Are Extraterritorial Restrictions on Bribery a Viable Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery

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ARE EXTRATERRITORIAL RESTRICTIONS ON BRIBERY A VIABLE AND DESIRABLE INTERNATIONAL POLICY GOAL UNDER THE GLOBAL CONDITIONS OF THE LATE TWENTIETH CENTURY?

INCREASING GLOBAL SECURITY BY CONTROLLING TRANSNATIONAL BRIBERY

Philip M. Nichols*

The collapse of Shah Muhammed Reza Pahlavi's government in Iran affected—and continues to affect—much of the rest of the world. A rash of nationalization of the investments of foreign companies accompanied the collapse.1 U.S. diplomats were taken hostage; an unprecedented event that may have affected the course of a presidential election in the United States.2 Regional tension increased dramatically.3 Moreover, credible sources suggest that to this day the revolutionary government in Iran supports terrorism throughout the world.4

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2. Richard Falk’s contemporary commentary captures the nature of Iran’s actions. “Even Hitler, it is alleged, never violated the diplomatic immunity of his enemies. In fact, one has to search the books of diplomatic history to find isolated precedents for the events of the last few weeks in Tehran, and in each instance the challenge to diplomatic decorum came from a source that can be credibly dismissed as ‘barbarian.’” Richard Falk, The Iran Hostage Crisis: Easy Answers and Hard Questions, 74 AM. J. INT’L L. 411, 411 (1980). While the frustration felt by voters at the time undoubtedly affected the presidential election in 1980, it must be noted that the famed “October Surprise” theory, which suggests that persons from the United States actually conspired with Iran to delay the release of the hostages and thereby deliberately affected the election, has virtually no factual support and in fact is contradicted by the actual evidence. See Steven Emerson, No October Surprise, AM. JOURNALISM REV., March 1993, at 16, 16–24 (reviewing Senate and House hearings on the “October Surprise” theory).


4. See Coordinator for Counterterrorism, U.S. Dept. of State, Pub. No. 10321, Patterns of Global Terrorism 1995, at 23 (1996) (describing Iran as a sponsor of terrorism). A particularly spectacular example of the degree to which Iran engages in such activity was the
The collapse of the Suharto government in Indonesia was also felt throughout the world, albeit in a different manner. Suharto’s collapse was economic: the value of the Indonesian rupiah fell precipitously, Indonesia cancelled millions of dollars worth of contracts, billions of dollars worth of loans will be rescheduled, and decades worth of growth in Indonesia’s wealth were wiped out. Moreover, the collapse of Indonesia’s economy contributed to a decline in most economies in the region, which in turn has contributed to a decline in transnational investment.

The collapse of each government occurred in different places, in different times, and with different effects. One factor, however, clearly played a very large role in each collapse. Both regimes were corrupt, and both accepted bribes from foreign parties.

creation, in 1984, of a special forces unit comprised of 2500 persons willing to undertake suicide missions in order to spread fundamentalism throughout the Middle East and Northern Africa. See John B. Wolf, Antiterrorist Initiatives 24 (1989) (describing the creation of the unit).

5. See Raising the Rupiah, Economist, Aug. 1, 1998, at 64 (showing that the value of the rupiah fell from 10,000 rupiah per U.S. dollar to around 17,000 rupiah per dollar in the month following Suharto’s departure from government).


7. See Lindorff, supra note 6, at 5 (“most of the estimated $65 billion in loans to the country’s corporate sector are probably history, along with the bulk of another $70 billion in government-to-government loans”).

8. See Arshad A. Ahmed, Note, Introducing Asset Securitization to Indonesia: A Method in Madness, 19 U. Pa. J. Int’l Econ. L. 823, 824 (1998) (noting that the Indonesian stock market lost 90% of its value from June 1997 to June 1998); Bernard Estrade. Fragmenting Indonesia: A Nation’s Survival in Doubt, World Pol’y J., Fall 1998, at 78 (reporting that gross national product per capita has fallen from US$1,100 to around US$300). The collapse of the Suharto government is too recent to have generated lengthy scholarly commentary; a thoughtful account can be found, however, in Keith Suter, Indonesia: The End of the Suharto Era, Contemporary Rev., Sept. 1998, at 120.


10. See Lea Brilmayer, Altruism in the International Environment, 44 Clev. St. L. Rev. 1, 6 (1996) (noting that U.S. support of corruption in the Shah’s regime contributed to its collapse); Nora M. Rubin, Note, A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany and Switzerland, 14 Am. U. Int’l L. Rev. 257, 277–78 (1998) (discussing the admission by the World Bank that unregulated loans contributed to corruption and the collapse of Indonesia); Indonesia’s Endgame?, Economist, June 29, 1996, at 31 (reporting that the huge increase in support for the opposition parties was due in part to disgust with the corruption of the Suharto regime).
This paper participates in a debate concerning the desirability and viability of extraterritorial prohibition of transnational bribery as an international policy goal. Bribery consists of the conferral of a benefit to a public official in exchange for abuse or misuse of that official's office. Transnational bribery occurs when a businessperson from one country (the "home" country) bribes a public official of another country (the "host" country). Although transnational bribery itself has only recently become a significant phenomenon, bribery itself has a long and dark history.

No country in the world expressly permits the bribery of its own officials. At the moment, however, few nations criminalize the bribery of foreign officials; the best known example of such a law is the United States' Foreign Corrupt Practices Act. Yet, this debate is not about the Foreign Corrupt Practices Act, and proponents of the criminalization of transnational bribery do not necessarily wish to export the language of that Act throughout the world.

Rather, the debate concerns an idea. That idea is captured in hypothetical legislation that could be enacted by any country. This legislation would state that it deals with conduct that falls within the parameters of bribery, and that it only applies to nationals—natural or artificial—of
that country or to nationals' agents or employees. The law would go on to say that because bribery is of necessity defined by the law of the pol-

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6 The law would go on to say that because bribery is of necessity defined by the law of the pol-

ity in which bribery is alleged to have occurred, only behavior that is considered illegal in the foreign country would be criminalized by the hypothetical legislation. In other words, if a businessperson violated the bribery laws of a host country, that businessperson could be tried in the courts of his or her home country.

