Regulatory Competition and Anticorruption Law

PAUL B. STEPHAN*

INTRODUCTION

For more than two decades, the United States acted alone when it imposed criminal and administrative sanctions on bribery of foreign officials carried out by its subjects and others under its jurisdiction.[1] From 1998 on, the possibility of competing regimes emerged. The commitments made under the Organization for Economic Cooperation and Development (OECD) Convention raised the specter of multiple sovereigns regulating the same conduct.[2] Since Germany's prosecution of

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* John C. Jeffries, Jr., Distinguished Professor and David H. Ibbeken '71 Research Professor, University of Virginia School of Law. I am grateful to the *Virginia Journal of International Law* and the John Bassett Moore Society of International Law for organizing this remarkable symposium, and to my co-panelists, Richard N. Dean and Elizabeth Spahn, for their assistance, comments, and criticism. My debt is especially great with respect to Rich, with whom I have taught courses on the Foreign Corrupt Practices Act for many years. Andy Spalding and Matt Turk also provided comments on this draft, which helped me greatly. Any errors or omissions remain my responsibility alone.

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, Title I, § 104, 91 Stat. 1496 (1977), *amended by*, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, § 5003(c), 102 Stat. 1419 (1988); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XXXIII, § 330005, 108 Stat. 2142 (1994); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 3, 112 Stat. 3304 (1988).

2. For background on the adoption of the OECD Convention, see Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 686–90 (2004); Elizabeth K. Spahn, *Multi-Jurisdictional Bribery Law Enforcement: The OECD Anti-Bribery*

Siemens and the adoption of the Bribery Act in 2010 by the United Kingdom, the specter has come closer to reality.[3]

This article considers whether the prospect of increased competition in the regulation of international bribery is desirable, and explores the factors that can determine whether this competition will augment or diminish global welfare. Its conclusion is optimistic. Based on what we know about the general dynamics of regulatory competition, the risk that multiple anticorruption regimes will lead to confusion, deterrence of socially beneficial transactions, or a kind of arms race among states seeking to protect national champions is low. Conversely, the likelihood that multiple, often overlapping regimes will decrease the incidence of welfare-diminishing corruption is high.

Part I provides a short summary of the general theory of regulatory competition. Part II then reviews the specific application of the theory to competition policy, an area where the effects of competing regulatory regimes are ambiguous. Part III contrasts anticorruption policy with competition policy. It concludes with a discussion of the case for managing regulatory competition over anticorruption measures and ends with a defense of the status quo.

I. THE GENERAL THEORY OF REGULATORY COMPETITION

The theory of regulatory competition assumes a dynamic world where private actors (the persons regulated) can make choices with a view to affecting which regulatory regime will apply to their transactions. These choices can be relatively costless, as with the U.S. rules for corporate governance regulation.[4] Alternatively, the expense can be considerable, as when a firm must give up particular markets or valuable inputs (such as access to U.S. capital markets) to avoid regulation. These costs may reduce competition among regimes, but they will not eliminate it. A model of regulatory competition thus must embrace both the substantive content of the regulatory policy and the costs associated with choosing among regimes.

Convention, 53 VA. J. INT'L. L. 1 (2012).

3. Bribery Act, 2010, c. 23, §2 (Eng.). For the plea agreement between Siemens and the U.S. Department of Justice, see Plea Agreement, No. 08-367 (RJL) (D.D.C. Dec. 15, 2008) *available at* http://tinyurl.com/asddqg9.

4. U.S. states generally follow a rule that recognizes the law of the state of incorporation as determining which corporate regime applies. Because changing the state of incorporation is relatively inexpensive, it is easy for states to compete with regulatory packages. In contrast, competition is costlier in those countries that link the choice of law to a firm's "real seat," because moving real activities is more expensive. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

The classic model of regulatory competition has several parts. First, in the absence of externalities, regulatory competition is presumptively desirable. It allows experimentation, thereby encouraging innovation and generating information that others can exploit. Where regulated persons enjoy exit options, competition also can induce states to balance regulation so as to optimize outcomes.[5] The model developed by Tiebout to account for property taxation competition among localities describes this dynamic.[6]

Alternatively, externalities and political economy factors can produce negative welfare effects in regulatory competition. First, states may export negative externalities. A country that hosts producers of toxic goods (e.g., dangerous consumer products or securities that mislead investors) may not try to suppress the risk of harm if the products are destined for the export market. Other states then may face pressure to lower their regulatory standards to keep their local producers from moving to the risk-indifferent jurisdiction. This dynamic commonly is called a "race to the bottom."[7]

Second, and resulting from the same fundamental analysis, is the concept that states may not supply a sufficient level of regulation if regulation produces positive externalities. By definition, the regulating state lacks the capacity to capture the benefits of such externalities and thus would not have the right incentive to produce the optimal level of regulation. This is a variation on the general point about the underproduction of public goods, that is, goods that are non-excludable and non-rivalrous. At the domestic level, state production is seen as a possible response to this difficulty, because governments may respond to different incentives than private actors. But for global public goods, the problem persists. There is little incentive to undertake costly actions that only pay off globally. Carbon emissions policy offers an excellent example: the benefits from reduced emissions are shared globally, rather than concentrated in the regulating state. All states thus have an incentive to free ride on the efforts of others, and underproduction of emission

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5. *See* ALFRED O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

6. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–22 (1956). For an extension of this theory to international relations, see generally Dennis C. Mueller, *Constitutional Constraints on Governments in a Global Economy*, 9 CONST. POL. ECON. 171 (1998).

