraterritorial” as distance, borders and geographic space itself lose economic and political significance. Markets no longer need to be defined in terms of geographic proximity and, in some instances, the location of transactions and organizations has become indeterminate.<sup>138</sup>

Gary Gereffi’s observation of how globalization affects production contrasts sharply with neomercantilist thinking: “Firms are less likely simply to make products and export them; they increasingly participate in highly complex cross-border arrangements that involve a wide array of partners, customers and suppliers.”<sup>139</sup> It is important, in a discussion of laws, to understand that business scholars are not attacking the concept of legal sovereignty.<sup>140</sup> A sovereign nation is still a sovereign nation, with dominion over that which occurs inside its borders. It is simply that in actual business practice “state

<sup>135</sup> David S. Law, *Globalization and the Future of Constitutional Rights*, 102 Nw. U. L. REV. 1277, 1278 (2008) (citations omitted); see also Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOBAL STUD. L. REV. 205, 218 (2007) (stating that “the increased economic interdependence of the international community” is one aspect of globalization).

<sup>136</sup> Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495–96 (2011).

<sup>137</sup> Stephen J. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights*, 19 BUS. ETHICS Q. 349, 356 (2009) (citations omitted).

<sup>138</sup> Stephen J. Kobrin, *Globalization, Transnational Corporations and the Future of Global Governance*, in HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP 249, 250 (Andreas Georg Scherer & Guido Palazzo eds., 2008) (citations omitted).

<sup>139</sup> GARY GEREFFI, *THE NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT: AN OVERVIEW OF THE CONTEMPORARY GLOBAL LABOR MARKET 2* (2005).

<sup>140</sup> See Kobrin, *supra* note 137, at 361 (“While the system is no longer state centric, states remain the most powerful actors and are not likely to cede sovereignty . . .”).

borders define less and less the boundaries of corporate thinking or practice.”<sup>141</sup>

The automobile industry provides a convenient illustration. Ford Motor Company is considered by many to be the quintessential “American” business firm, while Toyota Motor Corporation fills the same role in Japan.<sup>142</sup> Common shares of Ford are listed on the New York Stock Exchange, and also on exchanges in Belgium and France.<sup>143</sup> Sanchirico’s research suggests that identifying the nationality of holders of shares of Ford would be difficult but it is very likely that shares are held by persons and institutions outside of the United States.<sup>144</sup> Ford is headquartered in the United States, in Dearborn, Michigan, but “maintain[s] and operate[s] manufacturing plants, assembly facilities, parts distribution centers, and engineering centers” throughout the world.<sup>145</sup> In addition to these wholly-owned or controlled operations, Ford engages in joint ventures in several countries.<sup>146</sup>

The components that are assembled into a complete Ford automobile come from many different countries. As with ownership of Ford shares, it is very difficult to accurately assess the sources of automobile components. After a two year study to determine the sources of components, a consumer information group concluded “[i]n today’s global economy, there’s no easy way to determine just how American a car is.”<sup>147</sup> They estimated, however, that approximately forty percent of the components used to build some of Ford’s vehicles come from outside of the United States.<sup>148</sup>

Japan embraces a mercantilist orientation far more explicitly than does the United States.<sup>149</sup> Toyota Motor Corporation’s reality, however, differs

<sup>141</sup> Samuel Palmisano, *The Globally Integrated Enterprise*, 85 FOR. AFF. 127, 129 (2006).

<sup>142</sup> See Henry H. Drummonds, *Transnational Small and Emerging Business in a World of Nikes and Microsofts*, 4 J. SMALL & EMERGING BUS. L. 249, 255 (2000) (describing Ford Motor Company as “quintessentially American”); Matthew Senechal, *Reforming the Japanese Commercial Code: A Step Towards an American-Style Executive Officer System in Japan*, 12 PAC. RIM L. & POL’Y J. 535, 556 n.197 (2003) (describing Toyota “as one of Japan’s most traditional ‘Japanese’ firms”).

<sup>143</sup> Ford Motor Company, Annual Report (Form 10-K) 26 (Feb. 13, 2015) [hereinafter Ford Annual Report], <http://corporate.ford.com/content/dam/corporate/en/investors/reports-and-filings/Annual%20Reports/2014-ford-annual-report.pdf> [<http://perma.cc/63KC-WUQZ>].

<sup>144</sup> See Sanchirico, *supra* note 120, at 233–37 (concluding that although it is difficult to determine the amount of foreign investment in shares of U.S. firms, that amount is probably extensive). At the time this article was written, institutional investors holding shares of Ford included Allianz Asset Management AG, Norges Bank, Deutsche Bank, APG Asset Management N.V., HSBC Holdings PLC, Sumitomo Mitsui Trust, and AXA, all of which are domiciled outside of the United States. See Nasdaq, *Ford Motor Company Institutional Ownership* (Nov. 10, 2015), <http://www.nasdaq.com/symbol/fi/institutional-holdings> [<http://perma.cc/8FAB-3BCQ>].

<sup>145</sup> Ford Annual Report, *supra* note 143, at 21; see also *id.*, Exhibit 21: Subsidiaries of Ford Motor Company as of January 31, 2015 (listing subsidiaries of Ford).

<sup>146</sup> Ford Annual Report, *supra* note 143, at 21–22.

<sup>147</sup> Kelsey Mays, *The Cars.com American-Made Index*, CARS.COM, <http://www.cars.com/go/advice/Story.jsp?section=top&subject=ami&story=amMade0611> [<http://perma.cc/UN3S-62KS>].

<sup>148</sup> *Id.*

<sup>149</sup> Lansing & Gabriella, *supra* note 112, at 330.

only marginally from that of Ford. As is Ford, Toyota is a publicly traded corporation, with shares listed not only on the Tokyo Stock Exchange but also on the London Stock Exchange and the New York Stock Exchange.<sup>150</sup> Toyota itself suggests that almost a third of the shares of Toyota are owned by persons or entities outside of Japan, although that estimate is subject to the same uncertainties as with Ford.<sup>151</sup>

Toyota is headquartered in Toyota City, Japan, but has subsidiaries, branches, and offices throughout the world.<sup>152</sup> Toyota assembles many thousands of automobiles in the United States through its wholly-owned subsidiaries.<sup>153</sup> Although the components used to assemble the automobiles come from many places, many come from the United States; indeed, a consumer information group evaluates Toyota's Camry as having the most U.S.-sourced components—more, for example, than any automobile manufactured by Ford.<sup>154</sup>

Ford and Toyota keep meticulous financial records, for the purposes of making required disclosures to shareholders and reporting tax obligations. Their financial records are kept, however, to fulfill those exact obligations and not for the purpose of keeping a neomercantilist scorecard. No such scorecard exists. Ford and Toyota's reality raises several interesting questions regarding the identification of businesses and business transactions with particular countries. If, for example, a Toyota automobile is assembled and sold in the United States, to what country should that transaction be assigned? The good itself did not leave the United States, but many of the physical parts that make up the vehicle, as well as much of the intellectual property and the technology that went into making that vehicle did come to the United States from someplace else. The revenue generated by that sale will accrue to a company incorporated and domiciled in the United States, but that company, and its revenue, is subject to the control of an entity outside of the United States. Similarly, Ford Motor Company accrues revenue from sources throughout the world. Much of that money will never enter the United States, either physically or in account form. Wherever located in the world, that money does fall within the control, directly or indirectly, of a corporation headquartered in the United States. That corporation, however, has fiduciary duties to thousands of other entities, located in an ever-changing number of countries, and many of those duties directly relate to the control and disposal of that revenue. It is virtually impossible to state with particularity what country has been made wealthy by the sale of a vehicle.