The idea that transnational bribery must be controlled, and the leg-

islation that could implement the idea, are in fact desirable policy choices. Transnational bribery constitutes a significant threat to global security. As such, its control is the right and the obligation of every pol-

ity that is able to do so.

This paper argues that global security can no longer be evaluated in the realist terms of the sovereignty of nations, and that global insecurity
does not arise merely from a handful of relatively straightforward is-

17 As an analytical tool, this paper turns instead to the concept of “complex interdependence” put forward by Robert Keohane and Joseph Nye. This paper then demonstrates how transnational bribery damages the quality of transnational relationships, thus endangering global security. The paper concludes by examining empirical observations. Empirically, transnational bribery has contributed significantly to global instability. On the other hand, no empirical observations suggest that extraterritorial control of transnational bribery leads to global dishar-

mony, or decreases the level of commerce or cooperation among nations.

1. Global Insecurity

During the Cold War, global security arguably was predicated on preventing a nuclear confrontation between the United States and the Union of Soviet Socialist Republics. The end of the Cold War has fos-


17 See infra notes 22–34 and accompanying text.

18 See infra notes 39–50 and accompanying text.

19 See infra notes 72–115 and accompanying text.

20 See infra notes and accompanying text.

21 See infra notes 117–132.

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Weapons, for example, are still of concern, but the concern now focuses on the acquisition and use of nuclear weapons by terrorists or rogue nations. Indeed, the acquisition of not only nuclear weapons but also any weapons of mass destruction by terrorists constitutes a significant threat to global security. War remains a threat, but not between superpowers; war is more likely to occur among less affluent countries.

At the same time, the global system whose security is threatened by these menaces has also changed a great deal. Persons and businesses around the globe have entered into a period of unprecedented economic integration, with little regard for national borders. Emerging economies are engaged in a more fundamental change, transforming their bureaucratic and commercial institutions from their traditional inward looking orientations toward outward-looking orientations that fit into and welcome participants from the global economy. Clearly, new policies—and new legal regimes—must be devised to deal with changing global conditions.

Indeed, realist and neo-realist theories of international relations are poor analytical tools with which to consider global insecurity under...
current conditions. Realism posits that states are the only meaningful actors in international relations, that states are rational actors seeking power, and that the basic organizing principle of the relations between states is anarchy. In a time when entrepreneurs are forging deep commercial alliances with little regard for national borders, realism stops at the border. In a time of sustained global cooperation, classical realism insists on "a world of states obsessed with their power vis-à-vis other states." 

The realism theory of international relations is closely related to the realism school of international legal theory, which also posits that states are the primary actors. As is true of realism as an international relations theory, the realism theory of international law is limited and stultifying. Indeed, Phillip Trimble’s condemnation of legal realism’s “sterile positivism” echoes Roscoe Pound’s scathing attack on positivism in international legal scholarship made several decades earlier.

It should be noted that, consciously or subconsciously, Professor Salbu’s writings on transnational bribery reflect a realist orientation. Professor Salbu expresses great concern for the sensitivities of nations, and it is in a potential discord of nations that he finds the greatest threat to global security. Professor Salbu’s construct has little room for

34. See Roscoe Pound, Philosophical Theory and International Law, II BIBLIOTHECA VISERIANA 71, 87–88 (1923).
35. See Steven R. Salbu, Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village, 24 YALE J. INT’L L. 223, 231 (1998) ("Today’s world remains one of separate sovereignties. Although states may one day prove obsolete, they are today’s primary global units of analysis").
36. See id. at 257.
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Communities that are not coincident with political borders, and has little consideration for the myriad threats that are not the product of state interaction.

Fortunately, both international relations theory and international legal theory have broken from the limitations of realism. Indeed, in the context of global security, it is instructive to revisit an early departure from realism. Twenty years ago, Robert Keohane and Joseph Nye suggested that the notion of “complex interdependence” more accurately describes certain types of international relationships than does realism. Keohane and Nye put forward three characteristics of complex interdependence.

First, international relationships occur in “multiple channels,” including transstate, transgovernmental, and transnational. Transnational relationships are those among nongovernmental actors, such as businesspersons; Keohane and Nye’s observation of twenty years ago is even more compelling with respect to the current globalized economy. Keohane and Nye’s observation with respect to multiple channels of international relationships also underscores the fact that states are not the only actors that must be accounted for when considering international policy.

Keohane and Nye note second that “[t]he agenda of interstate relationships consists of multiple issues that are not arranged in a clear or consistent hierarchy.” In other words, global or national security is not simply a matter of accumulating power, and cooperation among

37. See id. at 252 (claiming that “moral imperialism is an ineluctable reality whenever one sovereign entity seeks to alter or control behavior inside the borders of another.”).

38. See David Kennedy & Chris Tennant, New Approaches to International Law: A Bibliography, 35 Harv. Int’l L. J. 417, 418 (1994) (describing “a dramatic increase during the past two decades in the volume of scholarly work that aims to rethink the foundations of international law and to respond to recent trends in political, social, and legal theory”).


40. Id. at 24-25.


42. See supra note 30 and accompanying text (describing globalization).

43. The contention that states are not the only actors in international relations is still a matter of debate. For a thorough account of the debate, see Marc S. Ehrlich, Comment, Towards a New Dialogue Between International Relations Theory and International Trade Theory, 2 UCLA J. Int’l L. & Foreign Aff. 259 (1998).

44. KEOHANE & NYE, supra note 39, at 25.
international actors is enhanced due to the sheer number of issues in which various actors may have an interest.\(^4\) Similarly, Keohane and Nye note third that the use of military force is often inappropriate for solving important problems,\(^4\) and that military force is not used when conditions of complex interdependence prevail.\(^4\) The corollary, of course, is that when conditions of complex interdependence do not prevail, armed conflict is possible.\(^4\)

Keohane and Nye's theory of complex interdependence has spawned and been subsumed by a host of theoretical discussions on regime theory, institutionalism and neoliberalism.\(^4\) Nonetheless, with respect to global security, its central point remains vital. Global security cannot be based simply on projections of force, or on economic hegemony.\(^4\) Ultimately, global security is assured by the quality of relationships. Keohane and Nye can be read as suggesting that the control of nuclear weapons, the dampening of state support for terrorist groups and popular support for insurgent groups, the quenching of appetites for arms, and effective cooperation to control drug trafficking and money laundering each is better accomplished through the creation of complex interdependence than through projections of force or bald assertions of national prerogatives.