7. *See* ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 664–66 (1974). The modern critique of this argument in the context where it originated, namely the market for corporate charters, can be found in RALPH K. WINTER, JR., GOVERNMENT AND THE CORPORATION (1978); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 847–50 (1993). For the continuation of the debate, see, e.g., Lucian A. Bebchuk & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549, 1558–59 (2010); Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 686 (2009).

controls is the predicted outcome in the absence of strong global cooperation.

Third, producers may enjoy a disproportionate influence over the political process as compared to consumers. This leads to regulation reflecting the producers' preferences, and thus, generating too few benefits and too many costs for consumers. The field of public choice economics has developed rich theoretical insights, bolstered by considerable empirical confirmation, into the conditions under which concentrated interest groups can wield disproportionate influence over democratic decision making.[8] Once a group achieves a friendly outcome in one jurisdiction, competition among states might drive the international regulatory norm toward standards that sacrifice global welfare for the benefit of concentrated interest groups. Thus, critics claim, Big Pharma, Big Media, and other powerful producers exploit regulatory competition to produce legal regimes that harm the general welfare.

The conventional policy response to undesirable regulatory competition is regulatory cooperation. Governments can coordinate their policies, either through express agreements or by creating multilateral institutions that supervise and guide those policies. An obvious analogy is the implied nondiscrimination commitment contained in the Commerce Clause of the United States Constitution. This multi-sovereign agreement delegates to an independent monitor (the federal judiciary) the authority to police state and local regulatory acts to suppress those that reduce national welfare.[9] At the international level, a host of multilateral regimes, including the World Trade Organization (WTO) system and various regional pacts, operate to similar effect (or at least purpose).[10] Alternatively, a single hegemon can regulate all transactions, if its power extends far enough.

In a world where both international regulatory cooperation and competition are possible, a normative analysis must weigh the relative costs and benefits of each strategy. On the one hand, coordination of regulatory regimes may succeed in addressing the externality problem. On the other hand, it also may raise the stakes of the political economy problem, as well as sacrificing the positive aspects of regulatory competition. Locating regulation in a single supranational or international venue may make it easier for concentrated interest groups to capture the

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8. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962). For more recent applications, see also DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

9. *See* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 568–70 (1983); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23, 23–24 (1983).

10. *See* J.H.H. WEILER, THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? (2000); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 530–41 (2000).

regulatory process.[11] Moreover, standardization of regulation makes it more difficult to carry out experiments that might reveal superior regulatory strategies.

In sum, the general theory of regulatory competition assesses multijurisdictional regulatory systems in terms of the negative and positive externalities generated by the regulated activity, the capacity of internationally managed regulatory programs to induce actors to internalize these externalities, the likelihood that internationally managed programs will remain insulated from capture by interest groups, and the need to encourage regulatory innovation through local experimentation. As the length of this list and the inherently empirical nature of the questions posed suggest, cases for and against international cooperation vary widely. There is no one-size-fits-all solution. Instead, one looks at a particular regulatory field to determine the marginal costs and benefits of greater or lesser cooperation.

II. THE CASE OF COMPETITION POLICY

Looking at competition over competition policy offers several payoffs. First, at the conceptual level, there is an interesting paradox: is the optimal level of competition in private markets different from the optimal level of competition among states to provide regulation? Second, the potential of competition policy to diminish global welfare seems well established. Competition policy easily can serve as a cover for protectionist, beggar-thy-neighbor regimes that suppress commerce and produce economic rents to entrenched interests. Third, competition policy has a significant history, which provides evidence about how regulatory competition plays out in practice. The United States has had a national competition policy, in the form of its antitrust laws, for more than a century. Central to the European Community project over the last fifty years has been the gradual substitution of a Community competition policy for national protection and cartelization. The interaction of these two regimes illuminates how regulatory competition can work.

In theory, competition policy is essential to the proper working of private markets. It addresses a pervasive problem in markets, namely the incentives producers have to collude in the withholding of goods from the market to drive up prices and collect monopoly rents.[12] But the combination of national regulation and global markets complicates matters. First, states that mostly export their products have no reason to

11. Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 697–99 (1996/97).

12. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 13–19 (1970).

concern themselves with the harm to consumers caused by withholding goods from the market and may seek to please local producers who pursue foreign monopoly rents. Such states might even put their power behind the creation and management of cartels, as in the case of the Organization of Petroleum Exporting Countries. Second, states that have no local producers would have no reason to tolerate cooperation among producers that generates net efficiencies. They instead might invoke competition policy to frustrate the development of industries that benefit from network effects or from economies of scale in production. Knowledge-based industries, including data processing, biotechnology, and pharmaceuticals, might be particularly susceptible to the hostility of states that are indifferent to producer surplus.[13]

National champions pose a particular problem for competition policy. On the one hand, modern trade theory indicates that markets with economies of scale in production or network effects are increasingly important. Accordingly, states rationally should adopt policies that encourage the international success of national champions in these industries.[14] On the other hand, there exists no global consensus about the optimal market structure of such industries. As a result, an array of competing, and to some extent, conflicting competition policies is available. Thus, states can pick the competition policy that best accommodates their national champions and disadvantages their national champions' rivals. In other words, national competition policy, ungoverned by any kind of international cooperation in policy coordination, can become an instrument of wasteful protectionism in exactly those industries the contemporary world depends on for economic growth and prosperity.[15]

To complicate matters further, powerful states can and do extend their competition regimes beyond their borders by linking compliance to access to their markets.[16] This approach leads to regulatory overlap and makes it

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13. *See* Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 183–84 (2005).

14. *See generally* STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (Paul R. Krugman ed., 1986); ELHANAN HELPMAN & PAUL R. KRUGMAN, MARKET STRUCTURE AND FOREIGN TRADE: INCREASING RETURNS, IMPERFECT COMPETITION, AND THE INTERNATIONAL ECONOMY (1985); Paul R. Krugman, *Is Free Trade Passé?*, 1 J. ECON. PERSP. 131, 135 (1987); Paul R. Krugman, *Increasing Returns, Monopolistic Competition, and International Trade*, 9 J. INT'L ECON. 469 (1979).

15. Stephan, *supra* note 13, at 182–85.

16. The United States made the first move with the articulation of the "effects" test that justified antitrust regulation of offshore activities that had a direct, intentional, and substantial effect on the U.S. economy. *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). The Supreme Court later ratified this approach. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). The European Community, after decades of resistance, now follows essentially the same approach. *See In re* Wood Pulp Cartel: A. Ahlström Osakeytiö v. EC Comm'n, Joined Cases 89, 104, 116, 117 & 125-

more costly for firms to avoid particular regimes. Two potential adverse consequences are extension of a suboptimal regime over a broader range of actors and wasteful arms races among powerful states to impose conflicting regulatory requirements.[17]

Concerns about conflicting competition policies are hardly speculative. Over the years, several battles have erupted in the developed world. During the 1970s, a U.S. effort to investigate producer cooperation in the production and enrichment of uranium ore provoked fierce opposition in Australia, Canada, Europe, and the United Kingdom.[18] The United States saw a cartel of ore producers, while the rest of the world perceived improper U.S. interference with national industrial policy. The 1980s witnessed a conflict over the structure of transatlantic commercial aviation fought out through U.S. antitrust suits and European counter-litigation.[19] During the last two decades, U.S. and European regulators have fought over the desirability of mergers in knowledge-intensive industries such as defense and information technology. The European Commission has blocked mergers that U.S. regulators view as promoting production efficiencies, leading to suspicions that protection of local producers, rather than consumer welfare, motivates the Commission's approach.[20]

Many in the scholarly community, reviewing these events, have raised an alarm about the risks of uncoordinated competition policy. They call for international cooperation over competition regulation, both to bolster international enforcement in areas where a policy consensus exists and to reduce the impact of conflicts where consensus has eluded regulators.[21] In addition to the proposal for stand-alone cooperation, a few have argued for bringing competition policy within the scope of the international regime administered by the WTO. Linking competition policy to a range of other policies, the argument goes, opens up bargaining space by enabling logrolling across issue areas.[22]

129/85, [1988] E.C.R. 5193.

17. *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 906–09 (2002).

18. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547 (H.L.) (U.K.); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1143 (N.D. Ill. 1979); Gulf Oil Corp. v. Gulf Can., Ltd., [1980] 2 S.C.R. 39 (Can.); James R. Wilch, *GATT and the Half-Life of Uranium Industry Protection*, 10 NW. J. INT'L L. & BUS. 150, 161 (1989).

19. Laker Airways Ltd. v. Sabena, 731 F.2d 909, 916 (D.C. Cir. 1984); Midland Bank v. Laker Airways Ltd., [1986] 1 Q.B. 689.

20. Stephan, *supra* note 13, at 192.

21. *See, e.g.*, COOPERATION, COMITY, AND COMPETITION POLICY (Andrew T. Guzman ed. 2011); Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 8101 (2000); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1505 (1998); Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 CHI. J. INT'L L. 391, 402–03 (2002); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 500–01 (2000).

22. *See* Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933, 951 (2003); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J.

