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The Foreign Corrupt Practices Act as a Threat to Global Harmony

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THE FOREIGN CORRUPT PRACTICES ACT AS A THREAT TO GLOBAL HARMONY

Steven R. Salbu*

I. INTRODUCTION	420
II. UNDERSTANDING THE BOUNDARIES OF BRIBERY AS A CULTURAL CONSTRUCT.....	422
A. <i>Reading the Host Country's Law</i>	426
B. <i>Interpreting the Nuances of Language of the Host Country's Law, Once Roughly Translated</i>	428
III. THE IMPRUDENCE OF MAKING SUBTLE MORALITY DISTINCTIONS EXTRATERRITORIALLY UNDER CONDITIONS OF CULTURAL HETEROGENEITY	430
IV. EXTRATERRITORIAL LEGISLATION VERSUS PERSUASION.....	433
V. AVOIDING ETHNOCENTRISM AND CONCOMITANT GLOBAL DISSENSION: SELLING DOMESTIC CONTROLS IN THE MARKETPLACE OF IDEAS	437
A. <i>Avoiding Legitimate Charges of Ethnocentrism</i>	437
B. <i>Avoiding Global Dissension</i>	440
1. Whether Multilateralization of the FCPA May Reduce Perceptions of U.S. Legal and Cultural Imperialism....	444
2. Whether Domestic Laws Are Capable of Addressing the Problem of Transnational Bribery	445
VI. CONCLUSION.....	447

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“In the past twenty-five years, the United States has had three major exports: rock music, blue jeans, and United States law. The first two have acquired an acceptance the last can never achieve.”¹

I. INTRODUCTION

Since 1977, the Foreign Corrupt Practices Act (FCPA) of the United States has prohibited and criminalized the payment of bribes by enumerated groups² to foreign officials.³ Although the particular legislation as originally passed was subjected to substantial criticism,⁴ Congress reaffirmed its faith in extraterritorial proscription of bribery by enacting revisions in 1988 that were intended to eliminate flaws, while maintaining the essential functions of the statute.⁵

Confidence in the FCPA's basic philosophy has been registered globally, in the form of post-Cold War initiatives toward multilateral adoption of comparable legislation.⁶ Two influential world organizations have voiced their specific support over the past few years. In 1996, member states of the Organization of American States (OAS) resolved to enact and implement their own versions of the original U.S. prototype.⁷ In the summer of 1998, twenty-nine members of the Organization for Economic Cooperation and Development (OECD) and five additional countries committed themselves to the ratification⁸ of the Convention on Combating Bribery of Foreign Public Officials in Inter-

1. V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980).

2. The groups enumerated include issuers of securities; domestic concerns; and the officers, directors, employees, agents, and stockholders of issuers of securities and domestic concerns. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-2 (1982)).

3. *Id.*

4. See, e.g., Irwin Arieff, *U.S. Business Groups Back Move to Ease Overseas Bribery Law*, REUTERS N. EUR. SERV., Apr. 20, 1986.

5. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1107, 1415-25 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-2 (1994)).

6. Hotchkiss attributes this movement to four post-Cold War phenomena: the opening of socialist societies; the flourishing of corruption in the wake of post-socialist collapse of economic and social structures; the opening of markets; and the attention of policy makers, investors, and citizens on negative effects of corruption. Carolyn Hotchkiss, *Let Sleeping Dogs Stir: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y & MKTG 108, 109 (1998).

7. See Remarks by Secretary of State Warren Christopher at the Council of the Americas Conference, State Dep't Briefing, FED. NEWS SERV., May 6, 1996.

8. Nancy Zucker Boswell, *Crackdown on Corruption*, LEGAL TIMES, Aug. 24, 1998, at S42.

national Business Transactions (Convention, or Convention on Combating Bribery).⁹

Pressure continues to mount for countries to support and adopt extraterritorial antibribery legislation akin to the FCPA.¹⁰ This trend may reflect deference to Western pressures,¹¹ particularly U.S. efforts to level the global playing field by encouraging other nations to adopt a tougher stance on corruption.¹² It may also represent a growing and heartening global consensus that corruption is dysfunctional and undesirable, and therefore in need of stronger controls.¹³ In a world that remains richly heterogeneous, is this growing accord regarding a general principle of transactional rectitude enough to justify the adoption of extraterritorial restraints?

In two previous articles, I have questioned both the wisdom of the Foreign Corrupt Practices Act in particular, and the logic behind extraterritorial criminalization of bribery in general. In the first article, I suggested that even the revised FCPA remains so fundamentally flawed that it causes more harm than it eliminates.¹⁴ In a follow-up

9. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1 (1997).

10. See Gilles Trequesser, *Inter-American Convention Signed Against Corruption*, REUTERS EUR. BUS. REP., Mar. 29, 1996 (discussing international multilateral antibribery efforts).

11. This scenario is certainly plausible, given the United States' openly aggressive efforts to foster adoption of FCPA-style legislation throughout the world. See *U.S. to Seek Foreign Acceptance of Anti-Corruption Laws, Practices*, 12 INT'L TRADE REP. (BNA) 714, 714 (Apr. 26, 1995) (referring to statement of U.S. Trade Representative Charlene Barshefsky).

12. Presently, U.S. commentators frequently bemoan the business they lose to companies from other countries that pay bribes prohibited for U.S. companies by the FCPA. See, e.g., Mary Mosquera, *Foreign Telecom Markets Tough to Penetrate*, TECHWEB NEWS, Apr. 1, 1998 ("The U.S. has more rigorous [antibribery] standards, which puts U.S. companies at a disadvantage. Our goods can't get through customs, but another distributor[s] can."). This common complaint is one of the most compelling motivators of U.S. efforts to sell FCPA-style legislation throughout the world.

At this stage in the movement for multilateral adoption of FCPA-style legislation, some OECD countries are expressing concern that they will simply be joining the U.S. on the disadvantaged side of the unlevel playing field. Since the OECD initiative still leaves most nations outside the multilateralization movement, some citizen member states of OECD, such as Australia, believe they will lose global competitive advantage. See *Costello Rejects Business Fears on Bribery Bill*, AAP NEWSFEED, Mar. 31, 1998 (noting belief of spokesperson for the Australian Chamber of Commerce and Industry that the severity of the FCPA-style penalties will disadvantage Australian firms).

13. See Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PACIFIC RIM LAW & POL'Y J. 549, 551 (1997) (suggesting recent antibribery efforts of organizations like OECD and OAS "represent a growing international consensus that illicit payments should be eliminated from transnational business").

14. Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997) [hereinafter *Bribery in the Global Market*].

piece, I argued that global heterogeneity at the end of this millennium remains so compelling a reality that even the most perfectly formulated extraterritorial legislation would be crude and unwieldy.¹⁵ The latter article observes that the "global village" is a work in its earliest stages, still subject to cultural pluralism in the form of a wide variety of local values, norms, and beliefs.¹⁶ This heterogeneity taints efforts to proscribe acts of bribery abroad.¹⁷

Focusing primarily on the pragmatic and moral perils of cultural imperialism, I also alluded very briefly to a "political peril" that arises from the FCPA.¹⁸ This peril consists of the added risk of cross-national hostility that is attributable to officious and overreaching legislation across national borders.¹⁹ This article will examine the political hazard in greater detail, explaining why the proliferation of FCPA-style legislation unjustifiably increases the threat to global harmony.

Section II examines why today's distinctions between acceptable behavior and bribery remain a cultural construct. Section III suggests it is imprudent to make subtle moral distinctions extraterritorially under conditions of cultural heterogeneity. Section IV compares two potential ways to address global bribery: encouraging the adoption of strong domestic anti-bribery legislation and enforcement through persuasion, and imposing transnational rule via extraterritorial legislative fiat. Section V discusses the ways in which the "persuasion for domestic enforcement" approach can avert the threat of global dissension inherent in the "extraterritorial legislation" approach. Section VI contains brief concluding remarks.

II. UNDERSTANDING THE BOUNDARIES OF BRIBERY AS A CULTURAL CONSTRUCT

Although some disagree,²⁰ I concede the contention of FCPA supporters that a generic disdain for corruption²¹ is a universal value,

15. Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 224, 227 (1999) [hereinafter *Extraterritorial Restriction of Bribery*].

16. *Id.* at 230.

17. *Id.* at 232.

18. *Id.* at 227, 254.

19. *Id.*

20. See, e.g., Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417, 447 (1985) (referring to "cultures in which there are no norms against bribery").

21. The word "generic" to qualify a universal disdain for corruption is intended to recognize the obvious fact that some persons in any culture will not have a disdain for corruption (otherwise, corruption would not exist), therefore a society's disdain is a prevalent value rather than a ubiquitous one. Despite the existence of some persons in any society

transcending national borders.²² Certainly, domestic legislative prohibitions of some form of bribery²³ are enacted by many nations across the globe.²⁴ Even where corruption is a reality firmly ingrained in the social fabric,²⁵ widespread participation does not denote approval. Those who are burdened by endemic corruption may have little choice but to participate in a firmly entrenched system of dealings.²⁶ In this setting, popular resentment accompanies a weary acknowledgment of, and engagement with, the corrupt system.²⁷

Citing this universal condemnation of bribery, some commentators suggest that the cultural construction of bribery is fallacious.²⁸ I would refine this sentiment, and suggest that while all cultures eschew corruption, culture remains a critical differentiator as opinions vary on what conduct falls inside and outside of that label.²⁹ The problem, then, is not

who will not hold bribery in disdain, my contention here is that in all cultures, the dominant value eschews bribery.

22. See Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 321-22 (1997) (noting condemnation of corruption among a wide array of religions and philosophies); Veronica Ann Deberardine, Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U. L. REV. 203, 222 n.123 (1984) (noting congressional focus "on a worldwide disdain for corporate bribery").