45. See Larry Kramer, Return of the Renvoi, 66 N.Y.U. L. REV. 979, 1026 (1991) (noting that "[i]f states have numerous interrelated interests, tacit or express cooperation is necessary on a wide range of issues.").

46. KEOHANE & NYE, supra note 39, at 27–28 (using the examples of economic and ecological issues); see also SHRI JASWANT SINGH, What Constitutes National Security in a Changing World Order?: India's Strategic Thought, at 15, (Center for Advanced Study of India Occasional Paper no. 6 1998), Essay prepared for The Future of Nuclear Weapons: A U.S.-India Dialogue held by the Center for Advanced Study of India (May 1997), (postscript added June 1998) (on file with author), ("knowledge and economics [have] overtaken the purely military components of power.").

47. KEOHANE & NYE, supra note 39, at 25.


50. See MURRAY WEIDENBAUM, SMALL WARS, BIG DEFENSE: PAYING FOR THE MILITARY AFTER THE COLD WAR 195 (1992) ("it has become clear that decisions affecting war, peace, and the host of in-between positions cannot be made in isolation from domestic and international political, economic, and social factors.").
Keohane and Nye are in good practical company. The current and most recent U.S. Secretaries of State each reflect the concept of complex interdependence in their own policy statements. Indeed, from a purely U.S. oriented perspective, Warren Christopher states that “Americans will be more secure and more prosperous if democratic institutions and market economies take hold.” Keohane and Nye’s observations teach that the same can be said for all persons in the world.

Unfortunately, transnational bribery endangers the quality of the relationships that create complex interdependence. Bribery corrodes governmental institutions. Bribery severely distorts economies. Bribery also erodes support for democratic reform and democratic institutions.

2. Transnational Bribery Degrades Governments, Economies, and Support for Democracy

Global security is based in part on the quality of the relationships among persons and organizations across political borders. Transnational bribery significantly affects the ability of transnational actors to establish relationships in three critical areas: intergovernmental, commercial, and democratic. Before discussing the corrosive effect of transnational bribery in each of these areas, it is first necessary to establish that transnational bribery is a pervasive problem.

2.1 Transnational Bribery

Bribery is a transaction in which a bribe-giver gives something of value in exchange for a benefit conferred through abuse or misuse of the bribe-taker’s office. The distinctive element of bribery is the quid pro

51. See Madeleine Albright, *American Leadership for the 21st Century: Doing What's Right and Smart for America's Future*, 8 U.S. DEP'T ST. DISPATCH, March 25, 1997, at 1, 2 & 4 (stating that U.S. foreign policy has three goals: (1) fighting threats to U.S. and allies' security, (2) increasing the global economy, and (3) promoting democracy and also noting that “compared to dictatorships, [free nations] are far less likely to commit acts of aggression, support terrorists, spawn international crime, or generate waves of refugees.”); Warren Christopher, *Statement of the Secretary of State*, 5 U.S. DEP'T ST. DISPATCH, Feb. 1994, at 1 (Supp. 1994) (“Building democracy and supporting market reform in the new independent states of the former Soviet Union and in Central and Eastern Europe are together a high priority and in the clear self-interest of the United States.”)

52. Christopher, supra note 51, at 1.

In transnational bribery, the transaction stretches across borders.

Philip Oldenburg observed two types of benefits conferred on bribe-givers in a small agency in India: "according to rule" benefits and "against the rules" benefits. According to rule benefits confer something on the bribe-giver that the bribe should have received pursuant to the rules; the bribe-taker takes action that he or she should have taken anyway. The abuse of office therefore occurs when the bribe-taker acts on the bribe-giver's request before the requests of others, or when the bribe-taker refuses to use his or her office in the absence of extralegal payments. Common examples include matters such as routine government approvals or the provision of basic government services. Bribes paid in order to obtain these benefits are often referred to as "facilitating" payments.

According to rule benefits could also include the award of a large contract that the bribe-giver should have won even in the absence of a bribe. Usually, however, a bribe will result in the award of a contract to a party who should not have won—an against the rule benefit. When a decision of this type is made, the abuse of office—usually given in exchange for large sums of money—involves the discretion of the public officials.

54. See James Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. REV. 815, 823 (1988) ("[W]hen a briber corruptly pays off a public official, he is paying to get some results for himself or those he favors. He is seeking preferential treatment."); Frank J. Sorauf, Politics, Experience, and the First Amendment: The Case of American Campaign Finance, 94 COLUM. L. REV. 1348, 1350 (1994) (stating that "quid pro quo" is "the vital element of any definition of bribery"). Interestingly, discussions of transnational bribery do not draw a distinction between bribery and extortion; this paper too will treat both as bribery. See Lindgren, supra, at 823–26 (noting that bribery occurs when the bribe giver initiates the transaction, whereas extortion occurs when the bribe taker demands the transaction). Bribery also occurs between private parties. See Ronald H. Coase, Payola in Radio and Television Broadcasting, 22 J.L. & ECON. 269, 270–74 (1979) (discussing bribery in the private sector). This paper discusses only the bribery of government officials.

55. Philip Oldenburg, Middlemen in Third-World Corruption: Implication of an Indian Case, 39 WORLD POL. 508, 523 (1987). Oldenburg does not use the phrase "against the rules" benefits; he refers instead to "illegal and improper work." Id.

56. See, e.g., Husted, supra note 51, at 21 (describing bribe payments made to expedite the issuing of drivers licenses in Mexico); Salim Rashid, Public Utilities in Egalitarian LDC's: The Role of Bribery in Achieving Pareto Efficiency, 34 KYKLOS: INT'L REV. FOR Soc. SCI. 448, 448–55 (1981) (describing bribe payments made to obtain telephone lines and place overseas and domestic calls in India).