Not everyone endorses such proposals. First, perhaps the most obvious problem — the low hanging fruit of international competition policy, if you will — involves not policy coordination but rather capacity. Many states in the developing world simply lack the expertise and the material resources to attack core competition problems such as price-fixing cartels.[23] The United States organized the International Competition Network to address this problem by channeling technical assistance and related aid from wealthy states to states that, in practice, do not regulate competition at all.[24]

Putting technical assistance aside, it is not obvious that the potential benefits of greater policy coordination will exceed the potential costs. First, the economic sectors that matter most in terms of international flows of goods and services increasingly are those where economies of scale and network effects exist. As to these sectors, the principal dynamic is over who will dominate the market, because concentrated production is more efficient than the alternative. Cooperation among governments is not likely to identify the optimal producer, but rather those producers that enjoy the greatest support of powerful states. The result is more likely to be the entrenchment of incumbents, lost consumer surplus, and a reduced incentive to innovate.[25] International markets for civilian air transport and communications used to look like this, at least prior to liberalization and privatization (which began in commercial aviation in the 1980s and in telecommunications in the 1990s).[26]

Before running the risk of international collusion to entrench incumbents, the argument goes, one must determine whether the long-term risks of regulatory competition with respect to competition policy are all that great. Perhaps disguising protectionism as competition policy is its own punishment. It may be that states that mold competition rules to protect local producers and to punish successful foreign innovators not only deny their consumers an optimal range of goods and services at an efficiently low price, but also discourage investment and innovation in

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INT'L L. 911, 912 (2003).

23. *See* Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT — CONTINUITY AND CHANGE 533, 541–43 (David L. Sloss et al. eds., 2011).

24. For the organization's website, see INTERNATIONAL COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/ (last visited Oct. 17, 2012); *see also* Ian G. John & Joshua B. Gray, *The International Competition Network: A Decennial Retrospective*, 26 ANTITRUST, Spring 2012, at 54.

25. Paul B. Stephan, *The Problem with Cooperation*, *in* COOPERATION, COMITY, AND COMPETITION POLICY 217, 220–21 (Andrew T. Guzman ed., 2011).

26. *Id.* at 223–24.

their domestic markets. Over the long run, such trends may undermine, and ultimately may kill off, such policies.[27]

Whatever the validity of these arguments, the status quo in international competition policy is definitely one of competition, not coordination. The international agreements governing cooperation between the United States and other developed countries envision shared investigative resources but impose no effective constraints on choices of substantive competition policy.[28] Neither talking shops such as the OECD, nor technical assistance projects such as the International Competition Network, constrain states from tailoring competition regimes to meet national interests rather than global welfare.[29] The proposal to link competition regulation to trade, first embraced as part of the Doha Round in 2001, was withdrawn in 2004.[30]

In sum, a substantial but by no means conclusive case exists for international efforts to supervise and limit national competition policy. That we see no such supervision might mean that the affirmative case is weaker than many assert, but it also might indicate that special interest obstructionism and a failure of political will have blocked the adoption of desirable reforms. Still, one fairly can ask how the argument for coordination of anticorruption policy compares to that for regulating competition rules. If uncoordinated anticorruption regulation is less problematic than competition regulation, and if uncoordinated competition regulation is tolerable in today's world, then perhaps international efforts to police anticorruption rules should receive a low priority.

III. COMPETITION OVER ANTICORRUPTION POLICY

The first puzzle posed by international anticorruption regulation is the expenditure of resources by states to deter the corruption of foreign officials. In a world of selfish states, why should anyone care whether foreign governments disserve their people? Moreover, if foreign officials face no domestic reprisals for converting public goods into private benefits, why shouldn't states allow their nationals to compete for business in corrupt states on the same basis as everyone else? In other words, why don't we see a race to the bottom in which states that export bribes (i.e., whose subjects attempt to corrupt foreign officials) compete against each other by relaxing their anticorruption regulation?

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27. Stephan, *supra* note 13, at 215–17.

28. *See id.* at 205.

29. *Id.*

30. *See* General Council Decision, *Doha Work Program — Decision Adopted by the General Council on 1 August 2004*, WT/L/579 (Aug. 2, 2004), at ¶ 1(g), *available at* http://tinyurl.com/a6kzv9l.

As the opening of this paper points out, what we observe is the opposite. We have shifted from a world where no country regulated international bribery (before 1977) to one where only one powerful state acted (1977–98), to today's environment, where most states have enacted anticorruption laws and several powerful states seem to take the problem seriously.[31] Either states are not acting rationally, or something more is going on.