---

<sup>150</sup> *Stock Overview*, TOYOTA MOTOR CO., [http://www.toyota-global.com/investors/stock\\_information\\_ratings/outline.html](http://www.toyota-global.com/investors/stock_information_ratings/outline.html) [http://perma.cc/WVG9-NJLU].

<sup>151</sup> *Id.*

<sup>152</sup> TOYOTA MOTOR CO., *TOYOTA IN THE WORLD 2013* 11–17 (2013), [http://www.toyota-global.com/company/profile/in\\_the\\_world/pdf/2013/databook\\_en\\_2013.pdf](http://www.toyota-global.com/company/profile/in_the_world/pdf/2013/databook_en_2013.pdf) [http://perma.cc/M2HN-4S7S].

<sup>153</sup> *Id.* at 12.

<sup>154</sup> Mays, *supra* note 147.

Proponents of neomercantilism envision national firms championing a nation's economic cause, whose successes contribute directly to a nation's economic well-being.<sup>155</sup> That vision does not comport with the world in which transnational business firms operate. Analyses of the Foreign Corrupt Practices Act premised on notions of affecting the competitiveness of U.S. business firms have little resonance with reality.

## 2. *The Neomercantilist Fallacy: A Regulatory Web*

The 1988 amendments to the Foreign Corrupt Practices Act called for the creation of an international anticorruption regime.<sup>156</sup> That call has been robustly answered.<sup>157</sup> The regime manifests itself in many intertwined ways. The domestic law components of this regime garner much attention, but the rules of private dispute resolution and the administrative processes of international organs also affect and constrain the activities of business firms. The Foreign Corrupt Practices Act cannot be analyzed as if it applies to all types of business behavior. Its definition of corruption renders it applicable only to bribery that relates to transnational business. This is exactly the behavior that falls within the reach of other strands of the anticorruption regime. Therefore, any business firm that is affected by the Act is, by definition, also affected by the global regime. To analyze the Foreign Corrupt Practices Act as if it and only it affected U.S. business firms is meaningless.

### a. *Domestic Law*

More than fifty countries outlaw the payment of bribes to foreign government officials.<sup>158</sup> These laws are often enacted in response to requirements imposed by an international organization.<sup>159</sup> The first of these was the Inter-American Convention Against Corruption, promulgated by the Organization of American States in 1996.<sup>160</sup> Interestingly Venezuela, rocked by the corruption-abetted failures of several large banks, pushed the treaty through

<sup>155</sup> See Sanchirico, *supra* note 120, at 211 (describing the logic of nationalist arguments).

<sup>156</sup> See *supra* notes 63–66 and accompanying text.

<sup>157</sup> See Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297, 326–29 (2015) (describing the role of the United States in creating the global regime); Philip M. Nichols, George J. Siedel & Matthew Kasdin, *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT'L L.J. 215, 216 (2004) (describing creation of the global regime).

<sup>158</sup> Nichols, *supra* note 55, at 362.

<sup>159</sup> See Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 435 (2009) (“Although the conventions set out general international standards, each member state is expected to unilaterally legislate and enforce its own national anti-bribery laws.”).

<sup>160</sup> Organization of American States, *Inter-American Convention Against Corruption*, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter *Inter-American Convention*]; see Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 491, 491 (1998) (noting that the treaty is the first of its kind).

the Organization rather than the United States.<sup>161</sup> The Inter-American Treaty requires members of the Organization of American States to criminalize transnational bribery, in a manner similar to that of the Foreign Corrupt Practices Act, and also requires signatories to cooperate with one another in the investigation, apprehension, and prosecution of persons and entities that pay bribes.<sup>162</sup> Pursuant to the Inter-American Convention, transnational bribery soon became illegal throughout almost the entirety of the Western Hemisphere.<sup>163</sup>

As foreseen by the United States Senate, the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>164</sup> promulgated shortly after the Inter-American Convention, transformed the regime in which transnational business is conducted.<sup>165</sup> While the United States took a stronger leadership role, a spate of devastating corruption scandals as well as the specter of endemic corruption in newly-liberated Eastern Europe spurred European and Japanese engagement with the issue of corruption control.<sup>166</sup> The OECD requires members to criminalize transnational bribery and to report on their progress in enacting and enforcing laws against bribery.<sup>167</sup> Significantly, members of the Organization of Economic Cooperation and Development—the “rich democracies club”—account for more than sixty percent of global domestic product, are involved in more than three quarters of all international trade and investment transactions around the world, and provide more than ninety-five percent of developmental aid.<sup>168</sup> International trade and investment are precisely the environments in which business firms affected by the Foreign Corrupt Practices Act operate.

Although progenitor and preeminent, the Inter-American Convention and the OECD Convention do not constitute the totality of international

<sup>161</sup> Bruce Zagaris & Shaila Lakhana Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL'Y INT'L BUS. 53, 65 (1998).

<sup>162</sup> See *Developments in the Law—International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2032 (2001).

<sup>163</sup> Mark, *supra* note 60, at 501.

<sup>164</sup> Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998) [hereinafter OECD Convention].

<sup>165</sup> See Beverley Earle & Anita Cava, *When Is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT'L & COMP. L. REV. 111, 142 (2013) (describing the “sea change” in attitudes toward bribery wrought by the OECD convention); Hess & Dunfee, *supra* note 57, at 602 (describing the OECD Convention as constituting the “most significant advancement in the fight against corruption and the strongest demonstration of its universal condemnation”).

<sup>166</sup> Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 639–40 (2000).

<sup>167</sup> Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 421 (2011).