58. See infra note 74 and accompanying text.
official. Particularly when large sums of money are involved, this type of bribery is often referred to as "grand corruption."\textsuperscript{59}

2.2 Transnational Bribery is Pervasive

Although many types of governmental corruption exist,\textsuperscript{60} bribery has become the most prevalent and prominent form.\textsuperscript{61} Indeed, some believe that bribery constitutes "the most significant problem, particularly, though not exclusively, in trade between North and South."\textsuperscript{62}

Given the current pervasiveness of grand corruption, one might suppose that grand corruption has always pervaded transnational commerce. Indeed, bribery itself is as old as governments.\textsuperscript{63} Those who have worked in international commerce for long periods, however, observe that the \textit{prevalence} of large-scale transnational bribery is a recent occurrence:

[T]he incidence of grand corruption has increased tremendously during the last decade. What used to concern a relatively small number of people working in a relatively small number of countries has now become a major South-wide problem. . . .

. . .

[By] general consensus, there has been a tremendous deterioration in the last ten years, with grand corruption becoming the general rule, rather than the exception, in major government-influenced contracts in the South.\textsuperscript{64}


\textsuperscript{60} For a discussion of the varieties of corruption, see Susan Rose-Ackerman, \textit{Corruption: A Study in Political Economy} 4 (1978).

\textsuperscript{61} See id. at 4 ("I shall always keep bribery in the analytical foreground."); Bruce E. Cain, \textit{Moralism and Realism in Campaign Finance Reform}, 1995 U. CHI. LEGAL F. 111, 113 ("Bribery defined in the traditional sense, the performance of public duty in exchange for something of personal value, is the paradigmatic instance of political corruption.").

\textsuperscript{62} Graham Wood, \textit{Ethics at the Purchasing/Sales Interface: An International Perspective}, INT'L MARKETING REV., No. 4, 1995, at 7, 18. See also Nancy Dunne, \textit{Kantor Calls for Bribery Action}, FIN. TIMES, July 26, 1996, at 3 ("The commerce secretary [of the United States] said that business leaders he had met say corruption in international trade is their number one concern.").

\textsuperscript{63} See Noonan, \textit{supra} note 12, at 4–5 (discussing the ancient practice of bribery).

\textsuperscript{64} See Moody-Stuart, \textit{supra} note 59, at 2–3. See also Konyin Ajay, \textit{On the Trail of a Spectre—Destabilisation of Developing and Transitional Countries: A Case Study of Corruption in Nigeria}, 15 DICKINSON J. INT’L L. 545, 545 (1997) (noting the recent "astronomical" increase in levels of corruption).
Several factors have contributed to the increase in transnational bribery. The World Bank suggests that opaque regulatory systems combined with weak enforcement institutions create an environment in which persons are more likely to offer and public officials are more likely to accept bribes.\(^6\) Patrick Glynn, Stephen Kobrin, and Moisés Naim suggest that “systemic political change has weakened or destroyed social, political, and legal institutions, opening the way to new abuses.”\(^6\) Weak legal systems also contribute to the growth of bribery.\(^6\)

It is very important to recognize, however, that the offer and supply of bribes by investors from industrialized countries is also a significant contributory factor.\(^6\) Ibrahim Shihata notes that “[f]oreign business, especially in developing countries, often contributes to the spread of corruption by assuming that pay-offs and connections are inevitable facts of doing business—an attitude which often turns out to a self-fulfilling prophecy.”\(^6\) The Speaker of the South African Parliament provides pertinent commentary, noting “that international corruption is often tacitly supported and actively encouraged by Western countries.”\(^7\)

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66. Patrick Glynn et al., The Globalization of Corruption, in CORRUPTION AND THE GLOBAL ECONOMY 7, 8 (Kimberly Ann Elliott ed., 1997). These scholars, who are each members of the World Economic Forum’s Davos Group, acknowledge that there is a greater awareness and exposure of corruption, but also state that actual levels of corruption have increased. Id.

67. See Daniel D. Bradlow, Foreword, 12 AM. U. J. INT’L L. & POL’Y 361, 400 (1998) (“Without the rule of law, bribery and corruption will flourish, and those without the necessary ‘connections’ will be left out in the cold.”).

68. See MOODY-STUART, supra note 59, at 27 (“initially at least, a far higher share of responsibility must rest on the tempters than on the tempted”); Beverly Earle, The United States’ Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendations: When Moral Suasion Won’t Work, Try the Money Argument, 14 DICKINSON J. INT’L L. 207, 221–23 (1996) (arguing that the increase in transnational bribery is caused in part by western companies); 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) (stating that western companies export the practice of bribery). Of course, these observations are difficult to quantify or even to discuss on anything other than a general level. For an interesting case study of corruption that specifically explicates the influence of bribe-offering foreign investors, see Agnieszka Klich, Note, Bribery in Economies in Transition: The Foreign Corrupt Practices Act, 32 STAN. J. INT’L L. 121, 131–33 (1996) (discussing how foreign investors spread the practice of bribery throughout Russia).


70. Anvers Versi, On Corruption and Corrupters, AFRICAN BUS., Nov. 1996, at 7 (quoting Frene Ginwalla, Speaker of the South African Parliament). Indeed, the significance of bribe suppliers to the spread of transnational bribery is of such concern that the most
Quantitative estimates of the dollar amount of bribery are impossible, as neither bribe-givers nor bribe-takers are likely to disclose the extent of their activities. It is, however, possible to estimate roughly how much of the world’s transnational commerce is affected by corruption. According to data on perceived levels of corruption as supplied by the nonprofit group Transparency International and information on transnational exports and imports as supplied by the International Monetary Fund, at least twenty percent of the world’s trade is perceived to be as likely to involve corruption as it is not to involve corruption.\(^7\)

Transnational bribery is a pervasive and growing problem. With respect to global security, transnational bribery constitutes an especially pernicious threat, because transnational bribery degrades the relationships that create complex interdependence.