23. For discussion of the different ways in which different countries and cultures can and do circumscribe corruption and bribery, see Salbu, *Extraterritorial Restriction of Bribery*, *supra* note 15.

24. See A. Timothy Martin, *Corruption and Improper Payments: Global Trends and Applicable Laws*, 36 ALBERTA L. REV. 416, 440-45 (1998) (reviewing laws against improper payments in Yemen, Libya, Nigeria, Kazakistan, Colombia, Venezuela, Indonesia and Vietnam).

25. Bribery, whether explicitly so designated or in the more ambiguous form of gifts and "consulting fees," is commonplace in some parts of the world. Catherine Reagor, *Preparation Can Help Companies Avoid Most Pitfalls of Exporting: First Step is to Learn Different Ways, Culture of Targeted Countries*, ARIZ. REPUB., May 17, 1998, at A14.

26. See John Hogarth, *Developments in Criminal Law and Criminal Justice: Bribery of Officials in Pursuit of Corporate Aims*, 6 CRIM. L.F. 557, 562 (1995) (noting that sometimes "need" rather than "greed" is the motivating factor in the payment of bribes where corruption is entrenched).

27. For many years, international students in my business ethics classes have made presentations about ethics in their countries. Consistently, when students come from countries where they view corruption and bribery as fixed or engrained in the culture, presentations take on a dual personality. The students discuss the woeful conditions with open and harsh criticism, and they also discuss the realities of surviving in the system. They often tell their peers how to get along, but none defends the corrupt system. This evidence, while informal and anecdotal, accrues over time to paint a clear picture. The masses may grudgingly participate in corrupt systems, but this participation should not be confused with approval.

28. See, e.g., Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 429 n.242 (1997) (noting a "false nexus between bribery and culture").

29. Leiken observes that while corruption has long been rejected, "its social and moral content has evolved." Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOR-

getting the world to agree on whether corruption is morally reprehensible. The immediate problem is that the world is not ready to agree about what comprises corruption.³⁰

In other words, while every culture disapproves of certain "reciprocal exchanges with officials,"³¹ countries in a highly pluralistic world are unlikely to agree about which reciprocities are acceptable and which are not. This problem is compounded by the fact that what constitutes a reciprocity is itself complex.³² For example, does reciprocity require an immediate exchange, or does corruption exist simply because the potential for an exchange exists? Is it corrupt for a private party to give a gift to another with no imminent expectation of any return, when the gift could plant seeds of unforeseeable reciprocal favor in the future?

Moreover, condemnation of certain behaviors may vary in degree—some cultures may not censure bribery to the extent that others do.³³ The idealized notion of a "global village" has yet to become a reality.³⁴ At the dawn of the twenty-first century, the world is still made up of an array of communities that embrace a widely divergent range of protocols, norms, values and beliefs.³⁵

Defenders of extraterritorial antibribery legislation suggest that the FCPA respects and accommodates cultural diversity, primarily through an affirmative defense that exists in the legislation: the legality of a payment in the country where it is made. Nichols, for example, parries the cultural imperialism charge against the FCPA by observing that "if a specific act is not illegal in the country in which it occurs, it cannot be prosecuted under a law modeled on the Foreign Corrupt Practices

EIGN POL'Y, Winter 1996, 55, 60. Disdain for corruption is easy; defining what qualifies as corruption along a continuum of activities is much harder.

30. See David A. Gantz, *The Foreign Corrupt Practices Act: Professional and Ethical Challenges for Lawyers*, 14 ARIZ. J. INT'L & COMP. L. 97, 102 n.28 (1997) (noting concern of the Philippines that governments respect the unique traditions and cultures of others in addressing corruption).

31. JOHN T. NOONAN, JR., BRIBES 692-93 (1984).

32. In this vein, Professor Howell identifies a number of different conceptualizations of corruption in regard to reciprocity, noting differences in the FCPA, World Bank, and other definitions of bribery. See Llewellyn D. Howell, *Corruption and Crisis in the Global Economy*, USA TODAY (Magazine), May 1998, at 37.

33. See Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model For the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1131 (1996) (positing situation where political mores of one country are less condemnatory of bribery and self-dealing than political mores of another).

34. See Salbu, *Extraterritorial Restriction of Bribery*, *supra* note 15, at 234.

35. See Daniel J.H. Greenwood, Review Essay, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559, 562 (1994). ("In this post-Babel, post-Temple, and pre-Messianic world, we speak different languages and follow different values.").

Act.”³⁶ Were this statement true under all circumstances, the cultural imperialism critique would be weakened.³⁷

The affirmative defense of legality is constrained by statute, such that many payments that might be lawful in a host country can fall outside the defense. Specifically, the affirmative defense permits only those payments and gifts that are “lawful under the written laws and regulations” of the host country.³⁸ The adjective “written” limits the affirmative defense solely to those lawful acts in the host country that are expressly deemed permissible via statute or regulation.³⁹

Ironically, the culture gap between payments banned under the FCPA and those considered acceptable in another country is very unlikely to be manifested in written laws. Rather, the permission of certain practices in other countries will most likely be achieved by omission—i.e., by leaving the acceptable behaviors out of the written enumeration of prohibited acts. The legality defense is singularly ill-equipped to accommodate cultural differences. Accordingly, FCPA-style legislation remains susceptible to charges of exporting morality.⁴⁰

In light of these arguments, one might suggest that the FCPA’s style of extraterritorial prohibition can easily be fixed to avert charges of moral imperialism. The legality affirmative defense could simply be expanded to include activities that are legal in a host country by default, in addition to those made legal by express written stipulation.⁴¹ This solution would open the affirmative defense up to include a more realistic set of locally permitted acts within its exemption. The FCPA would have to defer to local rules regarding bribery in all instances, and not just in the very unlikely cases where a practice is authorized by a written law.

36. Nichols, *supra* note 22, at 365.

37. While the cultural imperialism critique would be weakened by a truly comprehensive “domestic legality” defense, it would not be eliminated. When the U.S. assesses activities that occur in other nations under the justification that the actions are illegal under those nations’ domestic laws, it presumes to interpret (1) the activity, and (2) the foreign domestic law. These can be intrusive acts, particularly given that local institutions have been established to handle the problem internally. For further discussion, see *infra* notes 68–71 and accompanying text.

38. 15 U.S.C. §§ 78dd-1(c), 78dd-2(c) (1994).

39. See H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 7 n.19 (1998) (explaining the received interpretation of the legality defense).

40. See Lisa Harriman Randall, Note, *Multilateralization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657, 673 (1997) (“Some observers maintain that to require American businesses to adhere to the FCPA in their overseas operation is to ‘export our morality.’”).

41. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 288 (1999) [hereinafter *Regulating Transnational Bribery*].

Although this solution may have theoretical appeal, it is unlikely to eliminate or even significantly reduce moral imperialism in the real world. Consider what would happen under the FCPA if the legality affirmative defense were purportedly strengthened by eliminating the written law requirement. When pursuing cases under the FCPA, the United States would be required to read the bribery laws that exist in the host country and determine what specific practices those laws permit, either in express writing or by omission. Understanding a nation's laws, even with the benefit of social, legal and cultural familiarity, is a sufficiently daunting task.⁴² Interpreting what conduct is prohibited and what is permitted in hundreds of other legal systems will be immeasurably more difficult.⁴³ Unfortunately, this process is burdened with the substantial risk of overstepping appropriate boundaries.

When U.S. prosecutors try to determine whether a behavior is exempt under the legality defense, they must at very least read the host country's law, and interpret the nuances of language, once roughly translated. Each of these steps provides an opportunity to impose U.S. values on another land.

A. Reading the Host Country's Law

Even if the legality defense were to include practices that are lawful by omission (i.e., acts not explicitly proscribed), law enforcement officials still would be required to read the written laws of other countries. They would need to understand the scope of an express legislative proscription to determine exactly what acts are lawful in the host country. Reading a host country's law is often a difficult task⁴⁴ that raises "the formidable challenge of linguistic and cultural translation."⁴⁵ This process is fraught with occasions for both the exercise of judgment and the commission of error.⁴⁶

42. For example, commentators observe that U.S. companies have a difficult time interpreting the FCPA, a U.S. statute. See, e.g., Randall, *supra* note 40, at 672 (observing the difficulties businesses face in interpreting provisions of FCPA).

43. See Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984, 1993 n.57 (1984) ("[P]arties understand each other better, on the whole, than they understand each other's legal systems.") (quoting Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1438 (1963)).

44. See Peter W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. 47 (1986 Supp.) (noting the difficulties of legal translation).

45. See Francis H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923, 937 (1997).

46. For example, Britt notes a "varying quality" in the translations of foreign statutes. Robert R. Britt, *The Japanese Legal System and International Trade: Up-to-Date Sources of*

Consider the case in which a word in original language A can have any of three different meanings in language B. Choosing the translation that most accurately represents the host country's intent requires an intimacy with the country's culture and social systems, its legal system specifically, the region's history, the legislation's history, etc.⁴⁷ U.S. prosecutors, in their efforts to pursue violators aggressively, may either subjectively opt for the translation most favorable to their allegations, or objectively choose a translation option that fails to capture the host country's intent. Whether authorities charged with executing the extraterritorial law are overzealous or simply subject to normal human error, the very process of translation is unavoidably tainted with a potential for inaccuracy.⁴⁸ Of course, defense attorneys will be subject to the same dynamics, as will the U.S. judges who must ultimately apply the foreign laws. The result is a great likelihood of inaccurate translations and misunderstandings of other nations' laws.⁴⁹

These observations apply, albeit probably to a lesser degree, even when the host country and the country imposing extraterritorial legislation therein share a common language.⁵⁰ Two nations sharing the same language remain two separate countries; the contextual meaning of words, phrases and idioms have developed independently.⁵¹ For

Information in English, 82 LAW LIBR. J. 313, 317 (1990). See also Nancy J. Linck & John E. McGarry, *Patent Procurement and Enforcement in Japan—A Trade Barrier*, 27 GEO. WASH. J. INT'L L. & ECON. 411, 415 (1993–94) (noting the high frequency of translation errors from English to Japanese in the filing of patent applications in Japan).