<sup>168</sup> *What is the OECD?*, U.S. MISSION TO THE ORG. FOR ECON. COOPERATION AND DEV., <http://usoecd.usmission.gov/mission/overview.html> [<http://perma.cc/BA29-GUS4>].

agreements requiring members to criminalize transnational bribery. The African Union, the Council of Europe, and the European Union have each agreed to similar requirements.<sup>169</sup> More recently, the United Nations has promulgated a Convention Against Corruption, which requires signatories to criminalize transnational bribery.<sup>170</sup> Few of the more than 140 countries that have signed the Convention have yet enacted laws pursuant to the Convention, but over time the Convention will only increase the number of countries that criminalize transnational bribery.<sup>171</sup> While once only the United States and Sweden prohibited bribery of foreign government officials, now the prohibition is ubiquitous and soon it may be universal.<sup>172</sup>

Some scholars have commented, approvingly or disapprovingly, on the broad reach of the Foreign Corrupt Practices Act.<sup>173</sup> Many of the laws enacted by other countries, however, reach as far or even farther.<sup>174</sup> Elizabeth Spahn argues that these laws, therefore, must be understood dynamically and interactively, as a framework of ubiquitous, overlapping, far-reaching rules in which “[e]nforcement competition mixed with enforcement cooperation play the central roles.”<sup>175</sup> At least with respect to corruption, this web undermines another neomercantilist assumption: that a country solely controls the regulatory regime in which its business firms operate.<sup>176</sup> A business firm constrained by the Foreign Corrupt Practices Act is by definition constrained by the global regime, and the Act must be analyzed in that context.

<sup>169</sup> African Union, Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5; Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173, 38 I.L.M. 505.

<sup>170</sup> United Nations, Convention Against Corruption, arts. 15–20, Oct. 31, 2003, 2349 U.N.T.S. 41, 43 I.L.M. 37.

<sup>171</sup> See Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT’L L.J. 691, 747–48 (2007) (describing the African Union’s convention as a critical starting point); Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT’L & COMP. L. REV. 1, 11–12 (2013) (describing trends toward enactment and enforcement).

<sup>172</sup> See Nichols, *supra* note 55, at 362 (discussing increases in the number of countries criminalizing transnational bribery).

<sup>173</sup> See H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed its Grasp?*, 26 N.C.J. INT’L L. & COM. REG. 239, 302–58 (2001) (exhaustively reviewing arguments for and against the jurisdictional reach of the Act).

<sup>174</sup> Nichols, *supra* note 55, at 363–64.

<sup>175</sup> Elizabeth Spahn, *Multi-Jurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT’L L. 1, 43 (2012).

<sup>176</sup> Kobrin makes a similar point more generally. “While [multinational enterprises] are, in theory, responsive to all the national jurisdictions in which they operate, in practice, none has complete control either singly or collectively. No single territorial state has sufficient information to fully understand the operations of a [multinational enterprise]. Furthermore, authority cannot be summoned across jurisdictions; each nation attempting to regulate the [multinational enterprise] through the portion ‘residing’ within its borders may not provide sufficient leverage over the firm as a whole to provide leverage.” Stephen J. Kobrin, *Sovereignty@Bay: Globalization, Multinational Enterprise, and the International Political System*, in THE OXFORD HANDBOOK OF INTERNATIONAL BUSINESS 181, 186 (Alan M. Rugman & Thomas L. Brewer eds., 2001).



*b. Private Resolution of Disputes*

Business behavior is not bounded only by the anti-corruption web of domestic criminal laws. Private resolution of business disputes in arbitration fora also invokes rules against bribery. In 1963, well before the Foreign Corrupt Practices Act came into effect, Judge Gunnar Lagergren observed that:

Whether one is taking the point of view of good governance or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations.<sup>177</sup>

Commercial actors who pay bribes, therefore, according to Judge Lagergren "have forfeited any right to ask for assistance of the machinery of justice."<sup>178</sup> In other words, Lagergren felt that those who pay bribes may not even appear before an international tribunal to seek enforcement of their contracts.

More recently, relying on the principle that agreements to arbitrate are separable from otherwise unenforceable contracts, arbitration tribunals have exercised jurisdiction over disputes in which bribery is alleged.<sup>179</sup> This is not good news for business firms that pay bribes. In language only slightly more restrained than that of Judge Lagergren, the arbitration panel in *World Duty Free Company Ltd. v. Republic of Kenya* ruled that:

[B]ribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.<sup>180</sup>

Put simply, arbitration tribunals will not uphold contracts tainted by bribery.<sup>181</sup>

<sup>177</sup> ICC Case No. 1110, Award, ¶ 20 (1963), reprinted in 10 *ARB. INT'L* 282, 294 (1994).

<sup>178</sup> *Id.* ¶ 23, 10 *INT'L ARB.* at 294.

<sup>179</sup> J. Gillis Wetter, *Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10 *ARB. INT'L* 277, 278 (1994).

<sup>180</sup> *World Duty Free Company Ltd. v. Republic of Kenya*, ICSID (W. Bank) Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006), <http://italaw.com/documents/WDFv.KenyaAward.pdf> [<http://perma.cc/V33X-NH82>].

<sup>181</sup> W. Laurence Craig, *Conflict and Cooperation: The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 *AM. REV. INT'L ARB.* 243, 276 (2010).

International tribunals also actively engage in the regulation of bribery.<sup>182</sup> International tribunals investigate and rule upon allegations of corruption in any transaction in dispute.<sup>183</sup> Tribunals may, in fact, investigate the possibility of corruption on their own initiative; if they do not do so and the existence of corruption is later demonstrated, a tribunal's decision may legally be set aside by a national court.<sup>184</sup> If a tribunal finds that a contract was procured through corrupt means, then under current doctrine in international arbitration that contract is either unenforceable or is voidable at the request of the innocent party.<sup>185</sup>

This has serious consequences for business firms engaged in transnational activities. It is of course impossible to determine with precision, but evidence suggests that almost all transnational business contracts entered into by business firms with a relationship to the United States contain arbitration clauses.<sup>186</sup> Allegations of bribery “are the leading ground for invoking the principle” in arbitration that any given contract should not be enforced on public policy grounds.<sup>187</sup> There is also a growing consensus among arbitration tribunals that incidents of bribery must be reported to national authorities.<sup>188</sup>

These rules are generated by bodies other than the federal government of the United States. Their impact, however, on business firms engaged in transnational activities—the exact business activities targeted by the Foreign Corrupt Practices Act—is no less significant. That the Foreign Corrupt Practices Act is a criminal law while international arbitration is not has little bearing on any purported effects on competitiveness. If the Foreign Corrupt Practices Act were to vanish, business firms—including U.S. business firms—would still be constrained by the rules of international arbitration. There are of course U.S. business firms that will never appear before an international arbitration tribunal, but those same business firms also fall outside of the definitional boundaries of the Act. To analyze the Foreign Corrupt Practices Act without taking the rules of international arbitration into account makes little sense.

<sup>182</sup> See Catherine A. Rogers, *Secrecy and Transparency in Dispute Resolution: Transparency in International Commercial Arbitration*, 54 KAN. L. REV. 1301, 1332 (2006) (describing the roles of tribunals).

<sup>183</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 218 (2009).

<sup>184</sup> Bernardo Cremades & David Cairns, *Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering, and Fraud*, in ARBITRATION, MONEY LAUNDERING, CORRUPTION AND FRAUD 65, 67 (Kristine Karsten & Andrew Berkeley eds., 2003).