One possibility is what might be called the "Mad Men" story, namely that public pronouncements by canny transnational norm entrepreneurs have shifted public preferences and produced a widespread demand for anticorruption measures.[32] The great historical precedent is William Wilberforce, the British opinion-maker of the late eighteenth and early nineteenth century who led the crusade to abolish the slave trade. Mahatma Gandhi may be seen as a modern counterpart, inasmuch as he convinced British nationals that colonialism was a bad thing. Similarly, groups such as Transparency International, a Berlin-based non-governmental organization (NGO), receive credit for shifting public preferences in the developed world away from tolerance of the corruption of developing-country officials.[33]

There doubtlessly is something to this account. At the end of the day, however, one does not have to rely on an epistemological, and therefore non-falsifiable, explanation for the emergence of a multilateral anticorruption regime. One need not dismiss the conjecture that in all respects, states have acted rationally in pursuit of material rather than solely ethical interests. Perhaps the harm from international bribery does not fall only on the state whose officials abuse the public trust, and the benefits from its suppression do not go only to the bribe-taking state. Bribe exporting may hurt the bribe-payer's state significantly, independent of the injury to the state whose officials embrace corruption.

Consider first the supply side of bribery. Firms who allow their employees and agents to flout one body of law — the rules regulating bribes in the bribe-taking country — run the risk that these people will

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31. In addition to the OECD Convention, which has 39 parties, the 2003 UN Convention Against Corruption has 161 parties. Many states have joined both. One cannot assume that participation in a treaty regime necessarily translates into compliance. *Cf.* Oona Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935 (2002) (observing negative correlation between participation in human rights treaty regimes and human rights observance). But the British and German record, at a minimum, indicate increased levels of enforcement by states with substantial resources. *See* Spahn, *supra* note 2.

32. *See* VANCE PACKARD, THE HIDDEN PERSUADERS (2d. ed. 1981); William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT'L L. 839 (2012). For the general theory concerning the construction of preferences in international relations, see ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999).

33. *See* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. LEGAL STUD. S141, S160 (2002); Tarullo, *supra* note 2, at 678–79.

exploit their freedom from supervision in other ways harmful to the firm. As the U.S. experience illustrates, bribes require "black accounts" to fund payments meant to avoid detection, and the building up of these accounts usually involves false invoices and other manipulation of a firm's accounting rules.[34] Once a practice of phony accounting becomes entrenched, the firm's agents have every incentive to exploit the system for their own benefit.[35] The enterprise that wants to bribe, in other words, must accept that it has fewer tools for preventing its minions from stealing from it.

Corrupt hidden payments pose a threat not only to the firm that authorizes them, but also to the investors who back the firm. Even before adoption of the FCPA, U.S. securities regulators argued that a failure to disclose corrupt payments harmed investors by misleading them as to the basis of a firm's results.[36] Uncertainty about the accuracy of these results may discourage investors and thus raise the cost of capital. By giving the FCPA a home in the securities laws and the SEC a role in its enforcement, Congress ratified this theory.

Consider next the demand side of bribery. One problem with a corrupt quid-pro-quo between a firm and a government official is that the deal does not constitute a contract. If the official reneges, the bribe payer has no recourse. Many bribes represent waste due to the inability of bribe payers to distinguish officials who will stay bought from those who act opportunistically. Firms nonetheless might pay bribes out of concern that their competitors will. Drawing on the economics of information asymmetry and particularly the work of George Akerlof on the market for lemons, one might hypothesize that the risk of nonperformance might lead bribe payers generally to discount for the failure of the bribe.[37] This tendency might generate what the economists call a pooling equilibrium, with only flighty bribe takers accepting the discounted bribes and poor

34. SEC jurisdiction over corrupt payments rests ultimately on the legal obligation of issuers to maintain accurate books and records and a system of accounting controls. 15 U.S.C. § 78m(b)(2)(A),(B) (2012).

35. For example, Ousama Naaman, an intermediary used by a U.S. companies to pay bribes in connection with the Iraqi Oil for Food scandal, admitted to keeping $750,000 intended for bribes for his personal use. For the plea agreement, see Plea Agreement, United States v. Naaman, No. 08-246 (ESH) (D.D.C. June 25, 2010) *available at* http://tinyurl.com/axs8bec. This phenomenon is not limited to the private sector. Oliver L. North, a member of the National Security Council staff during the Reagan administration, was convicted, *inter alia*, of converting to personal use funds concealed from Congress and intended to support armed forces opposed to the Sandinista regime in Nicaragua. An appellate court ultimately overturned the conviction, but not on grounds related to guilt or innocence. *See* United States v. North, 910 F.2d 843 (D.C. Cir. 1990).

36. REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) (submitted to the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess.).

37. George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

performance of the illicit bargain becoming the norm. High performing officials (those who deliver on the promised favor) would refuse to participate because the market price would be too low.

There is no clear evidence to confirm this hypothesis, but the speculation is not totally improbable. If it were true, then penalizing bribe paying may end up saving firms money. The regulation would suppress wasteful bribes that do not generate the promised performance and would furthermore reduce the incentive for making these risky expenditures, which arises from competition among potential bribe payers. While any one state might lack the capacity to regulate all multinational firms, even reducing the number of competitors who might bribe would somewhat reduce the incentive for any one firm to make corrupt payments. The new equilibrium could be one where bribes are not tendered.