47. See Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19, 26 (1996) ("In any language, individual words bear not only their primary meanings but also layers of nuance, slowly built up as a result of the historical context in which the word has been used in the culture.").

48. See Andrew N. Adler, *Translating and Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37, 45 (1997) (describing difficulties anglophone judges experience with statutory translations, and noting the "glaring translation errors" that occasionally occur in cases as a result).

49. One can argue that the adversary system in the U.S. will assist judges to apply accurate translations of foreign laws. Certainly, the job of prosecutors and defenders is to present any conflicting translations that best support their cases. Two problems remain, however: (1) How are judges to choose the better translation, assuming a fundamental unfamiliarity with the law, society, and culture of the host country?; and (2) Does judges' special, heightened reliance on advocates to present translations hinder accuracy and fairness in applying foreign laws? Arguably, the judges' pronounced dependency on attorneys' proffered explanations in this arena could magnify the effects of the advocates' talents, aptitudes, and preparation on case outcomes.

50. As Weyrauch observes, "[t]o the extent that language mirrors cultural expectations, distortions of meaning may occur within the same language." Walter O. Weyrauch, *Oral Legal Traditions of Gypsies and Some American Equivalents*, 45 AM. J. COMP. L. 407, 427 n.65 (1997).

51. See Adler, *supra* note 48, at 48 (discussing the "high incidence of false similarities in legal vocabulary" among countries that share a common language).

instance, the meaning of an English word in the U.S. can have a somewhat or entirely different meaning in Australia, as the legal, social, political, economic and other structures in these two distinct and distant places⁵² may have developed separately.⁵³

*B. Interpreting the Nuances of Language of the Host Country's Law,
Once Roughly Translated*

Suppose that the enforcers of an extraterritorial law correctly translate the law within the meaning of the preceding subsection. In other words, when reading the host's law and translating it into their own language, they routinely choose the most precise of several translation meanings. This optimal accuracy of translation⁵⁴ does not, unfortunately, guarantee successful interpretation of the language.

Another dimension of meaning remains. Within the best possible translation of a word or set of words, or within one language in cases where no translation is necessary,⁵⁵ precise meanings must be derived through the inherently inadequate processes⁵⁶ of interpretation and construction.⁵⁷ In the business contexts frequently associated with bribery, discrepancies in the understanding of precise meanings even within a single language may result from differences in interpreters' "commercial subculture[s]."⁵⁸

52. Obviously, geographic distance increasingly plays a smaller role in fostering both cultural and linguistic isolation, as globe-spanning technology such as satellite transmission of television programs brings the world closer together. Nonetheless, national differences in a common language remain, and geography continues to play some role in regional distinctions.

53. This phenomenon is true as well within a country, particularly a large country such as the United States, where the meaning of language certainly can vary regionally. Recognition of and respect for these differences support the authority of states in our federalist system.

54. I speak of optimal rather than perfect accuracy of translation, since perfect translation is simply impossible. As cultural constructs, different languages reflect different kinds of meanings and even entirely different concepts that might not even exist across cultures. For discussion of these and related translation realities, see Foster, *supra* note 45, at 990-91.

55. These would be cases, obviously, where the host country and the interpreting country share the same official language.

56. For discussion of the inevitable failure of precision in interpretation, see Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393, 1399 (1998).

57. The need for interpretation and construction to hone precise meanings is a product of linguistic vagueness and indistinctness. Words that have generic definitions may also have more specific variations, such that "those who speak the same language do not always use [these words] in the same sense." THOMAS REID, *ESSAYS ON THE INTELLECTUAL POWERS OF MAN* 475 (MIT Press 1969) (1813).

58. Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635, 664 (1997).

This problem, already challenging when faced in one's own legal system, can be extremely troublesome in a foreign one.⁵⁹ Consider here the subtle distinctions in what is meant by bribery among different people in different cultures, using the closest translational concept for the English word "bribery" that exists in a host country's language.⁶⁰ Interpreting other nations' precise definition of the word, particularly in regard to categorizing various practices as either bribery or not bribery, is daunting to the point of approaching folly.⁶¹

A bribe to some is a harmless gratuity to others.⁶² It may represent an expression of gratitude, appreciation, or loyalty; a display of etiquette; a form of entertainment condoned by local protocol; a socially expected form of post-transactional celebration between transactors; a legitimate compensation for expenses incurred; a necessary facilitator or expeditor for services; a symbolic message conveying understanding of another's needs; or an acceptable token of nominal value.⁶³ Even when the interpreter correctly identifies the closest translational meaning of a word, its precise application cannot help but vary across cultures and languages. Accordingly, even extraterritorial applications relying on the most accurate possible translations will tend to fall within cultural and linguistic gaps.⁶⁴

59. See Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 186 (1993) (calling foreign language construction "one of the most difficult tasks a human being can perform," and noting the inevitability of mistakes even among the most experienced and competent interpreters).

60. Words that may refer to bribery in another language or culture may not be an exact translation. See, e.g., John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT'L L.J. 50, 72 (1996) (referring to Brazilian concept of "jeito," or a way to "bend or evade legal rules," which can include not only what we consider bribes, but other behaviors that evade rule of law).

61. Consider, for example, the Korean notion of "tokkap," which can refer to either traditional, socially acceptable payment of rice cakes as a form of hospitality, or the less acceptable improper payments to government officials in exchange for favors. Kim & Kim, *supra* note 13, at 561-62.

62. See Salbu, *Extraterritorial Restriction of Bribery*, *supra* note 15, at 235.

63. See *id.* at 234-50. A reader may be tempted to develop a taxonomy in which all of the above practices can be placed logically either within or outside of an optimal proscription of bribery. I would applaud the effort, which could provide a start toward clarifying some of the many ambiguities that remain in the coverage of the FCPA in its present incarnation. What such an effort will not and can not do, however, is ameliorate the problems associated with broadly translating, and then more subtly interpreting, the word most closely approximating "bribery" in another country and another language. The problem is that a disparity will remain between that country's conceptualization and the reader's idealized conceptualization. Even if the latter is exemplary, it cannot be used to interpret the laws of the host nation without warping or damaging the real meaning of those laws.

64. For discussion of cross-linguistic and cross-cultural translation challenges generally, see Steven R. Salbu, *Parental Coordination and Conflict in International Joint Ventures*:

III. THE IMPRUDENCE OF MAKING SUBTLE MORALITY DISTINCTIONS EXTRATERRITORIALLY UNDER CONDITIONS OF CULTURAL HETEROGENEITY

Ultimately, many gray areas in business ethics need to be resolved by edict of law.⁶⁵ Drawing lines distinguishing acceptable and unacceptable behavior may be precarious and may even threaten unjust results at the cut-off point.⁶⁶ Ordinarily, society accepts this as an unavoidable price of establishing order over complex problems.⁶⁷ Yet the arbitrary line-drawing that may be acceptable domestically, under conditions of relative cultural homogeneity, can become unacceptable when applied extraterritorially, under conditions of relative cultural heterogeneity.⁶⁸

The Use of Contract to Address Legal, Linguistic, and Cultural Concerns, 43 CASE W. RES. L. REV. 1221, 1240-58 (1993).

65. Arbitrary, legal line-drawing indeed pervades the world of business ethics. Lines are drawn to circumscribe unacceptable conflicts of interest, deceptive trade practices, and unfair employment practices, to name just a few examples. Given that the law routinely does and must classify complex behaviors that actually have mixed or ambiguous motives, my argument is not with the line-drawing process itself. Rather, my objection extends to arbitrary line-drawing in settings where the decision-maker is likely to misunderstand the values he or she attempts to implement.

66. The difficulty in making fine distinctions between unacceptable bribes and acceptable gifts is best illustrated by looking at a wide spectrum of behaviors that are extremely resistant to facile classification. Let us start at the extreme: a lavish gift given on condition that the giver receive a lucrative government contract is blatantly morally troublesome. A moderate gift given to a potential buyer without any stated expectations occupies a position of moral uncertainty: the ethical status of such a gift depends largely on the giver's expectations regarding how it will and should be received—i.e., with or without any sense of reciprocal indebtedness. Finally, a small token of nominal value, given to a social host who also is a potential buyer, would seem to be among the more innocuous gratuities that can be presented in any likely business setting. Yet even this last payment, which could easily fall under the rubric of "loyalty" and "appreciation," is far from morally unambiguous. Whenever the giver might possibly receive any selective benefit from the recipient, the ethical posture of the gift is at least suspect. See Jan Hoth Uzzo, Recent Decision, *Federal Prosecution of Local Political Corruption Under the Hobbs Act: The Second Circuit Attempts to Define Inducement*, 51 BROOK. L. REV. 734, 761 n.142 (1985) (noting while some gift-giving is innocuous, other gift-giving creates the expectation that a favor will be returned).