<sup>185</sup> Craig, *supra* note 181, at 26.

<sup>186</sup> See CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 59 (2005) (stating that almost ninety percent of these contracts contain arbitration clauses).

<sup>187</sup> Gordon Kaiser, *Corruption in the Energy Sector: Criminal Fines, Civil Judgments, and Lost Arbitrations*, 34 ENERGY L.J. 193, 201 (2013).

<sup>188</sup> Rogers, *supra* note 182, at 1332.

c. *Administrative Rules and Processes*

Administrative rules and processes also form boundaries for business behavior, and these too impose constraints on bribery. These rules and processes occur at the national and international level. At the national level, many countries have rules that prohibit a person or business firm that has engaged in bribery from entering into further business relationships with that government.<sup>189</sup> The federal government of the United States debars bribe-paying businesses or persons from entering into any transactions with the United States.<sup>190</sup> The process specifically identifies bribes that fall within the definition of the Foreign Corrupt Practices Act as grounds for debarment.<sup>191</sup> The central government of China also debars bribe-paying businesses and persons from any government relations, as does the European Union.<sup>192</sup>

International organs also promulgate rules that constrain bribery. The World Bank Group, for example, which consists of the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the International Centre for Settlement of Investment Disputes, and the Multilateral Investment Guarantee Agency, investigates claims of bribery in any project that involves one of its organs.<sup>193</sup> Indeed, an entire division of the World Bank—the Integrity Vice Presidency—is dedicated to reviewing and holding hearings on such claims.<sup>194</sup> If a claim of bribery is verified, then the responsible person or firm is placed on an embargo list and may not become involved in any project involving the World Bank Group.<sup>195</sup> The International Monetary Fund and each of the Regional Development Banks have similar processes, and maintain similar lists; reciprocal agreements among these institutions result in cross-debarment.<sup>196</sup> Paul Carrington describes these processes as a form of

<sup>189</sup> See DICK THORNBURGH, RONALD L. GAINER & CUYLER H. WALKER, REPORT CONCERNING THE DEBARMENT PROCESSES OF THE WORLD BANK 3 (2002), <http://siteresources.worldbank.org/PROCUREMENT/Resources/thornburghreport.pdf> [<http://perma.cc/V3RZ-79NC>] (stating that debarment “is commonly employed by victims [of corruption] that are national government agencies”).

<sup>190</sup> Federal Acquisitions Regulations System—Causes for Debarment, 48 C.F.R. § 9.406-2 (2014); see Pascale Hélène Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of U.S. Suspension and Debarment with the World Bank’s Sanctions System*, 2012 U. CHI. LEGAL F. 195, 198–216 (2012) (describing and analyzing the federal debarment process).

<sup>191</sup> Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 322 (2014).

<sup>192</sup> Council Directive 2004/17/EC, 2004 O.J. (L 134); Council Directive 2004/18/EC, section 2, arts. 45, 1(b) O.J. (L 134); Tong Xinchao, *Chinese Procurement Law: Current Legal Frameworks and a Transition to the World Trade Organization’s Government Procurement Agreement*, 17 TEMP. INT’L & COMP. L.J. 139, 163–64 (2003) (describing debarment in China).

<sup>193</sup> See Dubois, *supra* note 190, at 216–34 (describing and analyzing the international financial institutions’ debarment process).

<sup>194</sup> See *id.* at 218–26 (describing the Integrity Vice Presidency and the process).

<sup>195</sup> Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONTRACT L.J. 277, 278 (2007).

<sup>196</sup> Dubois, *supra* note 190, at 232.

enforcement of the international regime by international financial institutions.<sup>197</sup>

It is important to note that these rules were not created for the purpose of singling out particular businesses nor for expressing outrage or indignation. Rather, these rules were created for the purpose of strengthening markets.<sup>198</sup> It is also important to note that these rules matter in the world in which business firms actually operate. The federal government of the United States claims to be the largest purchaser of goods and services in the world, China is not far behind, the European Union spends billions of Euros each year, and those are only three examples.<sup>199</sup> Similarly, the members of the World Bank Group constitute significant economic actors in transnational business, particularly with respect to emerging economies.<sup>200</sup> Their enforcement of the global antibribery regime “have not been without effect on business practices.”<sup>201</sup>

As with private dispute settlement rules, any argument that the Foreign Corrupt Practices Act imposes criminal penalties while the rules of international organizations are only administrative misses the point. The neomercantilist mode of thought assumes that a polity can control the competitiveness of “its” business firms. In the case of the Foreign Corrupt Practices Act, however, that does not seem to be true. The Foreign Corrupt Practices Act is only one strand in a tapestry that includes, among other things, administrative rules and processes promulgated by entities other than the United States.

<sup>197</sup> Paul D. Carrington, *Qui Tam: Is False Claims Law a Model for International Law?*, 27 U. CHI. LEGAL F. 27, 40 (2012).

<sup>198</sup> See Hans-Joachim Priess, *Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks*, 45 GEO. WASH. INT'L L. REV. 271, 277–78 (2013) (noting that the World Bank Group rules were promulgated to enhance open and fair competition, to reduce trade barriers, to protect public interest in public funds, and to enhance governance); Jessica Tillipman, *Suspension and Debarment: The Congressional War on Contractors*, 45 GEO. WASH. INT'L L. REV. 235, 236 (2013) (noting that the federal rules were created to ensure that the government supported responsible economic actors).

<sup>199</sup> See CONSOLIDATED ANNUAL ACCOUNTS OF THE EUROPEAN UNION 2013 61 (July 30, 2014) (reporting net operating expenses of €139,426,000,000); Gil Lan, *American Legal Realism Goes to China: The China Puzzle and Law Reform*, 51 AM. BUS. L.J. 365, 366 (2014) (noting that China is the second largest economy behind the United States); *SBA's Role in Government Contracting*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/content/sbas-role-government-contracting> [http://perma.cc/E325-DJQH] (claiming that the U.S. federal government is “[t]he world’s largest buyer of goods and services”).

<sup>200</sup> See Jeehye You, *Legislative Reform of the Kaesong Industrial Complex in North Korea*, 29 UCLA PAC. BASIN L.J. 36, 67 (2011) (“Among international organizations, the World Bank has performed the most active role in assisting developing countries.”).

<sup>201</sup> Carrington, *supra* note 197, at 40.

VI. THE NEOMERCANTILIST MOTIF DISTORTS ANALYSIS OF THE  
FOREIGN CORRUPT PRACTICES ACT

Evaluation of the neomercantilist mode of thinking is not simply an intellectual exercise. The neomercantilist mode of thinking distorts analysis of the Foreign Corrupt Practices Act, and could lead to errant or fruitless policy initiatives. Three examples illustrate how the neomercantilist motif can distort analysis of the Foreign Corrupt Practices Act. The first is the facilitating payments exception, the second is a proposal for a defense based on implementation of comprehensive compliance programs, and the third is a proposal that portions of fines and settlements accrued pursuant to prosecution of the Act be used to fund anticorruption programs in the countries in which the bribery occurred.