If these speculations have some validity, then suppressing bribery seems clearly desirable, even from the perspective of the bribe-exporting state. Discouraging bribery enhances the efficiency of capital markets, improves corporate governance, and reduces rents in the form of employee embezzlement of funds intended for corruption. These effects may explain why the unilateral U.S. initiative from 1977 to 1998 seems not to have harmed U.S. multinational firms, even though their European and Japanese competitors faced no comparable regulation.

Thus a rational case exists for anticorruption regulation even in the face of indifference by competing states. More than just altruism and a taste for ethical behavior may have motivated the United States during the twenty years that it acted alone in fighting international bribery, and more than shame and pressure from NGOs might explain why other states eventually joined this struggle. Put simply, if suppressing bribery is in the interest of bribe-exporting states, then they do not need linkage to other issues, concessions, or other inducements to regulate this conduct.

Once states add anticorruption rules to their regulatory toolbox, however, a new competition dynamic may emerge. While suppression of corruption may benefit the regulating state, that state still might be tempted to tilt the playing field in favor of its exporters, bribe-paying or not. Part II of this article observed how competition policy can be molded to harass foreign competitors of national champions. Can states similarly use anticorruption policy strategically to punish foreign firms that challenge their most influential businesses?

Observers of U.S. practice note that in recent years the largest fines imposed for FCPA violations have tended to fall on foreign firms.[38] This

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38. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1793–800 (2011). For a systematic analysis of the correlation between FCPA prosecutions and the characteristics of the state where the misconduct occurs and where the bribe payer is based, see Stephan J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* (N.Y. Univ. Law Sch. Pub.

fact, by itself, proves nothing. Foreign firms might be less accustomed to FCPA compliance than are U.S. firms, which have lived under this regime for many decades. The Justice Department may simply be going after low hanging fruit, and foreign firms might disproportionately fall in that category because of their inexperience with anticorruption regulation. Still, the fact does raise suspicion of a possible protectionist bias in U.S. practice.

Against this hint of protectionism, however, a powerful array of arguments can be made. First, compared to other regulatory regimes, it is more difficult to use anticorruption as a form of disguised protectionism. In many fields — environmental protection, labor standards, food safety, or competition policy — there is no international consensus among policymakers or experts as to the optimal rule. To reprise Part II of this article, competition policy has no clear answer to the problem posed by industries that have positive returns to scale. A state might choose to tolerate the resulting industrial concentration by employing a lax approach to what counts as an abuse of monopoly power, or instead, taking the opposite tack. Protectionism might motivate the choice, but one cannot impeach on its face either competition policy.

With bribery, by contrast, there is far less range for reasonable disagreement over what counts as improper corruption. In essence, two elements must be present: (1) a proposal to exercise discretionary governmental authority in favor of the bribe payer; and (2) concealment of some reward. One can imagine boundary issues, such as the line between government and private authority or between discretionary and obligatory governmental actions. There may be ambiguities of proof concerning the existence of a proposal or of concealment. But, compared to the deep indeterminacy of other regulatory regimes, these issues seem fairly straightforward.

Because anticorruption regulation, compared to other fields, is fairly transparent, abuse of regulation for other purposes is relatively easy to detect. A state accused of such abuse might face informal sanctions, including reputational losses and retaliation.[39] In theory, using anticorruption law to obtain a trade advantage might constitute a nontariff barrier to trade and thus violate international trade law.[40] If so, an

Law & Legal Theory Working Paper Grp., Paper No. 12-15, 2012), *available at* http://ssrn.com/abstract=2116487.

39. *See* ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN — CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 88–97 (2006).

40. General Agreement on Tariffs and Trade 1994 art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187; Agreement on Technical Barriers to Trade art 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1381.

aggrieved state might invoke the WTO's dispute settlement process and obtain the right to retaliation through trade sanctions.[41]

Transparency aside, the presence of multiple regulators lowers the risk that states can engage in selective prosecution of bribery to advance protectionist goals. No state has an obligation to defer to the home-state regulator, and prosecution of foreign firms for corrupt payments is fairly common. Even if the home state wishes to give its national champion a pass, other states still can pursue the matter. The BAE litigation, where U.S. prosecutors pounced after the Blair government intervened to protect supposed national interests, is a case in point.[42]

To be sure, no anticorruption regime relies on universal jurisdiction. Prosecutors cannot go after bribe payers unless they have some nexus to their jurisdiction, based on either nationality (including, in the case of corporations, listing on a local exchange) or conduct.[43] But the contemporary globalized business environment makes it easier for prosecutors to meet this requirement. Creative use of accessory theories, including agency and conspiracy, further expand jurisdiction.[44] As a result, the large, powerful firms that home states might wish to treat leniently are the most likely to be exposed to foreign regulatory risk.

In sum, the free pass that a home state might wish to give a national champion involved with corrupt payments might not be worth much if other states have the capacity to prosecute that conduct. At least a few anecdotes indicate that this capacity exists. In addition to the BAE case mentioned above, France initiated a bribery investigation into Halliburton during the Bush Administration, when the company's former Chairman and CEO served as Vice President. U.S. regulators then stepped in to address the matter.[45] As these incidents illustrate, it is plausible to surmise

41. *Cf.* Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Apr. 5, 2001) (applying Agreement on Technical Barriers to Trade to health and safety regulation).