67. Both nations and companies frequently draw arbitrary lines distinguishing between acceptable and unacceptable gifts. The capriciousness of antibribery initiatives explains at least part of the resistance they meet in some locations. According to one report, the recent antibribery efforts in Japan are meeting some resistance. In a country where gift-giving is ingrained in the culture, restrictions on things like gifts, outings, and dinners are seen by some as arbitrary restraints. See *Financial Scandals Renew Focus on Bureaucratic Power (Part 2)*, JEI REP., Mar. 6, 1998. Despite the inevitable resistance that will exist in times of transition, and particularly in regard to arbitrary initiatives, it is important to note that Japan's recent domestic anti-bribery stance is a significant change. For further discussion, see *infra* notes 146-49 and accompanying text.

68. The best-intended efforts to curb bribery around the world cannot presently be translated into extraterritorial legislation like the FCPA without trampling on transnational social and cultural pluralism. This truth is magnified in importance by the difficulties that a

We may be able to accept the law's crude classification of lawful and unlawful activities when the governed group shares a strong bond of common values and norms.⁶⁹ It is harder to accept the bifurcation of legal versus illegal activities, inevitably blurry at the margin, when the arbitrary lines apply to other countries that function under fundamentally different belief systems that we may understand poorly.

Consider how this general principle applies to the specific problem of bribery. It may be possible to differentiate domestically, with due deference to cultural idiosyncrasies regarding acceptable and unacceptable gift-giving. For example, Woodward observes that Indonesians have been able to make distinctions "between their traditional practice of giving gifts to express loyalty and appreciation, and the traditional extortion practiced by some bureaucrats who exploit this generous trait."⁷⁰ If they are to be both fair and meaningful, such theoretical distinctions should be grounded in a common understanding.⁷¹ Outside this context, distinctions occupy an inherently and unavoidably shady area. Within this culturally bound ambiguity, the subtle gradations of acceptable business practices with regard to gratuities, favors and gifts are a

nation faces, even internally and without the added concern of massive cultural variance, when it attempts to draw lines among subtly differentiated cases. According to one commentator, distinguishing "unacceptable bribes from acceptable gifts" in Australia and New Zealand has become one of the area's "subtler ethical dilemmas." John Milton-Smith, *Business Ethics in Australia and New Zealand*, 16 J. BUS. ETHICS 1485, 1489 (1997). Once the effort shifts from a national to a transnational level, this challenge is only exacerbated by national and cultural heterogeneity.

69. In today's pluralistic societies, is it realistic to suggest that inhabitants of a nation share values and norms, any more than inhabitants of different nations do? While the characteristic of common values and norms obviously is relative, as a general rule one would expect people within one nation to form more culturally cohesive groups than people living in different nations. The former group shares a greater number of naturally developing affinities, through common descent, intermarriage, and greater incidence of religious and ethnic commonality. They also share, to some degree or another, a developing national culture.

Davis emphasizes the special importance of local culture and society in another context—constitutionalism—in terms of "indigenization." See Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 138 (1998) (noting importance of respect for "local cultural concerns" and the "local social condition" in the development of governing institutions). Consistent with this idea, one can argue persuasively that a culture indigenous to a geographically specific locale has a special and unique strength.

70. Donna K. Woodward, *Foreigners Fathered RI's Graft*, JAKARTA POST, Dec. 17, 1997, at 4.

71. When extraterritorial decision-makers render judgments without an intimate understanding of the cultural context, results are more likely to be meaningless and unfair due to a schism between law and ethics. While the outsider certainly can impose order, the outsider's inadequate understanding of cultural value subtleties increases the chances that the legal decision imposed will clash with received local norms and values. The result is a rule of law that fails to reflect the dominant value system of the nation in which it is being enforced.

potential mine field for legislators seeking to exert their influence extraterritorially.

Consider the bank that says acceptable gifts may cost no more than fifty dollars.⁷² Do bank officials believe that presents worth this maximum cannot have a corrupting effect on executive decision-making? If they do, one can argue persuasively that they are wrong. While such a modest gift is unlikely to yield gross miscarriages of sound executive judgment, it certainly can generate sufficient good will to tip the scales when stakes are moderate.⁷³ In all likelihood, bank officials realize this, but consider their regard for etiquette and protocol to outweigh very modest negative effects on objectivity.

This reasonable accommodation between cultural norms and ethical ideals must ultimately draw an arbitrary line. The fact that fifty dollars is probably as good a value as any to draw that distinction does not change the fact that it is indeed arbitrary,⁷⁴ and that the line itself acknowledges that gift-giving practices can serve legitimate social and cultural functions, even when gift-giving technically could corrupt decision-making.⁷⁵ Under these conditions, where different reasonable

72. See *Banker's '£1m Bribe' From Bus Firm's Sell-Out*, EVENING STD. (London), June 17, 1997, at 16 (discussing policy of First National Bank of Boston in regard to alleged one million pound bribe).

73. For example, a government procurement decision-maker might have to choose between two relatively comparable suppliers. The decision-maker might err in favor of the supplier who has conferred even a nominal, relatively valueless gift simply because of the good feelings the decision-maker has toward this supplier for the gesture made. Subversion of the pristine evaluatory process could take any number of forms. For example, the decision-maker might assess the gift-giver as slightly superior to the non-gift-giver, despite an objective parity of qualification, because the bestowing of the gift has clouded the decision-maker's evaluative capabilities. Or if the decision-maker's evaluative abilities are unimpaired by the gift, the decision-maker could nonetheless use the good will engendered by the gift as a tie breaker. This phenomenon could be blatant or latent—the decision-maker may or may not realize that the enhanced comfort level in the relationship with the gift-giver is a function of the gift-giving. In either instance, the gift can skew the decision-makers' judgment.

74. The arbitrariness of the line is demonstrated by a consideration of hypothetical cases. In Case 1, a \$49 gift that is permitted under the policy may actually change a bureaucrat's or an executive's decision. In Case 2, a \$51 gift that is prohibited under the policy might have had no effect on a bureaucrat's or an executive's decision. This inconsistency can exist for any number of reasons. One reason is that gifts of virtually the same value will have different effects on different decision-makers. This allows for two types of errors—i.e., the error of outlawing a gift that would have no corrupt impact, and the error of permitting a gift that does have a corrupt impact. These types of errors highlight the arbitrariness of picking a cut-off figure for acceptable gifts.

75. These legitimate social and cultural functions may not outweigh the ethical problems associated with corrupted decision-making. They do suggest, however, that the evaluation of gift-giving is complex—gift-giving in business contexts cannot simply be viewed as purely evil. The complexity demands that assessors of the process of gift-giving understand social and cultural functions from within before they can judge their value and enter that value into any utilitarian calculus.

judgment calls can be made by different companies and different governments, it is dangerous for any country to try to impose its judgment on others.

IV. EXTRATERRITORIAL LEGISLATION VERSUS PERSUASION

Potential host country resentment of extraterritorially applied legislation is hardly debatable. The imposition of influence and control across borders is an undeniable source of transnational tension and strife.⁷⁶ However, corruption's undesirable effect on world markets is also indisputable.⁷⁷ Just as intrusive legislation poses a threat to global peace, rampant bribery in the post-Cold War era⁷⁸ potentially undermines world order, particularly as it harms struggling nations,⁷⁹ where fair and efficient economic development is critically important.⁸⁰ Thus, we are left to determine whether the medicine of multilateralized FCPA-style legislation provides the best cure to an admittedly deadly disease.

The FCPA and other such extraterritorial legislation⁸¹ are unnecessarily harsh and intrusive treatments for bribery. Political, social, and

76. See Penny Zagalis, Recent Decision, *Hartford Fire Insurance Company v. California: Reassessing the Application of the McCarran-Ferguson Act*, 27 CORNELL INT'L L.J. 241, 267 (1994) (noting "unmitigated hostility" to U.S. law applied abroad) (citation omitted).

77. Among the costs of bribery are the subversion of transactions, the impairment of foreign direct investment, the distortion of relative prices, and the reduction of gross domestic product and, therefore, of living conditions. See Nichols, *Regulating Transnational Bribery*, *supra* note 41, at 275-76.

78. See Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL. 711, 712 (1996) ("The end of the Cold War, the creation of fledgling market systems, the hastened pace of globalization and economic integration, and a number of other factors have led to an increase in the perceived amount of corruption activity in both local and global commerce.").

79. See Charles S. Saphos, Essay, *Something Is Rotten in the State of Affairs Between Nations: The Difficulties of Establishing the Rule of International Criminal Law Because of Public Corruption*, 19 FORDHAM INT'L L.J. 1947, 1947 (1996) (quoting President Clinton: "[a]s the cold war gives way to the global village, too many people remain vulnerable to poverty, disease . . . ethnic and religious hatred, the reckless aggression of rogue states, terrorism, organized crime, drug trafficking and the proliferation of weapons of mass destruction.").

80. In particular, developing nations and nations in transition from communist to capitalist markets cannot afford bribery's impairment of free-market efficiencies. See Salbu, *supra* note 14, at 252-53.

81. The analysis contained in the remainder of this article will address at least three possible closely related phenomena—the FCPA, the legislation that Congress ultimately passes to revise the FCPA in order to comply with the Convention, and all extraterritorially applied anti-bribery legislation generally. While particular observations may relate to one of these three phenomena, all observations are intended to apply to the most generic of the classes, i.e., extraterritorially applied anti-bribery legislation in general. All the comments made about the more specific classes apply to the generic category as well.

economic pressures are powerful, persuasive tools in modern, information-intensive society.⁸² Increased accessibility to information makes it harder to hide and to ignore the world's spotlight.⁸³ Contemporary global media such as CNN Worldwide expose newsworthy activities to global scrutiny,⁸⁴ rendering businesses increasingly accountable for their actions even in the absence of legally-imposed accountability. Transparency will necessarily increase in this context,⁸⁵ providing a strong impetus for the internal, domestic treatment of infractions. These forces of persuasion address the problem of bribery without threatening trans-border overreaching.