The facilitating payments exception illustrates the distortions introduced by a neomercantilist analysis of the Foreign Corrupt Practices Act. Facilitating payments are bribes paid to secure routine, non-discretionary government action such as securing a telephone line in a normal amount of time or obtaining a clerk's stamp on a document.<sup>202</sup> The Foreign Corrupt Practices Act excepts facilitating payments from its jurisdiction.<sup>203</sup>

Lindsey Hills observes that, unlike the Foreign Corrupt Practices Act, the United Kingdom's corresponding Bribery Act does not except facilitating payments.<sup>204</sup> Hills argues, from an anglo-centric neomercantilist perspective, that "the lack of exception under the [United Kingdom Bribery Act] causes U.K. companies to be placed at a competitive disadvantage."<sup>205</sup> Hills goes on to decry the "disastrously large discrepancy" between the laws of the United Kingdom and the United States.<sup>206</sup>

Hills's analysis errs in at least two ways. First, Hills's implicit assumption that U.S. and British business firms are siloed within the United States and the United Kingdom fundamentally misunderstands both the reality of business and the nature of the international anticorruption regime. The British law "has been viewed as a broader and tougher foreign anti-bribery law than its United States' counterpart."<sup>207</sup> In particular, the jurisdictional reach of the Bribery Act is broad, and extends even to firms that merely conduct

---

<sup>202</sup> Sarah Bartle, Chris Chamberlain & Brian Wohlberg, *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265, 1283 (2014).

<sup>203</sup> Murphy, *supra* note 18, at 239 ("The most well known FCPA exception is for so-called 'facilitating' or 'grease' payments to low-level foreign officials who perform 'routine governmental actions.'").

<sup>204</sup> 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. GLOBAL L. & BUS. 469, 476 (2014).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 28 (2011).

some business activity in the United Kingdom.<sup>208</sup> It is difficult to envision how a U.S. business firm whose activities fall within the definitional boundaries of the Foreign Corrupt Practices Act—in other words, a business that is engaged in transnational business activities—would escape the jurisdictional reach of the United Kingdom’s Bribery Act. Moreover, a meaningful discussion of constraints on the payment of facilitating bribes by business firms engaged in transnational activities must take into account more rules than just the Foreign Corrupt Practices Act and the Bribery Act; of the more than fifty countries that have enacted rules similar to the Foreign Corrupt Practices Act, only five include exceptions for facilitating payments.<sup>209</sup> A U.S. firm does not enjoy a competitive advantage over a British firm, because to the extent that both firms engage in transnational business, then both firms are subject to the entire international regime. It is nonsensical to suggest that a U.S. firm is subject only to a small portion of that regime and a British firm is subject only to another portion. An analysis predicated on such assumptions is meaningless.

Hills also asks the wrong question. Questions about effects on individual business firms have little to do with the purpose of the Foreign Corrupt Practices Act or of the anticorruption regime in general. The Act was adopted to strengthen the integrity and functionality of the market. The appropriate question, therefore, is not whether a particular firm is advantaged by the facilitating payment exception but instead what effect the facilitating payment exception has on the integrity of the global market.

Asking that question leads to critical information that is ignored when merely attempting to discern advantage. Facilitating payments inflict substantial damage on the global market.<sup>210</sup> Among other things, facilitating payments distort allocations of public resources, encourage the creation of bureaucratic obstacles and over-regulation, erode the functionality of critical government agencies, and contribute to endemic corruption.<sup>211</sup> The Organization of Economic Cooperation and Development, recognizing the “corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law,” supports the elimination of facilitating payment exceptions in domestic implementation of the anticorruption regime.<sup>212</sup>

---

<sup>208</sup> Misty Robinson, *Global Approach to Anti-Bribery and Corruption, an Overview: Much Done, But A Lot More to Do*, 37 T. MARSHALL L. REV. 303, 319 (2012).

<sup>209</sup> Jordan, *supra* note 62, at 888–89.

<sup>210</sup> Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for Routine Government Action Payments*, 25 PENN ST. INT’L L. REV. 251, 263–64 (2006) (“[T]he majority of economic and development experts . . . argue that ‘small scale’ bribery is extremely harmful.”).

<sup>211</sup> Antonio Argandoña, *Corruption and Companies: The Use of Facilitating Payments*, 60 J. BUS. ETHICS 251, 257–58 (2005).

<sup>212</sup> C(2010)19: Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions ¶ VI, ORG. FOR ECON. COOPERATION AND DEV. (2010), <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=258&Lang=en> [<http://perma.cc/3M86-NG27>]. When drafting its Convention Against

Proposals to amend the Foreign Corrupt Practices Act to include an adequate procedures defense provide a second illustration. Mike Koehler and others have suggested that the Act be amended so that business firms that have implemented substantive programs to control bribery are shielded from liability for the bribes paid by employees or affiliates.<sup>213</sup> The existence of an adequate procedures defense in the United Kingdom's antibribery law may have spurred these proposals, although the proposals take many forms.<sup>214</sup> The proposal is controversial, in part due to concerns that it would dilute the enforceability of the Act, as well as concerns that business firms could acquire immunity through implementing weak compliance programs.<sup>215</sup> Opponents of the proposal also point out that proponents of such a change have no verifiable complaints "other than that the authorities are enforcing the law."<sup>216</sup>

Analysis of these proposals could embrace a neomercantilist perspective. Deiter Juedes, for example, clearly approaches these proposals from a neomercantilist position. Juedes begins with a remarkable empirical assertion: "To survive in today's complex commercial world, many American corporations must develop international business relationships and pursue transactional opportunities abroad. For these American firms, the Foreign Corrupt Practices Act is the most important United States law governing international commerce."<sup>217</sup> Juedes does not explain why the Act surpasses in importance tax laws, financial rules, licensing permissions, local laws, and the many other laws that a business firm will encounter in any given transaction, but his siloing of U.S. firms sets the stage for a neomercantilist criticism of the Act:

With the increased enforcement of the FCPA and the difficulties in complying with the statute, American firms are at a disadvantage when it comes to competing internationally. Indeed, both large and small firms have spent millions of dollars on FCPA compliance,

---

Corruption, the OECD deliberated permitting facilitating payments but intentionally left the language of the Convention open for interpretation. Philip M. Nichols, *Who Allows Facilitating Payments?*, 14 AGORA WITHOUT FRONTIERS 303, 310–11 (2009).

<sup>213</sup> Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 617; see Jordan, *supra* note 207, at 60 (suggesting that the United States should consider an adequate procedures defense either through amendment or through procedure).

<sup>214</sup> See Schwartz & Goldberg, *supra* note 191, at 333 (describing several proposals).