2.3. Bribery Depresses the Relationships that Create Complex Interdependence

2.3.1. Bribery Corrodes Governments

Bribery damages governments by affecting both the decisionmaking process and by diminishing the pool of persons who make decisions. Bribery causes government decisionmakers to ignore fundamental parameters of economic decisionmaking. “A fundamental tenet of a free market system is that economic transactions should be based solely on the price and quality of a product and the service provided by the seller.”\(^7\) When a decisionmaker has been bribed, however, the decision is based not on price and quality, but instead on which supplier is able to pay the largest bribe.\(^7\) This dysfunction occurs at both the level of discrete transactions and at the level of administrative systems.

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73. See M. Shahid Alam, Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment, 48 AM. J. ECON. & SOC. 441, 450 (1989). Alam notes that not only is the quality of the good disregarded, but also that suppliers who cheat on the quality of the good in order to pay larger bribes will be “successful” in such a transaction. Id.
At the level of discrete transactions, bribery creates a system that rewards those who do not fulfill the terms of a contract. In a corrupt transaction, a contract is awarded not on the basis of quality or price or even the likelihood that the bidder will comply with the terms of the contract, but instead on the basis of the bribe paid. Thus, there is no incentive to provide goods or services as specified in the contract; there is, however, a compelling incentive to divert resources from fulfilling the contract in order to pay larger bribes. A corrupted transaction may appear to involve the transfer of a good or a service, but in practice the object of the transaction is the transfer of an illicit payment.

Bribery also affects administrative systems as a whole. As Vito Tanzi notes, "When civil servants appropriate, for their own use, the instruments that the government has at its disposal to influence the economy and to correct the shortcomings of the private market, they reduce the power of the state and its ability to play its intended, and presumably corrective, role."

Pervasive bribery tends to drive out honest and effective bureaucrats, leaving only the dishonest and ineffective. Indeed, in some corrupt systems positions within the bureaucracy are illicitly sold by superiors, thus effectively screening out those whose own integrity prevents the payment of a bribe. Within a system in which bribery occurs,

74. See Bader & Shaw, supra note 72, at 627 (noting the "distortion of the relationship between price and quality" that is created by bribery).
75. Alam, supra note 73, at 450.
76. See Oliver E. Williamson, The Economic Institutions of Capitalism 1 (1985) (defining a transaction as the transfer of a good or a service "across a technologically separable" boundary).
78. See Omotunde E.G. Johnson, An Economic Analysis of Corrupt Government, With Special Application to Less Developed Countries, 28 KYKLOS: Int'l Rev. Soc. Sci. 47, 57 (1975) (noting that efficient potential government employees will avoid government work for moral reasons when corruption is pervasive); Tanzi, supra note 77, at 26 ("Some individuals will try to get jobs not in the areas in which they might use their particular ability for productive use but in areas that provide scope for taking advantage of their special positions.").
resources are diverted from productive purposes to actions undertaken to hide bribery. Bribe-taking bureaucrats also withhold resources or hide information in an effort to extract larger payments from bribe-givers. Eventually, bribery can cause the persons who operate under a corrupted agency to discount that agency altogether.

In short, transnational bribery has a deleterious effect on government institutions. Bribery fundamentally warps the decisionmaking process of government agencies. Bribery also skews the pool of decisionmakers by driving out honest bureaucrats and enticing dishonest persons.

2.3.2. Bribery Distorts Economies

There is little question that bribery damages economies. Bribery distorts markets in a number of ways. First, and most fundamentally, bribery causes the system to work in a way other than the way it is supposed to work. Rather than making decisions on the basis of cost, quality or appropriateness, bribe-taking decisionmakers choose products or services on the basis of personal gain. This incentive structure can lead to the choice of an inappropriate supplier, or to the selection of products, services or projects that simply are not needed. It can also cause an economy to develop in ways that are not optimal.

Transnational bribery also distorts relative prices. Bribery causes excessive amounts of money to flow into a government, with no increase in output by the government. Indeed, bribery is even more

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80. See M.S. Alam, A Theory of Limits on Corruption and Some Applications, 48 KYKLOS: INT’L REV. FOR SOC. SCI. 419, 431 (1995) (stating “there will be a waste of resources used in the cover-up of illicit activities.”).

81. See Alam, supra note 73, at 449 (“bribery may impose costs because of the official’s efforts to maximize the offers of bribes” by creating false uncertainties).

82. One of the most comprehensive observational studies of bribery is that of the Irrigation Department in a southern Indian State conducted by Robert Wade. After several periods of observation between 1976 and 1981, Wade concluded that virtually the entire system was corrupt. Robert Wade, The System of Administrative and Political Corruption: Canal Irrigation in South India, 18 J. DEV. STUD. 287, 287, 291 (1982). Among other things, officials extracted bribes, called ayacut, from farmers for extra water or in some cases for the water already allocated to that farmer. Id. at 314. Wade found that officials actively created uncertainty among farmers in order to generate greater ayacut. Wade also found that the credibility of the Irrigation Department had deteriorated to the point that farmers did not believe warnings about impending water shortages. Id. at 314–15; see also Robert Wade, Irrigation Reform in Conditions of Popular Anarchy: An Indian Case, 14 J. DEV. ECON. 285 (1984) (further discussing Wade’s observational study).

83. See supra notes 72–73 and accompanying text (discussing bribery’s distortion of decisionmaking).

84. Johnson, supra note 78, at 54–55.
distortionary than excessive taxes, because bribery must be carried out in secret. This secrecy requirement enhances the distortionary effect of bribery. Thus, bribery renders price—one of the fundamental pieces of information in a market economy—less meaningful.

Bribery also reduces the incentive to complete contracts—indeed, an effective bribe-giver will divert resources from the completion of the contract in order to pay larger bribes; thus, the corrupt system burdens economies with underfulfilled contracts. Bribery lowers the tax base if some taxpayers pay bribes rather than taxes. Bribery may also divert resources from infant industries, thus stunting the growth of entire sectors of an economy.