An example illustrates the superiority of persuasion and the inappropriateness of extraterritorially applied legislation. Consider Russia's emerging capitalist markets, in which bribery and corruption are generally considered to be pervasive and destructive forces.⁸⁶ Puffer and McCarthy describe the current Russian climate in the throes of rapid change:

Russia's turbulent history has been characterized by oppressive political regimes that have created confusion about the role and importance of business in Russian society, as well as conflicting standards of ethical business behavior. This history, coupled with the recent turmoil created by the move toward a market economy, has created ambiguity among business people about what constitutes ethical behavior.⁸⁷

Within this general framework of moral ambiguity, Mahoney describes the Russian climate regarding corruption in particular:

82. See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 709 (1993) (noting that today's information technologies can be used to influence disparate groups and constituencies).

83. For discussion of the impact of open, accessible information technologies on an informed citizenry, see Peter Seipel, *The Technology of Insight: Computers and Informed Citizens*, 69 CHI.-KENT L. REV. 417 (1993).

84. See Martin, *supra* note 24, at 439-40 (citing the proliferation of global communications such as CNN as a source of increased worldwide dissatisfaction in regard to corruption).

85. See Thomas Cottier, *The Impact of New Technologies on Multilateral Trade Regulation and Governance*, 72 CHI.-KENT L. REV. 415, 434 (1996) (noting "technology-driven pressure to open. . . processes").

86. See Helen Womack, *Corruption "Corroding" Russia*, INDEPENDENT (London), Feb. 13, 1993, at 10 (describing government corruption as existing throughout the Russian state structure).

87. Sheila M. Puffer & Daniel J. McCarthy, *Business Ethics in a Transforming Economy: Applying the Integrative Social Contracts Theory to Russia*, 18 U. PA. J. INT'L ECON. L. 1281, 1285 (1997).

The bribery required as a condition of doing normal business may be due to explicit demands or expectations. It may more subtly result from an inherently unjust market characterized by inequality of access and unfairness in distribution, as has been alleged with regard to modern Russia, where trying to work within such an unethical system can justify taking counter-measures which would not otherwise be ethically acceptable.⁸⁸

A difficult moral question arises in this context. Suppose for a moment that a particular payment is not prohibited by Russia's written laws. Suppose also that this payment would be considered a bribe under U.S. law. Is it ethical for a U.S. businessperson to make the payment in Russia under the conditions stated in the above quotations? While deontological principles may suggest it is not,⁸⁹ a utilitarian calculus might indicate the contrary.

How might this utilitarian argument be made? In a number of "endemically corrupt countries" throughout the world, bribery is so entrenched that outsiders have only two real choices—to pay bribes, or to avoid doing business entirely.⁹⁰ If Russia is such a country, an outsider might determine that participating in the system causes more harm than good, and therefore decide to stay out.⁹¹ Another person might reason that the benefits of opening previously closed markets, and the opportunity to effect change through active engagement rather than avoidance, operate in favor of entry.⁹²

88. Jack Mahoney, *Ethical Attitudes to Bribery and Extortion*, in BODO B. SCHLEGELMILCH, *MARKETING ETHICS: AN INTERNATIONAL PERSPECTIVE* 283, 290 (1998).

89. For example, one can argue in favor of a Kantian categorical imperative that makes payments to government officials unethical under all circumstances.

90. See David Pallister, *No Sweeteners Added: Britain's Bribery Culture is Coming Under Attack From International Initiatives*, *GUARDIAN* (London), Apr. 17, 1998, at 20 (noting that businesspersons, banks, and government in Britain condone bribery that is "the only way to proceed" in numerous countries).

91. This scenario indeed seems to play out in the real world, as some companies decide against foreign investment in countries where corruption is entrenched. See Peter Daniel DiPaola, Note, *The Criminal Time Bomb: An Examination of the Effect of the Russian Mafiya on the Newly Independent States of the Former Soviet Union*, 4 *IND. J. GLOBAL LEGAL STUD.* 145, 164 (1996) (noting some U.S. businesses' hesitancy to invest in Russia because of endemic corruption there).

92. The "active engagement" approach is most familiar to us through the historic controversies surrounding U.S. and global responses to apartheid in South Africa. Of course, the active engagement arguments against trade bans eventually were rejected by the U.S. in regard to South Africa, so it is difficult to assess the active engagement approach of changing host country cultures from within. The concept of active engagement in the more general sense of healthy discussion and debate is frequently mentioned in the literature. See, e.g., Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 *OHIO ST. L.J.* 19, 130 (1998) (noting relationship between citizens' active engagement and shifting conceptions of ethics).

Moreover, a utilitarian calculus can distinguish among different patterns of bribe-paying. Consider the payment of many bribes that are substantial, and undermine critically important decisions. Then consider the payment of a small number of bribes that are insignificant, and undermine only trivial decisions. Engaging in the greater magnitude of bribery might be too weighty a price to pay for participation in, and attempts toward reform of, the Russian market. Conversely, engaging in the lesser magnitude of bribery arguably could be justified by the positive changes one might bring to the host country's economy and politics.⁹³

Which choice the reader would make is immaterial to the purposes of this discussion. What is relevant is that extraterritorial antibribery legislation may prohibit a U.S. actor from making a difficult ethical choice under conditions where the behavior being considered does not violate local laws.⁹⁴ The American actor with years of experience in the host country may have a finely honed understanding of local culture and extenuating circumstances.⁹⁵ This understanding might persuade her to make what she would consider to be unacceptable payments in most other contexts.⁹⁶ Her judgment may lead to more beneficent results than the blind application of extraterritorial legislation.

In this and other instances, countries around the world would be far more prudent to adopt the light-handed expedients of colloquy and persuasion. The relative subtlety of this approach does not imply that efforts will be weak; rather, it suggests that they should be respectful of

93. Canada's policy of maintaining open trade relations with Cuba is an example of a policy of active engagement, aimed at bringing change through continued interaction and discussion with Cuba, which differs from the U.S. policy of imposing sanctions. See David S. DeFalco, Comment, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act Of 1996: Is the United States Reaching Too Far?*, 3 J. INT'L LEGAL STUD. 125, 142 n.106 (1997) (contrasting Canada's efforts to bring change to Cuba through dialogue and active engagement with the United States' isolationist policy). While a particular reader may prefer one policy over the other, reasonable utilitarian arguments can be made in support of either.

94. In previous writings, I have argued that legally imposed conceptions of right and wrong under conditions where reasonable minds can differ entail an impoverished notion of ethics. Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble With Law-Based Conceptions of Ethics*, 68 IND. L.J. 101, 131 (1992). The imposition of a rule of law upon the decision-maker in the hypothetical at hand provides an example of this thesis.

95. See Terry W. Schackmann, *Reflections in a Rock Garden: A Civic Commitment to International Understanding?*, 42 KAN. L. REV. 531, 540 (1994) (noting value of "perspectives gained from living and working at length in foreign countries, experience essential to advising in foreign transactions").

96. See Martin Davis, *Just (Don't) Do It: Ethics and International Trade*, 21 MELBOURNE U.L. REV. 601, 614 (1997) ("If . . . we are genuinely satisfied that the practice is both morally acceptable in the foreign country and that it does not have any victims, then we may make the payment.").

autonomy and sovereignty of the nations around the world that are working toward a unified goal in a diversity of settings.

V. AVOIDING ETHNOCENTRISM AND CONCOMITANT GLOBAL DISSENSION: SELLING DOMESTIC CONTROLS IN THE MARKETPLACE OF IDEAS

This section suggests that there are two important benefits to addressing the issue of bribery using persuasive rather than intrusive measures. First, persuading the world's nations to adopt and vigorously implement effective domestic antibribery laws avoids legitimate charges of ethnocentrism. Second, persuasion is less likely to create global dissension than coercive, extraterritorially applied laws.

A. Avoiding Legitimate Charges of Ethnocentrism

Increasingly, nations around the world share the United States' goal of fighting the economic dysfunction associated with bribery.⁹⁷ With due deference to sovereignty and autonomy, OAS and OECD nations and others concerned about bribery can make a compelling case in favor of relatively noninvasive domestic (rather than FCPA-style extraterritorial) anti-bribery legislation, combined with rigorous domestic enforcement. Domestic controls are a realistic, workable option for the future. As we shall observe in greater detail later,⁹⁸ Japan has recently accelerated its movement towards more stringent domestic anti-bribery initiatives⁹⁹ in the wake of perceptions that corruption contributes to its recent economic woes.¹⁰⁰ Nations concerned with the moral climate and the economic health of their markets can and should be persuaded to adopt domestic antibribery laws within their own borders. As each new country works in this direction, the goals of reducing global corruption are furthered, but without the intrusiveness and insensitivity to subtle cultural distinctions evinced by the FCPA and its impending imitators.¹⁰¹

Consider the analysis of information collected recently from United Nations member states, noting "an increasing awareness by governments of the need to instill and nurture, through administrative and

97. For discussion of the costs of bribery, see Almond & Syfert, *supra* note 28, at 434-35.

98. See *infra* notes 145-48, and accompanying text.

99. See Yasumasa Shimizu, *Bribery Scandals Generate Ethics Bills, Opposition Measures Calls For Strict Rules, Stiff Penalties For Bureaucracy While Ruling Coalition Trails in Effort*, NIKKEI WKLY., Mar. 23, 1998, at 4.