<sup>215</sup> See, e.g., Philip Urofsky, Hee Won (Marina) Moon & Jennifer Rimm, *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken—The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1172 (2012); Press Release, Transparency Int'l, Broad Coalition of 33 Civil Society and Socially Responsible Investment Leaders Call on Congress to Refrain from Introducing Legislation Amending FCPA (Jan. 12, 2012), [http://www.transparency.org/files/content/pressrelease/20120112\\_International\\_FCPA\\_letter\\_EN.pdf](http://www.transparency.org/files/content/pressrelease/20120112_International_FCPA_letter_EN.pdf) [<http://perma.cc/RM2C-XRV7>]; Schwartz & Goldberg, *supra* note 191, at 334 (describing arguments against the proposal).

<sup>216</sup> Urofsky, Moon & Rimm, *supra* note 215, at 1147.

<sup>217</sup> Deiter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 39 (2013).

have poured money and energy into internal investigations aimed at determining whether a FCPA violation occurred, and have, in certain instances, avoided foreign markets altogether because of the FCPA. These implications reveal just how helpless American firms are against the FCPA. American firms need some type of tool that will incentivize compliance with the Act and curtail liability when the DOJ or SEC brings an action, and this tool is an “adequate procedures” defense.<sup>218</sup>

The observation that business firms need to spend money to create programs in order to comply with a long-standing law is less sensational than Juedes probably intends it to be. But Juedes errs in three substantial ways. First, Juedes’s siloing of U.S. business firms implies that they and only they are subject to the strictures of the Foreign Corrupt Practices Act. This is not true. As is the case with most laws criminalizing transnational bribery, the Act has broad jurisdictional reach.<sup>219</sup> In fact, many of the recent high profile prosecutions of violations of the Act have been of business firms headquartered outside of the United States.<sup>220</sup>

Second, and conversely, firms engaged in transnational activities are likely subject to the United Kingdom’s Bribery Act.<sup>221</sup> The Bribery Act does provide a safe harbor for firms that have implemented legitimate compliance programs, but it also imposes strict liability on firms that have not—such firms are strictly liable for any bribes paid by employees or affiliates.<sup>222</sup> Jon Jordan points out that in the United States prosecutors exercise discretion toward firms with legitimate compliance programs and the sentencing guidelines mandate leniency for such firms, which he suggests is little different than the strict liability/safe harbor structure found in the laws of the United Kingdom; business firms, he suggests, are essentially presented with the same requirements by each set of laws.<sup>223</sup> Jordan’s observation resonates with the broader observation that domestic laws prohibiting transnational bribery are components of a global regime, and that analysis of those domestic laws must take into account the contextual reality of the global regime. As a practical matter, the observation suggests that all business firms that engage in transnational activity, no matter where they are headquartered, should consider the establishment of a compliance program that satisfies the official

---

<sup>218</sup> *Id.* at 42 (citations omitted).

<sup>219</sup> See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 552–53 (2011).

<sup>220</sup> *Id.*

<sup>221</sup> See Bruce W. Bean & Emma H. MacGuidwin, *The Extraterritorial Grasp of Anti-Bribery Legislation: Expansive Reach—Useless Guidance: An Introduction to the U.K. Bribery Act of 2010*, 18 ILSA J. INT’L & COMP. L. 323, 338–39 (2012) (noting not only the broad reach of the Bribery Act but also the United Kingdom’s explicit plan to hold all business firms to its standards).

<sup>222</sup> Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 803–04 (2011).

<sup>223</sup> See Jordan, *supra* note 207, at 49–50.



requirements of the United Kingdom and the unofficial requirements of the United States.<sup>224</sup>

Finally, as with Hills, Juedes's focus is misplaced. The Foreign Corrupt Practices Act was enacted to strengthen the marketplace, rather than to bestow advantage on any particular business firm. Proposals to create a safe harbor for business firms that have implemented legitimate procedural safeguards can be evaluated from the perspective of the objectives of the Foreign Corrupt Practices Act.<sup>225</sup> A meaningful analysis would not attempt to discern advantage to a particular firm but would instead examine the extent to which the proposed safe harbor would enhance the integrity of the global market. Analyzing the efficacy of a safe harbor would obviate concerns that it would create only "a façade of compliance and allow business to proceed with a wink and nod."<sup>226</sup> Arguably, well-designed compliance programs would deputize business firms as "partners with" the government "in rooting out corruption," which would magnify the Act's positive effect on the global market.<sup>227</sup> A meaningful analysis of proposals for a safe harbor would also take into account the fact that the Foreign Corrupt Practices Act is embedded in a global anticorruption regime. Notably, the Organization for Economic Cooperation and Development, the United Nations Office on Drugs and Crime, and the World Bank recognize "the integral role the private sector plays in the fight against corruption and call [ ] for greater public-private partnership in this effort."<sup>228</sup> These organizations, working with the G20, offer guidance in how business firms can create compliance programs that satisfy the requirements of the global regime.<sup>229</sup> This salient and useful point is lost in a neomercantilist analysis.

Andrew Spalding's proposal for the distribution of fines accrued through prosecution of the Foreign Corrupt Practices Act offers a third illustration. Spalding has suggested that prohibitions on transnational bribery deter business activity in endemically corrupt polities, most of which are developing or emerging countries.<sup>230</sup> Rather than a system that relies entirely on punishing bribe-payers, Spalding calls for attention to principles of re-

---

<sup>224</sup> See, e.g., Homer E. Moyer, Jr., *Complying with the Foreign Corrupt Practices Act in a Down Economy*, CORPORATE COMPLIANCE INSIGHTS (Jun. 23, 2009), <http://www.corporatecomplianceinsights.com/complying-with-the-foreign-corrupt-practices-act-in-a-down-economy/> [<http://perma.cc/KHW2-JYNX>].

<sup>225</sup> See Michael Peterson, *Amending the Foreign Corrupt Practices Act: Should the Bribery Act 2010 Be a Guideline?*, 12 RICH. J. GLOBAL L. & BUS. 417, 427 (2013) (arguing that the safe harbor would help to fulfill the objectives of the Act).

<sup>226</sup> Urofsky, Moon & Rimm, *supra* note 215, at 1172.

<sup>227</sup> Schwartz & Goldberg, *supra* note 191, at 319.

<sup>228</sup> ORG. FOR ECON. COOPERATION AND DEV., U.N. OFFICE ON DRUGS AND CRIME & WORLD BANK, *ANTI-CORRUPTION ETHICS AND COMPLIANCE HANDBOOK FOR BUSINESS 3* (2013), <http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf> [<http://perma.cc/BNY2-EP55>].

<sup>229</sup> See *id.* at 15.