Most damning is a growing body of empirical work that demonstrates a negative correlation between perceived levels of corruption and foreign direct investment. Paolo Mauro’s statistical study of the relationship between corruption and private investment finds that “corruption lowers private investment, thereby reducing economic growth . . . . The negative association between corruption and investment, as well as growth, is significant, both in a statistical and in an economic sense.” In a later study, Mauro finds that a measurable decrease in the level of corruption in a country would raise its investment to gross domestic product ratio by almost four percent and the annual growth of its gross domestic product by almost half a percent.

In short, transnational bribery fundamentally subverts an economy. Bribery imposes real costs on economies. Perhaps most troubling, bribery seriously impedes the ability of an economy to grow. Clearly, bribery impedes an entire category of relationships that contribute to complex interdependence.

85. See Andrei Schlieffer & Robert W. Vishny, Corruption, 108 Q.J. Econ. 599, 600 (1993) (“the imperative of secrecy makes bribes more distortionary than taxes.”).
86. Alam, supra note 73, at 450.
87. See Tanzi, supra note 77, at 26. In addition to lowering the tax base, bribery thus also raises the effective tax burden on those taxpayers that will not or cannot bribe tax authorities.
88. Id.
90. Paolo Mauro, The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross-Country Analysis, in Corruption and The Global Economy 83, 91 (Kimberly Ann Elliot ed., 1997). Considering the fact that the average annual growth rate in world domestic product is between 2.5 and 3.0 percent, half a percentage point represents a considerable improvement.
2.3.3. Bribery Undermines Support for Democratic Institutions

Bribery is universally despised. The myth that bribery is acceptable in some cultures has no empirical support. Instead, the empirical work demonstrates that even persons who live in countries in which a great deal of bribery occurs condemn bribery. Every major religion or school of moral thought, including Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Sikhism and Taoism, specifically condemns bribery. Indeed, "that bribes have to be paid secretly everywhere, and that officials receiving bribes have to resign in disgrace if the bribe is disclosed, makes clear that bribery violates the moral standards of the South and the East, just as it does in the West." Given the universal approbation for bribery, the Speaker of the South African Parliament again has terse words for those who continue to argue that some cultures embrace behaviors that constitute bribery: "[A]ttributing corruption to [African] cultures is both arrogant and racist, as well as convenient and self-serving. It says more about the culture of the North, than our own." The socially corrosive effects of transnational bribery are straightforward. Bribery is illegal and socially condemned, and yet is practiced.

92. See Noonan, infra note 92.
93. Judge Noonan, in his authoritative treatment of the subject, dismisses the myth as an example of cultural arrogance: "[I]t is often the Westerner with ethnocentric prejudice who supposes that a modern Asian or African society does not regard the act of bribery as shameful in the way that Westerners regard it." NOONAN, supra note 12, at 703.
94. An excellent example is a study conducted in Sierra Leone under the supervision of Sahr John Kpundeh. Even though bribery is commonplace in Sierra Leone, eighty-nine percent of those surveyed stated that bribery was doing a great deal of harm to Sierra Leone, and ninety-seven percent suggested that reducing bribery should be a priority for the government. SAHR JOHN KPUNDEH, POLITICS AND CORRUPTION IN AFRICA: A CASE STUDY OF SIERRA LEONE 109, 115 (1995). The author of this article has supervised a large study of indigenous attitudes toward corruption in a particular transition economy; that study too indicates that persons in that country condemn bribery.
95. See Philip M. Nichols, Outlawing Transnational Bribery Through the World Trade Organization, 28 L. & POL. INT'L BUS. 305, 321–22 (1997) (citing primary sources from each of the major religions and schools of moral thought that specifically condemn bribery).
96. Heimann, supra note 13, at 7. Heimann concludes the obvious: "There is no country in the world where bribery is either legally or morally acceptable." Id. See also Richard T. De George, Competing With Integrity in International Business 104 (1993) ("In no country do high government officials openly practice and publicly justify the acceptance of large sums of money for preferential treatment."). While the precise boundaries of what constitutes a bribe may differ; nonetheless, the concept of bribery is universally condemned. See also Shihata, supra note 69, at 453 ("Societies may differ in their views as to what constitutes corruption, although the concept finds universal manifestation.").
by those in positions of authority. The ability of law creators to dispense
with the law and of bribe-givers to buy their way around the law renders
the rule of law meaningless.' Ultimately, bribery "undermines the le-
gitimacy of governments, especially of democracies. Citizens may come
to believe that the government is simply for sale to the highest bidder.
Corruption undermines claims that the government is substituting
democratic values for decisions based on ability to pay. It can lead to
coups by undemocratic leaders."

Unfortunately, the corrosive effects of bribery on popular support
for the economic and democratic reform are not mere scholarly specu-
lation; the deleterious effects have been observed in Central and Eastern
Europe's transition to a market economy. Indeed, a recent report from
the World Bank indicates that corruption is one of the largest factors
causing popular resistance to market reform.

In short, transnational bribery threatens the creation of democratic
institutions throughout the world. In doing so, it severely limits the
abilities of persons and entities to engage in a multitude of the relation-
ships that contribute to complex interdependence.

98. See Herbert H. Werlin, The Consequences of Corruption: The Ghanaian Experi-
earce, 88 POL. SCI. Q. 71, 79 (1973) ("The effect of corruption is to generate an atmosphere
of distrust which pervades all levels of administration."); Jerold S. Kayden, Market-Based
Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Tech-
some individuals observe the law when others can pay to elude it? If the rule of law isn't the
rule of law, can anarchy be far behind?").

99. See Susan Rose-Ackerman, The Political Economy of Corruption, in CORRUPTION
AND THE GLOBAL ECONOMY, supra note 66, at 31, 45. Corruption also results in inequitable
distributions of wealth, further adding to social tensions. Id. at 44.

100. See Cheryl W. Gray & William W. Jarosz, Law and the Regulation of Foreign Di-
rect Investment: The Experience from Central and Eastern Europe, 33 COLUM. J.
TRANSNAT'L L. 1, 28 (1995) ("Charges of bribery and corruption can easily erode popular
support for economic reform in general, and foreign investment in particular.").