100. *Id.*

101. Domestic anti-bribery laws are relatively unintrusive because they are enacted and applied by the host country to behaviors within its own borders.

legislative initiatives, a culture of legality, accountability and transparency.”¹⁰² The analysis emphasizes the development of “a shared understanding that action against corruption can be effective only when there is a concrete and continuous synergy between all actors involved at both the national and international levels.”¹⁰³

Depending on how they are interpreted, these statements can support either extraterritorial or exclusively domestic legislation. How groups like the United Nations implement their observations will be critically important as the world tries to fight corruption, while remaining sensitive to cultural pluralism and considerations of sovereignty and autonomy. On one hand, the above comments appear to recognize the importance of colloquy and persuasion across borders, given their emphasis on instilling and nurturing the values of accountability and transparency. On the other hand, efforts toward “concrete and continuous synergy” could lead to overstepping. If the achievement of a concrete transnational synergy relies upon extraterritorial edict, then we approach an otherwise laudable goal with a directedness that is premature, because it precedes an underlying threshold-level global value consensus.¹⁰⁴

In other words, a critical question regarding transnational bribery is whether payments made outside the United States should be identified, analyzed and evaluated by U.S. courts and judges under U.S. law, or rather by officials within the host countries in which the payments were made. It remains dangerous for one country to enforce its values in another country, even when the enforcing country feels confident that it is proposing righteous standards.¹⁰⁵

Of course, the impulse to enforce morality through extraterritorial application of law may be grounded in both good intentions and sound thinking. For example, the recent backlash against moral relativism

102. *Commission on Crime Prevention, Criminal Justice, to Meet at Vienna, 21–30 April*, M2 PRESSWIRE, Apr. 22, 1998.

103. *Id.*

104. Accordingly, global resentments toward extraterritorially applied laws generally, and those of the U.S. specifically, are not a new phenomenon peculiar to the FCPA. For discussion of earlier resentments over extraterritorial legislation, see Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 *FORDHAM L. REV.* 201, 238–39 (1992).

105. The rhetoric of selling the FCPA frequently employs the idea of requiring the rest of the world to adopt the U.S.’s already high anti-bribery standards. For example, Senator Feingold alludes, in support of the Convention on Combating Bribery, to the “high standards Senator Proxmire established” in outlawing bribery through the FCPA. Senator Russ Feingold, *Feingold Urges Swift Senate Action on Anti-Bribery Treaty*, CONG. PRESS RELEASES, June 9, 1998. While such references may imply the existence of an objectively optimal or at least superior set of standards, valuation of standards becomes difficult, as well as subject to cultural determination, in borderline or fuzzy area cases.

indicates popular support for a single, defensible ethical system.¹⁰⁶ Especially at the extremes of human behavior, it is appropriate and necessary to demand that moral mandates transcend cultural boundaries and differences.¹⁰⁷ Nazi atrocities of World War II cannot be excused under the theory that right and wrong are cultural artifacts, or that those outside the system cannot judge the system because they are imposing a subjectivity in their assessments.

Beyond these extremes, however, ethical relativism continues to encourage intercultural respect where distinctions between right and wrong are less clear.¹⁰⁸ This observation is a product of two factors, considered in combination. First, cultural anthropologists tell us that variations across cultures are pervasive—"that there are virtually no aspects of culture that are common to all human societies."¹⁰⁹ Second, while some moral mandates can be said to transcend culture, a far greater number do not.¹¹⁰ Transcendent moral mandates include only the most fundamental of imperatives. The moral duty not to murder¹¹¹ can be classified persuasively as universal. The larger class of nontranscendent values can and should be defined by agreement, under arrangements of social contract.¹¹² Respect for the pluralism identified by cultural

106. See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1642-43 (1998) (eschewing "moral subjectivism" and the "'vulgar relativism' that teaches, self-contradictorily, that we have a moral duty to tolerate cultures that have moral views different from ours. . .").

107. See Bobby Jindal, *Relativism, Neutrality and Transcendentalism: Beyond Autonomy*, 57 LA. L. REV. 1253, 1278 (1997) ("Objective morality, which transcends the particulars of any given situation or society, allows the minority to criticize atrocities. . .").

108. See Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT'L L. 307, 383 (1994) (observing that while the relativist position can be flawed, it does reflect "sensitivity to and respect for cultural differences," and avoids ethnocentricity).

109. FRANCIS FUKUYAMA, TRUST 33 (1995) (citing CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 34-35 (1973)).

110. Moses brought back a scant ten commandments, and even some of these are controversial. Moreover, they do not cover most situations. Consider the manager who must decide whether to relocate a plant abroad. There is no universal moral mandate to apply; rather, managers facing this decision must weigh effects, such as impact on current employees, impact on local and foreign economies, effects on profits and therefore on shareholders, etc. Likewise, a boss who must evaluate an employee can be brutally honest, or can temper the assessment with a degree of diplomacy that detracts from the total honesty of the evaluation. Which is the morally superior approach? While many people may believe there is a clear answer, others will disagree. Most ethical decisions are akin to these two examples in that a number of different but reasonably defensible approaches can be adopted.

111. See CLIFFORD CHRISTIANS & MICHAEL TRABER, *COMMUNICATION ETHICS AND UNIVERSAL VALUES* 72 (1997) (discussing taboo against unjustifiable homicide as universal).

112. See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 260-62

anthropologists suggests that ethical relativism is and should be alive and well, at least within the large sphere of operations in which values can be defensibly labeled social constructs, not categorical imperatives.¹¹³ Within this framework, encouraging nations to adopt and implement their own domestic antibribery laws is the solution to corruption most respectful of legitimate cultural differences.

B. Avoiding Global Dissension

The overreaching of extraterritorial legislation can affect world relations. The 1990s critique of relativism¹¹⁴ has the potential to empower a resurgence of moral imperialism. Peter Drucker identifies this trend as a new ethics that "denies to business the adaptation to cultural mores which has always been considered a moral duty in the traditional approach to ethics."¹¹⁵

History tells us that nations around the world highly value control over their own political processes.¹¹⁶ At best, they will resist extraterritorially imposed legislation that is perceived as imperialistic.¹¹⁷ At worst, the encroachments such legislation represents can engender the same kinds of international hostility and conflicts caused by physical invasion.

Pfaff accurately casts some United States efforts toward global economic transformation as imperialistic.¹¹⁸ He asserts, "[t]he United States, ambivalently backed by Europe and Canada, is attempting to force the replacement of crucial economic and social institutions in the non-Western world with institutions drawn from its own experience and that of Western Europe."¹¹⁹ While critiques that cast modern U.S. economic

(1994) (discussing conditions under which ethics can be derived legitimately through social contracts).

113. Deference to cultural delineations of ethics in the vast realm of discretionary areas is captured in Fukuyama's definition of culture as "inherited ethical habit." Fukuyama cites moral inventions such as the uncleanness of pork in Judaism and primogeniture in Japan to illustrate the cultural definition of many ethical precepts. FUKUYAMA, *supra* note 109, at 34.

114. *See supra* note 106.

115. *See* Peter Drucker, *Business Ethics*, in ROBERT C. SOLOMON, *THE NEW WORLD OF BUSINESS: ETHICS AND FREE ENTERPRISE IN THE GLOBAL 1990s* 323 (1994).

116. *See* Douglas Michael Ely, Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343, 1360 (1984) (observing a "foreign sovereign's strong stake in its own political process").

117. *See* Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1318 n.58 (1983) ("Past assertions by the United States of extraterritorial jurisdiction have led to legislation in other countries designed to block what these countries believe to be violations of international law and infringements of territorial sovereignty.").

118. William Pfaff, *A New Imperialism?*, COMMONWEAL, Mar. 13, 1998, at 6.

119. *Id.*

policy as the colonialism of the 1990s¹²⁰ may be dramatic, they also contain a prudent warning, reminding nations with expansionist histories that the world resents and fights their encroachment. While “[t]he new Western offensive means no damage . . . it is a war of society and culture, and causes damage . . . [that] has political consequences.”¹²¹

The vernacular of Senator Jesse Helms in regard to the Convention on Combating Bribery captures an attitude U.S. interests adopt all too often in the debate over corruption. In Helms’ own words, there is “a need to push—and I use that word advisedly—to push our European allies and other countries to enact laws that criminalize bribery of foreign officials by their citizens overseas.”¹²² The comment is telling in two ways—it evokes a tradition of aggressive, forceful U.S. demands that the world resolve problems in the U.S.-endorsed manner, and it reinforces the idea that “[t]he only right way is our way—the way we do it in the United States.”¹²³ In view of Helms’ comments and similar statements, it is little wonder that both the FCPA and aggressive U.S. measures to bring other countries in line with the statute’s philosophy have met with resistance and resentment.¹²⁴

Few would challenge the idea that physical aggression and expansionism endanger global harmony. A greater number of observers would question the idea that forcefulness in promoting public policies bears similar kinds of risks. Yet Alterman accurately observes that global hostilities toward U.S. imperialism are not limited to military foreign relations issues, but encompass economic encroachments as well.¹²⁵ “Growing resentment of U.S. heavy-handedness is hardly limited to Europe, the Gulf, or even military matters,” he notes, adding that, “[i]n Asia, resentment is growing at U.S.-directed demands that nations like Indonesia and South Korea open up their societies to U.S.-style capitalism.”¹²⁶ He concludes that many Asians see “a U.S. attempt to use their temporary weakness to impart a new form of what Thai newspapers are calling ‘U.S. financial imperialism’ and ‘economic colonialism’ in the region.”¹²⁷

120. *Id.*

121. *Id.* at 7.