42. See Plea Offer, United States v. BAE Systems plc., Case No. 1:10-cr-035-JDB (D.D.C. Mar. 1, 2010), *available at* http://tinyurl.com/a9uwoll; Spahn, *supra* note 2, at 23–26.

43. In the case of the FCPA, the accused must be an issuer under the U.S. securities laws or persons affiliated with such an issuer, a U.S. concern or persons affiliated with such a person, or foreign persons engaging in substantial conduct on U.S. territory. If the accused is not an issuer organized under U.S. law or a U.S. national, the government also must prove use of an instrumentality of interstate commerce in furtherance of the crime. 15 U.S.C. §§ 78dd-1, et seq.

44. The high-water mark, so far, of extraterritorial enforcement of the FCPA involved Panalpina World Transport (Holding) Ltd., a Swiss company with a U.S. subsidiary. In 2010, Panalpina Holding entered into a deferred prosecution agreement with the Department of Justice based on a charge of conspiracy to violate the FCPA, even though none of its actions apparently satisfied the jurisdictional requirements of the latter statute. For the deferred prosecution agreement, see Deferred Prosecution Agreement, United States v. Panalpina World Transport (Holding) Ltd., No. 10-769 (S.D.Tex Nov. 4, 2010) *available at* http://tinyurl.com/bkefgsb.

45. The French investigation ultimately led to U.S. administrative charges against Halliburton as well as criminal charges against others involved in the scheme. For a press account of the link

that home governments take potential foreign actions into account when deciding how to treat a powerful or prominent domestic concern. On balance, the dynamic of regulatory competition seems capable of deterring any effort to recruit anticorruption regimes to promote protectionism.

A final concern is that competition among anticorruption regulators might lead to an oversupply of regulation. Overlapping enforcement might result in the piling on of regulatory penalties. Not only might companies face excessive burdens relative to the cost of the bribes paid by its employees or agents, but companies might also become excessively risk-averse when doing business in countries where bribery is widespread. The result might be less development in countries with weak institutions, rather than reform; as well as lost opportunities to undertake valuable and socially desirable projects by developed-world firms.[46]

A variant of this argument asserts that firms subject to effective anticorruption regulation are only a subset of those that might do business in bribery-prone states. Firms that do not face regulation in their home country and are not subject to the jurisdiction of regulating states will remain free to bribe. Thus, vigorous anticorruption enforcement, so the argument goes, will drive out U.S. and other developed-world firms, leaving developing world markets open to Chinese and Indian actors, among others. According to this scenario, corruption will not go down, but developing countries will have a smaller array of business partners and presumably will pay more for lower quality transactions.[47]

The risk of overly aggressive prosecution will always be with us. Prosecutors do not internalize all of the costs of the actions they take, and can do too much as well as too little. Perhaps competition among states

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between the French actions and the U.S. prosecution, see *Halliburton/KBR*, The TRACE Compendium, http://tinyurl.com/a2u8pv9 (last visited Aug. 27, 2012).

46. *Cf.* PAUL B. STEPHAN III, DON WALLACE, JR. & JULIE A. ROIN, INTERNATIONAL BUSINESS AND ECONOMICS — LAW AND POLICY 502 (1st ed. 1993).

> What would be the impact of such higher costs on the behavior of U.S. firms? Some would hold off seeking such contracts, decreasing the supply of contractors and presumably raising the cost of procurement to foreign governments. Other U.S. firms would continue to seek foreign government business but would charge more to offset the costs of ensuring compliance with the FCPA. In either case foreign governments may end up paying more for what they buy.

Id. With two decades of hindsight, I think the quoted analysis is correct, but only under certain assumptions that may not be realistic, as I indicate in text.

47. *See* Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354 (2011); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA L. REV. 351, 371–74 (2010). For a more general concern that the label "anticorruption" might be deployed to mask a series of more controversial developmental strategies, see David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455 (1999). Professor Kennedy's views, like mine, have evolved over time. *See* DAVID KENNEDY & DAN DANIELSON, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT (Sept. 2011), *available at* http://tinyurl.com/ber375g (last viewed Aug. 27, 2012).

will drive firms away from desirable transactions, and in particular might leave developing-world governments saddled with bribe-paying counterparties from states that flout anticorruption rules. There are good reasons, however, to doubt whether this tendency will predominate.

First, and most importantly, firms that generate jobs, taxes, and economic growth enjoy a certain amount of political clout that restrains prosecutors from excess. Illustrative is the Siemens prosecution, where all the prosecutors involved collaborated in not triggering the European Community's debarment sanction.[48] The English courts, when managing multinational bribery prosecutions, have discussed the imperative of not destroying companies.[49] More generally, the long record of prosecutorial inaction outside the United States puts the burden on critics to explain why we should anticipate a sudden switch to over-prosecution.