101. See Kevin Done, High Levels of Bribes Harms Pace of Growth, FIN. TIMES, June

102. Indeed, "the very factors that encourage corruption prevent any major reforms
from taking place." Werlin, supra note 98, at 84. A study of judicial reform in Latin America
found that factors related to corruption in the court system contributed to political inertia in
dealing with corruption and bribery. Edgardo Buscaglia, Corruption and Judicial Reform in
Latin America, 17 POL'Y STUD. 273, 276 (1996). Having exported bribery to developing and
emerging countries and watching as corruption degraded the economies and governments of
those countries, it is somewhat disingenuous of the industrialized countries to ask the de-
graded countries to reform themselves. See supra note 62 and accompanying text (discussing
the exportation of bribery). National criminalization of bribery has value, but only as part of
a broad-based attack that includes the criminalization of transnational bribery. See Robert S.
(describing the broad policies needed to combat transnational bribery, especially home
country criminalization).
2.4. Transnational Bribery Degrades Transnational Relationships

Keohane and Nye's description of complex interdependence highlight the importance of relationships at the international and transnational level. Transnational bribery degrades the quality of these relationships. An administration in which bribery is prevalent tends to be composed of persons seeking bribes rather than attempting to accomplish other societal goals, thus limiting the complexity of relationships with other nations and rendering the creation of those relationships more difficult. Economic relations, including those among private actors, are distorted; the relationships expressed as direct investment measurably declines. Even the democratic quality of a corrupted nation diminishes.

The degradation of a country and of the quality of its relationships could manifests itself in several ways. First, bribery is closely associated with money laundering and other financial crimes. At the most basic level, the bribes themselves must be laundered. Money laundering undermines financial institutions, and thus "has a detrimental effect in nearly every aspect of society." A failure to recognize that communities are not coincident with borders, and the concomitant failure to create laws that do not cease to have effect at borders, further facilitates financial crimes in at least two ways. In the first place, to the extent that most interstitial actors are engaging in legitimate albeit unregulated conduct, then interstitial malfeasors can hide their own illegitimate transactions amongst the unregulated legitimate transactions. Second, a failure by major trading

103. See supra notes 41–42 and accompanying text (relating Keohane and Nye's discussion of relations through multiple channels).
104. See supra notes 78–79 and accompanying text.
105. See supra notes 89–90 and accompanying text.
106. See supra notes 100–101 and accompanying text.
108. See Lawrence L.C. Lee, Combating Illegal Narcotics Traffic in Taiwan: The Proposed Money Laundering Control Act, 4 TULANE J. INT'L & COMP. L. 189, 191 (1996) (stating that money laundering is necessary to ensure the success of bribery). This was the rationale behind the holding in United States v. Montoya, which upheld the money laundering conviction of an official who deposited a $3,000 bribe check in a bank on the grounds that bribes cannot be used without being laundered. 945 F.2d 1068, 1076 (9th Cir. 1991).
110. Symposium Proposal of the Michigan Journal of International Law (January 11, 1999) (defining "interstitial actors" as "actors who neither represent nor claim to represent an internationally recognized nation-state, yet whose reach and sophistication resemble a
countries to regulate the behavior of their businesses while those businesses are in an emerging economy sends a message to that emerging economy that bribery is acceptable and that therefore other financial crimes such as money laundering or securities fraud must also be acceptable.111

The political and institutional degradations caused by bribery create other threats to global security. In his model of the causes of terrorism, Jeffrey Ross places grievances in a critical position.112 Grievances include exploitation, expropriation, government insensitivity, and political dysfunction.113 Clearly, bribery falls within or contributes to such grievances. Indeed, popular reaction to corruption in Indonesia has lead to a collapse not only of the national but also local governments.114 Some commentators feel that if the situation degenerates further, violence could be directed toward western institutions.115

Global security cannot be analyzed in simply in terms of the sovereignty of nations. A large and growing percentage of transnational relations occur in a community that transcends political borders. To the extent that this community does not have laws or other institutions on

nation-state (e.g., drug barons, Hamas, Cosa Nostra).") (quoting an April 1, 1998 telephone interview with Elizabeth Rindskopf, former General Counsel of the CIA) (on file with the Michigan Journal of International Law). While Rindskopf focuses on interstitial malfeasors, it should be noted that multinational corporations, international financial institutions, international organizations, and many other legitimate entities fit into her definition of interstitial actors.

111. See Klich, supra note 68, at 145 (discussing message to emerging economies).

112. See Jeffrey Ian Ross, Structural Causes of Oppositional Political Terrorism: Towards a Causal Model, 30 J. PEACE RES. 317, 321 (1993). Although not as part of formal models, the connection between grievances and terrorism has been observed by others. See, e.g., M. Cherif Bassiouni, A Policy-Oriented Inquiry into the Different Forms and Manifestations of 'International Terrorism', in LEGAL RESPONSES TO INTERNATIONAL TERRORISM xv, xxiii (M. Cherif Bassiouni ed., 1988) (defining international terrorism as "[a]n ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for or on behalf of themselves or on behalf of a state"). Indeed, even when condemning terrorism the United Nations is careful to maintain the linkage between grievances and terrorism. See, e.g., Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms And the Study of the Underlying Causes of Those Forms of Terrorism And Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, In an Attempt to Effect Radical Change, G.A. Res. 36/109, U.N. GAOR, 36th Sess., 92d plen. mtg., Agenda Item 114, at ?, U.N. Doc. A/RES/36/109 (1981).

113. Ross, supra note 112, at 325–26. Ross divides grievances into seven categories: ethnic, racial, legal, political, religious, and social. Id. at 325.


115. See Lindorff, supra note 6, at 6.
which to structure its relationships, then the quality of those relationships declines. One means of regulating the quality of these relationships is for home countries to prohibit bribery by their nationals without regard to whether that bribery occurs inside or outside of a given political border.