122. Ben Barber, *Helms Vows Quick Action on Anti-Bribery Treaty*, WASH. TIMES, June 10, 1998, at A16.

123. Thomas J. Vernados & Mei Lin Fung, *Ethics: Ho-Hum? Or, Gotcha!*, J. MGMT CONSULTING, May 1998, at 51.

124. See Salbu, *Bribery in the Global Market*, *supra* note 14, at 278 & n.316.

125. Eric Alterman, *We Are the World*, NATION, Mar. 9, 1998, at 4.

126. *Id.*

127. *Id.*

Thus, while much of the world resented perceived U.S. political imperialism during the Cold War, nations are now likely to resent U.S. economic imperialism.¹²⁸ The resentment will be exacerbated when nations fear that their culture is at risk of being supplanted by U.S. culture.¹²⁹ Moreover, other nations' sensitivity regarding U.S. economic intrusiveness has become aggravated over the past few years. Europe is increasingly uneasy with U.S. world influence,¹³⁰ and Canada has instituted "blocking measures" that "insulate Canadian nationals and companies from foreign attempts to enforce their extraterritorial requirements or penalize their violation."¹³¹ Meanwhile, turmoil in Asia's economy has triggered a backlash there against U.S. influence in global economic affairs.¹³² According to Kawachi,

Those who feel victimized by post-cold war trends regard economic globalization as a campaign to impose Western values, under which a country's development strategy and reform efforts are judged by how close they approach the Anglo-American model. Among these people there are rising concerns that, unless something is done, their own cultures and even value systems will be swallowed up by foreign norms.¹³³

To what degree such resentments are justified is an interesting question. In itself, however, its answer cannot resolve the policy issues surrounding extraterritorial statutes. Justified or not, resentment over

128. Modern resentment of economic imperialism, focusing specifically on extraterritorial application of U.S. laws, dates back at least to the 1980s, in regard to antitrust legislation. See Gary E. Dyal, Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 NW. J. INT'L L. & BUS. 1065, 1065 (1984-85) ("The extraterritorial enforcement of United States antitrust law against Canadian businesses has been a source of continual conflict between these two nations.").

More recent concerns focus on the Helms-Burton Act and the Iran and Libya Sanctions Act. For discussion of these extraterritorial legislative sanctions, see J. Brett Busby, Note, *Jurisdiction to Limit Third-Country Interaction With Sanctioned States: The Iran and Libya Sanctions and Helms-Burton Acts*, 36 COLUM. J. TRANSNAT'L L. 621 (1998).

129. See, e.g., David Ivanovich, *To Canada, Free Trade Isn't Trouble-Free*, HOU. CHRON., Nov. 7, 1997, at Bus. 1 (quoting Ron Wyatt, a staff representative of U.S. Steelworkers of America in Canada: "There's a fear of our culture being swallowed up by the American culture. . . . We're fearful of losing our uniqueness.").

130. Richard Whittle, *Nations Resent Preeminence of U.S.*, DALLAS MORNING NEWS, Dec. 29, 1997, at 1J.

131. Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 60, 62 (1998).

132. Takashi Kawachi, *A New Backlash Against American Influence*, JAPAN ECHO, Apr. 1998, at 44.

133. *Id.* at 45.

legislative overreaching has historically engendered hostility,¹³⁴ potentially threatening diplomatic relations between nations.¹³⁵ This hostility in turn has created a hazard to international relations, and may even pose a threat to global peace. In a world where U.S. flags are burned in demonstrations against alleged U.S. arrogance and hegemony,¹³⁶ any perception of an overweening megalith has the potential to fuel backlash¹³⁷ and create an atmosphere of conflict, acts of retributive terrorism, and even war.

Of course, the degree of harm engendered by invasive laws will vary and will be difficult to predict under a range of circumstances. Goldsmith and Rinne attribute "withdrawal of foreign investment, blocking of corporate acquisitions and mergers, and damage to foreign relations" to extraterritorial application of laws.¹³⁸ Zimmerman accurately notes, "[t]he more intrusive the application [of an extraterritorial statute], the more the United States exposes itself to international criticism and retaliation."¹³⁹

Clearly, world order is threatened by acts of aggression, whether physical or ideological. Particularly in regard to ideological aggression and multilateralization of extraterritorial antibribery legislation, two questions remain. First, is it possible that multilateralization of the FCPA may in fact reduce perceptions of legal and cultural imperialism in conjunction with the United States? Second, are stepped-up worldwide domestic laws and implementation really capable of addressing the unwieldy problem of transnational bribery?

134. See Michael Elliott, *Going Home: People and Nations Have a Sense of Identity, Which Could Fuel a Growing Resentment of America*, NEWSWEEK, Dec. 30, 1996, at 38 (noting that the rest of the world looks upon the U.S. as an "aggressive bully," and that American hegemony packaged as globalization is engendering a growth in anti-American sentiments).

135. See Zagalis, *supra* note 76, at 267 (observing that extraterritorially applied U.S. antitrust laws "threaten diplomatic relations between the United States and other nations").

136. See Drusilla Menaker, *Iraq Standoff Fueling Anti-American Feeling in Mideast*, DALLAS MORNING NEWS, Feb. 28, 1998, at 12A.

137. See Mark E. Zelek, Book Review, 14 COMP. LABOR L. 514, 517 (1993) (reviewing JAMES MICHAEL ZIMMERMAN: *Extraterritorial Employment Standards of the United States: The Regulation of the Overseas Workplace* (1992)) (noting "the imposition of extraterritorial standards may be viewed by foreign countries as uninvited interference," which historically has "resulted in retaliation and embarrassing diplomatic protest in the foreign public policy arena").

138. Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants and "ET,"* 73 MINN. L. REV. 1023, 1027 (1989).

139. James M. Zimmerman, *International Dimension of U.S. Fair Employment Laws: Protection or Interference?*, 131 INT'L LABOUR REV. 217, 230 (1992).

1. Whether Multilateralization of the FCPA May Reduce Perceptions of U.S. Legal and Cultural Imperialism

Sources suggesting that overreaching threatens diplomatic stability typically focus on U.S. legislative intrusions and international resentment directed toward the "ugly Americans." One might argue that multilateralization of the FCPA will take some heat off the United States. Other countries might serve as new lightning rods to receive some of the criticism historically lodged exclusively against the United States. Moreover, as more countries create extraterritorial legislation, they will have joined the U.S. camp and cannot criticize our legislative posture without also criticizing their own.

While these observations are probably accurate, their veracity will not save multilateralization of the FCPA from being diplomatically divisive. The citations in this section, evoked to highlight the problems of legislative overreaching, focus on the U.S. simply because we are perceived as the most aggressive nation in the world in our legal encroachments.¹⁴⁰ Given this fact, the literature in U.S. international law journals will naturally focus predominantly on U.S. cultural and legal imperialism.

Moreover, multilateralization will not take the heat off the U.S.; instead, it will dramatically expand the potential for discord and conflict. This is true for several reasons. In the short run, only thirty-four nations have agreed, at least in theory,¹⁴¹ to adopt legislation in compliance with the Convention on Combating Bribery.¹⁴² How many or how few will follow, and over what span of time, is impossible to predict. It is, however, highly unlikely that all the world's nations will join the present effort, as it is unlikely that the world's nations will ever act collectively. This is especially true given the reservations many nations have enun-

140. See, e.g., Robert D. Shank, Note, *The Justice Department's Recent Antitrust Enforcement Policy: Toward a "Positive Comity" Solution to International Competition Problems?*, 29 VAND. J. TRANSNAT'L L. 155, 160 n.18 (1996) (noting the U.S. "has traditionally been the most aggressive nation exercising extraterritorial jurisdiction in antitrust cases").

141. The potential slip between the Convention signatories' initial manifestations of concurrence, and actual implementation of the legislation that will be required by the Convention, is very real. Indeed, even the United States, which already has in place the only legislation that comes close to the Convention's requirements, is experiencing impediments to the necessary legislative emendation at the time of writing. These impediments have evoked concerns that the Convention initiative could be delayed or derailed if the U.S. cannot pass appropriate laws expeditiously. See Nancy Dunne, *Last-Minute Moves on Bribery Pact*, FIN. TIMES, Oct. 20, 1998, at 4 (describing trouble in Congress passing the legislation needed to comply with the Convention, and quoting Transparency International USA Chairman Fritz Heimann: "Failure by Congress to pass implementing legislation would be regarded as a ready excuse for inaction.").

142. See *supra* note 8.

ated regarding extraterritorial laws in the post-Cold War era.¹⁴³ Multilateral efforts will not make global adoption of FCPA-style legislation unanimous. The logical result will be an increased application of extraterritorial law in countries that themselves decline to pass extraterritorial legislation. This dynamic is unlikely to reduce tensions. Even if it does reduce tensions against the U.S. specifically, it would only focus attention on other nations perceived to have become unacceptably aggressive. Again, this shift is unlikely to benefit global relations.

Now suppose that all countries did indeed adopt extraterritorial legislation prohibiting the bribery of foreign officials. Unanimity of approach would hardly guarantee that the rampant reaching into transactions across borders would remain peaceable. To the contrary, regardless of how many countries eventually sign on to the present multilateralization efforts, the attempts of one sovereign to moderate activity within the borders of another will always pose the risk of disagreements, resentments, and conflict.¹⁴⁴ Should all the world's nations enact extraterritorial anti-bribery legislation, the result will increase the pool of potential international relations mine fields. As every country adjudicates right and wrong in the complex social landscapes of its neighbors, we may wistfully reminisce about the days when peace was measured by how well each nation minded its own business.