Moreover, unlike other regulatory regimes such as competition law, securities law, and human rights enforcement, anticorruption enforcement remains largely the monopoly of government officials. Although the United States opened a narrow door to private civil litigation two decades ago, very few suits have resulted.[50] As a result, politically accountable political actors, rather than plaintiffs' attorneys with other motives, determine the level of enforcement.[51]

Second, the assumption that firms from countries such as China and India can both easily step into the shoes of developed-world companies subject to anticorruption regulation, while themselves remaining free of such regulation, seems unrealistic. Firms that operate internationally increasingly encounter the developed world, whether seeking access to its capital markets or selling it their products. Along with the capacity to substitute for developed-world firms comes a greater likelihood of exposure to developed-world anticorruption regulation.

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48. Samuel Rubenfeld, *Siemens Pivots to Thrive in US After Bribery Settlement*, WALL ST. J. BLOG — CORRUPTION CURRENTS (Dec. 15, 2011, 6:23 PM), http://tinyurl.com/ak88m4b (last visited Aug. 27, 2012).

49. R v. Innospec Ltd., [2010] WL 3580845 (Mar. 26, 2010), *available at* http://tinyurl.com/aw6k4fs.

50. Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, W.S. Kirkpatrick & Co. v. W.S. Kirkpatrick & Co., 493 U.S. 400 (1990); Raymond J. Dowd, Note, *Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT'L L.J. 946, 962–70 (1990). The plaintiff in *Environmental Tectonics* was a U.S. competitor of the bribe payer who could claim injury due to the lost business opportunity. Competitor standing seems rare in practice, and the courts have not yet recognized standing for nationals of the state where bribes have been paid. Moreover, recent decisions limiting the extraterritorial scope of civil RICO suits may bar such litigation entirely. *See* Norex Petroleum Ltd. v. Access Industries, Inc., 631 F.3d 29 (2d Cir. 2010) (limiting civil RICO suits to injuries occurring in the United States).

51. *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001).

Third, the model that posits no changes in the level of corruption in countries that host foreign business rests on several unrealistic assumptions. First and most important, the model ignores the possibility that foreign governments might respond to price signals by clamping down on corruption and thereby increasing foreign competition for government contracts. Second, it ignores learning effects. Firms might learn how to manage corruption risk at a lower cost and thus compete more successfully for foreign government business. Third, developed-world governments might couple their anticorruption regulation with the provision of technical assistance and other inducements to developing-country governments in order to subsidize local anticorruption efforts. This could be done directly or under the auspices of international organizations, such as the World Bank or the IMF.[52]

In sum, the case against regulatory competition in anticorruption policy remains unproven. Competing regimes can correct one tendency that might otherwise exist, namely leniency toward national champions coupled with aggressive prosecution of their competitors. Additionally, a more general concern about excessive enforcement does not seem well founded. Conversely, competitive enforcement does have a reasonable prospect of both saving firms from bad bargains and reducing the incidence of corruption in the developing world.

CONCLUSION

At the end of the day, it appears that the current level of regulatory coordination of anticorruption policy, soft and precatory though it is, suffices and may even be optimal. Prosecutors from the 39 states that have joined the OECD Convention meet regularly in Paris to discuss their work and hear comments and criticism from their peers. They also must submit to periodic reviews by inspectors selected by the OECD. Less formally, they know with whom to collaborate on investigations and to contact when problems emerge. Coordination under the UN Convention, to which 161 states are parties, is not as well developed, but some reporting and review does occur. Finally, the WTO serves as a limited last-resort constraint on the abuse of anticorruption policy as a barrier to international trade. In sum, reporting and scrutiny exists, even though very little in the way of legal constraints binds national regulators.

Right now there does not exist a strong case for deeper coordination to deter under-enforcement. First, the existence of overlapping regulatory

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52. The World Bank in recent years has assigned a high priority to anticorruption regulation. For discussion of this, see Anticorruption, The World Bank, http://tinyurl.com/amdegv9 (last visited Aug. 27, 2012). As for the IMF's similar commitment, see Factsheet — The IMF and Good Governance, International Monetary Fund (Sept. 10, 2012), http://tinyurl.com/3984bcp.

jurisdiction means that the state with the most intrusive regime will have its rules apply in all instances of overlap. States that impose weak enforcement thus only surrender their jurisdiction to the more aggressive state. In particular, states that want to give national champions a pass must confront the possibility that other states will step in. Deeper coordination is not likely to strengthen this dynamic, and possibly may weaken it by providing a basis for greater negative comity.

As for over-enforcement, the risk exists, but on the present evidence one cannot say that there currently is a problem. Strong enforcement might lead countries with corrupt governments to obtain alternative sources of business rather than suppressing bribe-taking. It seems more likely, however, that these countries will respond to prosecutions of bribe payers in the developed world by themselves cracking down on their own officials. Coordination to cut back on enforcement would risk undermining this virtuous dynamic.