<sup>230</sup> Andrew B. Spalding, *Four Uncharted Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV. 661, 663.

storative justice.<sup>231</sup> In particular, he suggests that a substantial percentage of any fine or settlement pursuant to the Foreign Corrupt Practices Act be used to fund anticorruption programs in the country or countries in which the underlying bribery occurred.<sup>232</sup>

From a neomercantilist perspective, Spalding's proposal might seem quaint or irrelevant.<sup>233</sup> The proposal does not, after all, relate directly to enhancing the ability of U.S. business firms to conduct business profitably. The proposal does not advantage U.S. business firms over those of other countries. A neomercantilist analysis of Spalding's proposal would probably involve an estimation of the revenue lost by the federal government and a (generally erroneous) estimation of the change in revenue to U.S. business firms.<sup>234</sup>

Viewed with the objectives of the Act in mind, however, the proposal becomes very interesting. The Foreign Corrupt Practices Act was enacted in order to strengthen the integrity of the global market. Anticorruption programs could significantly contribute to achieving that objective. Many developing and emerging economies have an appetite for these types of programs, and although evaluating the effectiveness of programs is difficult, the consensus among practitioners is that anticorruption programs do contribute to reducing bribery and strengthening markets.<sup>235</sup>

Reducing bribery in developing and emerging economies would significantly contribute to the integrity of the global market. Bribery is considered by many to be the single greatest barrier to the formation of transnational relationships, particularly in developing and emerging countries.<sup>236</sup> Nearly forty-five percent of senior executives reported in a survey by PWC that they had foregone entry into particular markets or had not entered into par-

<sup>231</sup> *Id.* at 677–78.

<sup>232</sup> Andrew B. Spalding, *Does Anti-Bribery Enforcement Reduce Bribery?*, 49 U.C. DAVIS L. REV. (forthcoming 2015).

<sup>233</sup> Cf. Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 209 (1996) (“Fighters of corruption, such as former President Jimmy Carter, were often ridiculed as ‘do gooders’ who ignored the realities of business.”).

<sup>234</sup> Cf. Eric M. Pedersen, *The Foreign Corrupt Practices Act and its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, 43 (2008) (evaluating the costs and benefits of proposed changes to the issuance of opinion letters in Foreign Corrupt Practices Act actions).

<sup>235</sup> See Steven E. Hendrix, *New Approaches to Addressing Corruption in the Context of U.S. Foreign Aid with Examples from Latin America and the Caribbean*, 12 SW. J.L. & TRADE AM. 1, 14 (2005) (discussing examples of successful programs); Patricio Maldonado & Gerardo D. Berthin, *Transparency and Developing Legal Frameworks to Combat Corruption in Latin America*, 10 SW. J.L. & TRADE AM. 201, 259 (2004) (discussing demand for high-quality anticorruption programs).

<sup>236</sup> See James H. Davis & John A. Ruhe, *Perceptions of Country Corruption: Antecedents and Outcomes*, 43 J. BUS. ETHICS 275, 276 (2003) (reporting that the World Bank considers corruption the greatest impediment to global commercial relationships); Adam Raviv, *Jigsaw Sovereignty: The Economic Consequences of Decentralization in Post-Dayton Bosnia*, 37 GEO. WASH. INT'L L. REV. 109, 113–16 (2005) (noting that “corruption that is endemic to [parallel institutions] can serve as a barrier to foreign investment”).

ticular relationships due to concerns regarding bribery, while a survey by Deloitte found that nearly half of the respondents had foregone relationships over bribery concerns.<sup>237</sup> Even though the European Union, which is still the world's largest single market, hosts several nations with low levels of corruption, more than forty percent of businesspeople surveyed there consider bribery a serious obstacle to business relationships; among emerging economy members of the Union that response rises to over sixty percent.<sup>238</sup> Global, ongoing surveys of transnational businesspeople, such as the Business Environment and Enterprise Performance Survey or the World Economic Forum's Global Competitiveness Index, consistently find that businesspeople consider corruption one of the most serious barriers to forming business relationships in emerging economies.<sup>239</sup> Numerous surveys within emerging economies find that bribery constitutes the most serious barrier to business relationships.<sup>240</sup> Bribery in emerging economies weakens

---

<sup>237</sup> DELOITTE DEVELOPMENT LLC, LOOK BEFORE YOU LEAP: MANAGING RISK IN GLOBAL ENVIRONMENTS 7 (2011), <http://www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/us-fas-lby-look-before-you-leap-navigating-risks-in-emerging-markets-102412.pdf> [<http://perma.cc/2AC9-LY8T>]; PRICEWATERHOUSECOOPERS, CONFRONTING CORRUPTION: THE BUSINESS CASE FOR AN EFFECTIVE ANTI-CORRUPTION PROGRAMME 2 (2008), [http://www.pwc.com/gx/en/psrc/pdf/confronting\\_corruption\\_effective\\_anti-corruption\\_programme.pdf](http://www.pwc.com/gx/en/psrc/pdf/confronting_corruption_effective_anti-corruption_programme.pdf) [<http://perma.cc/VR2L-EAEB>].

<sup>238</sup> EUR. COMM'N, FLASH EUROBAROMETER 374: BUSINESS' ATTITUDES TOWARD CORRUPTION IN THE EU 17 (2014), [http://ec.europa.eu/public\\_opinion/flash/fl\\_374\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf) [<http://perma.cc/7CHN-782K>]; see generally EUR. COMM'N, EU ANTI-CORRUPTION REPORT 3 (2014), [http://eur-lex.europa.eu/resource.html?uri=cellar:058aecf0-d9b7-11e3-8cd4-01aa75ed71a1.0012.01/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:058aecf0-d9b7-11e3-8cd4-01aa75ed71a1.0012.01/DOC_1&format=PDF) [<http://perma.cc/2B26-KPBF>] ("Corruption alone is estimated to cost the EU economy EUR 120 billion per year, just a little less than the annual budget of the European Union.").

<sup>239</sup> E.g., Press Release, World Bank, Kyrgyz Republic: Business Climate Improved, But Corruption Remains Key Problem—New World Bank-EBRD Study (Apr. 2, 2014), <http://www.worldbank.org/en/news/press-release/2014/04/02/kyrgyz-republic-business-climate-improved-but-corruption-remains-key-problem-new-world-bank-ebrd-study> [<http://perma.cc/B4NP-W3C6>] (noting that, even as other business barriers recede, corruption is considered by businesspeople the second-greatest barrier to engaging in business relationships in Kyrgyzstan); Press Release, United Nations Office on Drugs & Crime, EU, UNODC and EFCC Partner with the National Bureau of Statistics in the Conduct of the First Ever Crime and Corruption Survey in Nigeria (July 1, 2010), [http://www.unodc.org/nigeria/en/press-release\\_business-crime-and-corruption-survey-in-nigeria.html](http://www.unodc.org/nigeria/en/press-release_business-crime-and-corruption-survey-in-nigeria.html) [<http://perma.cc/6CXX-QDJW>] ("The survey reveals that for more than 70% of Nigerian businesses, crime and corruption constitute the most serious obstacles to conducting business in Nigeria."); Press Release, Business Enterprise and Enterprise Performance Survey, The Russian Regions: Results 1 (May 2013), <http://www.ebrd.com/documents/comms-and-bis/business-environment-and-enterprise-performance-survey-the-russian-regions.pdf> [<http://perma.cc/E6XK-D5T7>] ("The 2012 BEEPS results show that most enterprises in Russia identify corruption, access to finance and workforce skills as the main constraints.").