2. Whether Domestic Laws Are Capable of Addressing the Problem of Transnational Bribery

While extraterritorially applied legislation may be heavy-handed, one can argue that it is necessary if global corruption is to be expunged. This underestimates the power of persuasion, light-handed diplomacy and dialogue in the information era. As Boswell notes, "we are witnessing the growth of a free press and investigative journalism as well as more open political competition, more independent judiciaries and prosecutors, and a coming of age of civil society as a political force demanding accountability from those who govern."¹⁴⁵

The scenario under which countries aggressively attack bribery domestically is not unrealistic. As the critical discussion of corruption mounts worldwide, we are beginning to see nations that have tolerated corruption in the past addressing the problem in unprecedented ways. Consider an incident in Japan, where a rich tradition of gift-giving has

143. See *supra* notes 116–139 and accompanying text.

144. See *supra* note 76.

145. Nancy Zucker Boswell, *An Emerging Consensus on Controlling Corruption*, 18 U. PA. J. INT'L ECON. L. 1165, 1168 (1997).

begun to evoke concerns regarding bribery and corruption.¹⁴⁶ Recently, an “excessive entertainment” scandal rocked the nation, as the Bank of Japan penalized nearly one hundred of its officers for ostentatious entertainment of government officials.¹⁴⁷ Finance Minister Hikaru Matsunaga likewise punished over one hundred government officials for accepting excessive entertainment from insurance companies, banks, and brokerage companies.¹⁴⁸

To what can we attribute unprecedented corporate and government responses to bribery in Japan? It was spurred by the collapse of one of Japan’s largest brokerage houses in November of 1997, and backlash against “a network of over-familiar relationships between important bureaucrats and the corporate entities they supposedly regulated. . . .”¹⁴⁹ Japan’s recent hard line on bribery is a domestically fashioned solution to a problem of admittedly global proportions. At the end of the millennium, no nation can miss the clear and highly publicized conclusion that corruption is economically devastating.¹⁵⁰ The message will travel only more quickly as the information technologies of the next century spread throughout the world.¹⁵¹

Consider as well the “sweeping anti-corruption policy” recently adopted by the Asian Development Bank (ADB), aimed at increasing the accountability and transparency of public institutional transactions throughout the continent.¹⁵² The regional initiative was spurred by an ADB study demonstrating economic inefficiencies associated with bribery, inefficiencies so severe that losses attributable to corruption sometimes exceed a country’s foreign debt.¹⁵³ Awareness of the devastating costs of bribery and corruption are more than sufficient incentive to spur local and regional reforms. The self-interests of the nations of the world provide strong impetus for internal change, and we see such change occur as word spreads.

146. See Sonni Efron, *Gift-Giving Tradition Abruptly Ends in Japan*, L.A. TIMES, Dec. 26, 1996, at A12 (discussing how recent scandals have chilled “the traditional custom of businesses sending posh year-end gifts to their regulators”).

147. Jonathan Watts & Dan Atkinson, *Sayonara to Sake, Sushi and Geisha Sleaze*, GUARDIAN (London), Apr. 28, 1998, at 21.

148. *Id.*

149. *Id.*

150. For a catalog of the ways in which corruption devastates economically, see Robert H. Sutton, Note, *Controlling Corruption Through Collective Means: Advocating the Inter-American Convention Against Corruption*, 20 FORDHAM INT’L L.J. 1427, 1437–40 (1997).

151. See *supra* note 85 and accompanying text.

152. P.T. Bangsberg, *Corruption Cleanup Will Level Playing Field for Contractors*, J. COM., Aug. 5, 1998, at 1C.

153. See *id.*

While some gray-area cultural distinctions regarding acceptable and unacceptable specific behaviors will linger in the foreseeable future, we can expect the global debate to escalate, and consensus on the broader principles concerning bribery and corruption to gel over the long run. For now, imposition of extraterritorial fiat is unnecessarily harsh and invasive. The resentment it engenders threatens global harmony, and could even encourage resistance to domestic corruption reforms that might be more easily embraced under less aggressive conditions.

VI. CONCLUSION

The world is too culturally diverse to accept the external imposition of laws without resentment.¹⁵⁴ Under these conditions, extraterritorial legal fiat is at the very least insulting and distasteful.¹⁵⁵ Transnational relations likely will be strained by the overreaching of any one nation into the affairs conducted within the borders of another.¹⁵⁶ As one commentator suggests, other nations “may perceive the FCPA as a culturally arrogant encroachment on their ability to govern activities exclusively within their own borders, in accordance with international law principles on territorial sovereignty.”¹⁵⁷

While the risk of being perceived as obnoxious and intrusive is hardly insignificant, it pales when compared with a more serious risk—the increased likelihood that transnational relations will become strained,¹⁵⁸ and that nationalistic sentiments will flourish in response to

154. For comparison, consider treaties through which signatories all agree to mutually accepted conditions and terms that apply only to the signatories themselves. Within these bounds, no laws are being applied extraterritorially without the consent of the local sovereignty. In contrast, FCPA-style legislation, now to be adopted in dozens of countries, restricts behavior even in non-signatory nations that have not consented to the intrusion.

155. See Meredith Poznanski Cook, Note, *The Extraterritorial Application of Title VII: Does the Foreign Compulsion Defense Work?*, 20 SUFFOLK TRANSNAT'L L. REV. 133, 149 (1996) (labeling aspects of the extraterritorial application of U.S. employment laws as arrogant); Henry H. Rossbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509, 526 (1997) (observing that critics label FCPA “cultural imperialism”).

156. See Muriel van den Berg, Comment, *The Cuban Liberty and Democratic Solidarity Act: Violations of International Law and the Response of Key American Trade Partners*, 21 MD. J. INT'L L. & TRADE 279, 306 (1997) (referring to “climate of hostility towards extraterritorial American laws”).

157. Kenneth U. Surjadinata, Comment, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1026 (1998).

158. Applications from our history in other areas of the law are instructive here. See, e.g., John Byron Sandage, Note, *Forum Non Conveniens and the Extraterritorial Application of Antitrust Law*, 94 YALE L.J. 1693, 1693 (1985) (“Expansive extraterritorial application of United States antitrust law has precipitated a political crisis with America’s major trading partners.”).

the perceived invasiveness of the extraterritorially applied laws.¹⁵⁹ The results of this scenario can range from mounting hostilities over other issues to the severance of trade,¹⁶⁰ and potentially even to military confrontation.¹⁶¹ Thus, van den Berg observes that extraterritorial application of the Helms-Burton Act in Canada has fueled an "international perception of the United States not only as a cultural imperialist but as a growing legal imperialist."¹⁶² Perhaps more threatening to the delicate global diplomatic balance, the reach of the Helms-Burton Act has sparked an unforeseen and undesirable alliance between Canada and Cuba,¹⁶³ in effect undermining U.S. efforts to apply economic sanction pressures in the latter. Simply stated, laws resented for their overreaching nature can be counterproductive.

Van Wezel Stone identifies similar risks in another area where extraterritorial law has been posited as a possible global solution—international labor regulation.¹⁶⁴ She notes that because extraterritorial jurisdiction does not aspire to be integrative, it fails to contribute to a common international system of norms and standards.¹⁶⁵ Instead, extraterritorial jurisdiction tends to undermine international peace and cooperation by creating tension and destabilizing international relations.¹⁶⁶ Sovereign nations "react with intense hostility when . . . activities within their own borders are made the subject of investigation by a foreign nation applying foreign rules and procedures."¹⁶⁷

159. See Y. Kurt Chang, Comment, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206, 223 (1994) (attributing arousal of nationalistic reactions to one country's imposition of its laws on another).

160. See June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 LAW & POL'Y INT'L BUS. 1185, 1190 (1996) (noting aggressive U.S. protection of copyright interests in China nearly resulted in a trade war in early 1995).

161. The potential for hostilities over extraterritorial legislation to escalate to the point of military confrontation is a logical possibility, rather than a trend in recent history. Indeed, even U.S. antitrust law, the extraterritorial application of which has evoked substantial retaliatory reaction, has not led to this extreme. See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument For Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 165 (1998) (noting that while extraterritoriality of U.S. antitrust law has evoked blocking statutes and claw-back statutes, it has not caused the cessation of international cooperation). While we have yet to see hostilities over U.S. extraterritorial legislation escalate to the point of war, the potential for such a scenario can never be ruled out.

162. Van den Berg, *supra* note 156, at 314.

163. See *id.* at 306–07.

164. Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1995).

165. See *id.* at 1026.

166. See *id.*

167. *Id.*

The world is not sufficiently homogenized to embrace one conceptualization of morality in gray areas,¹⁶⁸ and attempts to force a unified fit via extraterritorial legislation are likely to spark ill will and retaliation.¹⁶⁹ Such hostilities can result, of course, whenever one country imposes its rule upon transactions that occur in another country. The potential is increased when vague laws are applied to the ambiguous conditions of markets in transition, such as communist economies that are in the process of converting to capitalist ones.¹⁷⁰ This suggests a danger in externally-based efforts to unify legal structures addressing such moral issues. Must we therefore throw up our hands in despair, and abandon all exertions to extirpate bribery and corruption? The answer is decidedly no. Abdication of responsibility to improve global markets would be as irresponsible as overweening intrusion into the affairs of other nations. The appropriate middle ground between complacency and invasiveness is persuasion.

168. Gray areas are unavoidable both in the assessment of bribery generally and under the FCPA in particular. For example, while it is reasonable to exempt so-called "grease payments" from criminal sanctions, a partner at Arthur Anderson describes classification of grease payments as "a very gray area, the most difficult for lawyers and/or accountants to opine on." Elizabeth V. Mooney, *Bribery Norm in Foreign Markets Poses Legal Challenge for U.S. Firms*, RADIO COMM. REP. (Int'l ed.), Mar. 30, 1998, at 26.

169. See Sandage, *supra* note 158, at 1693 (attributing political crisis and retaliatory legislation to "[e]xpansive extraterritorial application of United States antitrust law").

170. See Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT'L L. 378 () (describing ambiguities in the application of the FCPA to various situations in newly opening markets of previously communist countries).