<sup>240</sup> E.g., GRANT THORNTON VIETNAM, PRIVATE EQUITY IN VIETNAM: INVESTMENT SENTIMENT AND OUTLOOK QUARTER 2, 2013 5 (2013) (reporting that private equity investors continue to identify corruption as one of the three greatest obstacles to investment); Elena Denisova-Schmidt, *Corruption and Informal Practices in Russia*, 7 EUXEINOS 4, 8–9 (2012), <https://www.alexandria.unisg.ch/publications/216729> [<https://perma.cc/9KGF-TJUE>] (describing numerous surveys of businesspeople in Russia); Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225, 251 (2012) (reporting a 2005 World Bank survey that found "that 71% of businesses considered corruption the biggest barrier to foreign

already fragile governance mechanisms for foreign investors and exacerbates difficulties with already cumbersome procedures for the entry of goods and services.<sup>241</sup> Emerging economies, however, constitute the fastest growing potential markets and are predicted to drive global economic growth following the recession.<sup>242</sup> Assigning penalties and settlements accrued from Foreign Corrupt Practices Act prosecutions would resonate with the very heart of the reasons for the enactment and amendment of the Act.

## VII. CONCLUSION

Analyzing law through the lens of enhancing the integrity of a market does not present a new paradigm for legal scholarship. The antitrust laws of the United States were enacted for many purposes, of which the Supreme Court has most recently emphasized “the purpose of the antitrust laws . . . is ‘the protection of competition, not competitors.’”<sup>243</sup> The Foreign Corrupt Practices Act is not perfectly analogous to antitrust law, but it too was enacted for many reasons, one of the most important of which was enhancing the integrity of the global market.<sup>244</sup> 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.”<sup>245</sup> The same benefits can be accrued through proper administration of the Foreign Corrupt Practices Act. Justice Breyer warns, however, that at times “policymakers will protect competitors instead of protecting competition” and that this will probably

---

investment” in Russia); see Jelena Budak & Edo Rajh, *Corruption as an Obstacle for Doing Business in the Western Balkans: A Business Sector Perspective* 14-15 (Ekonomski Institut Zagreb, Working Paper No.1104, 2011), [http://hrcaak.srce.hr/index.php?show=clanak&id\\_clanak\\_jezik=112046](http://hrcaak.srce.hr/index.php?show=clanak&id_clanak_jezik=112046) [<http://perma.cc/C6KL-ZFHD>] (reporting survey of business people in Balkans showing bribery is serious obstacle to entering into business relationships).

<sup>241</sup> Norman D. Bishara, *Governance and Corruption Constraints in the Middle East: Overcoming the Business Ethics Glass Ceilings*, 48 AM. BUS. L.J. 227, 237-38 (2011); see Spahn, *supra* note 57, at 867.

<sup>242</sup> See M. Ayhan Kose & Eswar S. Prasad, *Emerging Markets Come of Age*, FIN. & DEV. 7, 10 (2010); Enrique R. Carrasco, *An Opening for Voice in the Global Economic Order: The Global Financial Crisis and Emerging Economies*, 12 OR. REV. INT'L L. 179, 195 (2010) (stating that half of global economic growth was driven by emerging economies); Yvonne C.L. Lee, *A Reversal of Neo-Colonialism: The Pitfalls and Prospects of Sovereign Wealth Funds*, 40 GEO. J. INT'L L. 1103, 1142-43 (2009) (comparing high growth rates in emerging economies to comparatively stagnant growth in mature economies).

<sup>243</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)); see Zephyr Teachout, *Neoliberal Political Law*, 77 LAW & CONTEMP. PROB. 215, 233-34 (2014) (describing the many goals of antitrust laws and the genesis of the notion that antitrust rules are intended to protect the marketplace and consumer welfare).

<sup>244</sup> See *supra* notes 21-52 and accompanying text.

<sup>245</sup> Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987).

happen “when regulators or antitrust enforcers confuse means with ends by thinking that the object of the law is to protect individual firms from business risks rather than to bring consumers the price and production benefits that typically arise from the competitive process.”<sup>246</sup> This danger is particularly manifest in the neomercantilist analysis of the Foreign Corrupt Practices Act.

The reason for the persistence of the neomercantilist motif in analysis of the Foreign Corrupt Practices Act may not be the difficulty in analysis *qua* analysis but instead with the contextual reality of business. The Foreign Corrupt Practices Act, though a domestic law, applies only to those business firms that engage in some form of transnational business. For all business firms, but particularly for those engaged in transnational activities, the world in which they operate seems to be a different world than that envisioned by traditional legal analysis. Steve Kobrin, who writes at length about the contextual transformation of business operation, uses the term “globalization.”<sup>247</sup> Legal regulation has not caught up with business.<sup>248</sup> Nor, perhaps, has the legal analysis of the regulation of globalized business. Peer Zumbansen depicts two reactions by legal analysts to the progression of globalization:

One view insists on emphasizing and lamenting the alleged weakness of (the state’s) regulatory law that finds its most persuasive illustration in the triumphant proliferation of private norm-setting and suggests that law cannot escape death by suffocation in the oxygen-free atmosphere of globalization. The competing view presents a radicalized version of the first: it holds up an idealized image of the nation-state and its legal order as unified, hierarchical, and coherent—only to suffer from the undermining and corrosive effects of globalization. From this perspective, globalization is depicted as a process that emerges in (a particular) time and from outside the nation-state to destroy the state-based legal order. Such depictions of law “as it lay dying” suggest, above all, that law would enjoy blissful health and strength if only it had been protected from globalization. What happened?<sup>249</sup>

Neither of these need come to pass. The Foreign Corrupt Practices Act interacts robustly with the reality of business operations in a globalized context. In order to continue doing so, however, legal scholars and policymakers must understand the Act as part of that contextual reality, and must avoid the neomercantilist fallacy.

---

<sup>246</sup> Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1018 (1987).

<sup>247</sup> Kobrin, *supra* note 176, at 181.

<sup>248</sup> See Burkeen, *supra* note 135, at 219 (“The process of economic globalization has progressed more rapidly than the restructuring of the public institutions that regulate it.”).

<sup>249</sup> Zumbansen, *supra* note 134, at 122 (citations omitted).

Fidelity to the purpose and intent of the Foreign Corrupt Practices Act is not just a matter of intellectual rigor. The very concept of neomercantilism implies that the global market is a zero sum game. This, too, is an error. If structured with integrity the global market, as any market, grows and innovates and expands. U.S. business firms, along with everyone else, will be made better off not by gaming the market in an attempt to confer advantage, but by preserving and enhancing the integrity of the market.