3. Empirical Experience Supports the Control of Transnational Bribery

Although technology and economic globalization have made many persons and businesses interstitial actors, sovereigns have not ceased to exist. A concern may exist, therefore, that the control of nationals of a home country while they are in the territory of a host country may have deleterious effects with respect to the cooperation of nations. This concern is baseless. No empirical data supports the notion that the control of transnational bribery will anger national governments to the point that cooperation among governments is endangered. A great deal of empirical experience supports the proposition that transnational bribery destabilizes global economic and political systems. This fact alone militates for the control of transnational bribery.

3.1. No Empirical Evidence Suggests that the Control of Transnational Bribery Endangers Cooperation Among National Governments

Professor Salbu claims that controlling transnational bribery will adversely affect cooperation among nations. His claim is predicated on a characterization of prohibitions of transnational bribery as an aggressive extraterritorial application of domestic law—a form of “moral imperialism” and an assertion that such an extraterritorial application will lead to dangerous political discord among nations. His characterization grossly misconstrues the nature of prohibitions of transnational bribery, and his assertion is unsupportable.

In some ways, the argument as a whole is troubling. The examples given are often caricatures, or are given by persons with a vested interest

116. The author of this article, for example, has argued that the World Trade Organization operates as a collection of sovereigns and must be recognized as such. Philip M. Nichols, Realism, Liberalism, Values, and the World Trade Organization, 17 U. PA. J. INT’L ECON. L. 851, 878 (1996).
in maintaining bribery. Moreover, if the examples that are provided truly are indistinguishable from bribery, then it is because the indigenous culture is not capable of distinguishing gifts from bribes. Such, in fact, is not the case. Finally, given the general condemnation of bribery, the argument seems to defer to the basest elements of a society. Respecting cultural differences, however, does not mean respecting only the practices of the most corrupt level of a society.

Criminalization of transnational bribery cannot be characterized as officious. The criminalization of transnational bribery neither thrusts a new set of laws into host countries nor regulates the conduct of host country governments or citizens. In the first place, the control of transnational bribery does not constitute the ubiquitous transnational application of one set of laws. Indeed, the control of transnational bribery cannot be made without reference to local law. A benefit conferred on an official only constitutes bribery if the law dictates that the conferral is bribery. If the law dictates that such a conferral is lawful, then the conferral does not constitute bribery. It is relatively easy to produce examples of behavior that might be considered bribery in a businessperson's home country and to ask if these behaviors would thus be considered bribery under an international proscription. The question, however, is meaningless and irrelevant. The real question is whether the behavior would be considered bribery in the host country—the country in which the businessperson is operating. Thus, far from thrusting law into the host country, criminalization of transnational bribery actually gives broader voice to the laws of that country.

Moreover, criminalization of transnational bribery does not dictate the behavior of foreign government officials or other foreign entities. The hypothetical statute described in the introduction to this paper, as well as the actual legislation required by treaty, only applies to persons who are citizens or residents of the country enacting such legislation. Exercise of this type of jurisdiction, through the nationality


120. See Daniel Y. Jun, Note, Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor, 29 VAND. J. TRANSNAT'L L. 1071, 1084–85 (1996) ("Korean people share the same moral standards as the Western culture regarding bribery. They are equally capable of distinguishing between what is intended to be gratuitous and what is intended to wrongfully influence another person.").


122. Supra note 16 and accompanying text.

Extraterritorial Restrictions on Bribery

principle, is well established and noncontroversial in international law. A host country cannot credibly claim offense when a home country exercises its rights to regulate the conduct of its own nationals—particularly when its regulation consists merely of requiring its nationals to obey the laws of the home country.

Similarly, the assertion that criminalization of transnational bribery will cause global discord is unsupported—and unsupportable. In part this is because there is not a large body of law to generate data for empirical studies; the United States’ Foreign Corrupt Practices Act has for many years been the only effective law criminalizing transnational bribery. Comparison to other extraterritorially-applied criminal law is inappropriate and unlikely to yield real insights. Antitrust law, for example, is applied extraterritorially not on the basis of the nationality principle but instead on the basis of the effects test. The effects test allows a country to extend its laws outside of its border to reach conduct that will have a significant negative effect inside its borders, even if the parties that the country prosecutes have no other connection to that country. The use of the effects test as a means for extending jurisdiction—particularly with respect to antitrust regulations—does generate controversy and hostility. Comparisons between antitrust and anti-bribery laws, therefore, are disingenuous and unenlightening.

124. See Ian Brownlie, Principles of Public International Law 303 (3d ed. 1979) (discussing the nationality principle). See also Oscar Schachter, International Law in Theory and Practice 254 (1991); Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217, 1241 (1992) (“It is also fairly well established that a state may regulate its residents, even when they are acting outside of the state.”); Stephen Wilske & Teresa Schiller, International Jurisdiction in Cyberspace: Which States May Regulate the Internet?, 50 Fed. Comm. L.J. 117, 131 (1997) (noting that the “right of a State to regulate the conduct of its citizens or nationals anywhere in the world is . . . noncontroversial.”).

125. A Swedish law also prohibited the bribery of foreign government officials, but was drafted in such a manner as to make it virtually inapplicable. See Michael Bogdan, International Trade and the New Swedish Provisions on Corruption, 27 Am. J. Comp. L. 665 (1979) (discussing the Swedish law). See also David R. Slade, Comment, Foreign Corrupt Payments: Enforcing a Multilateral Agreement, 22 Harv. Int'l L. J. 117, 122 n.22 (1981) (observing that the Swedish law applied only to payments to officials of countries that themselves criminalized bribe payments by their own nationals to Swedish officials).


127. See Wilske & Schiller, supra note 124, at 132-33 (describing the effects test).

128. See id. at 132 (noting that the use of the effects principle is “a major source of controversy in antitrust cases”). The use of the effects test is not universally accepted. Matthew Goode, for example, does not even include it among the legitimate means of extending jurisdiction outside of the territory of a state. See Matthew Goode, The Tortured Tale of
Those who choose to ignore the differences among laws may assert that the hostility created by the extraterritorial application of law is beyond debate. However, when more refined analysis of extraterritorial law is used, the potential for host country resentment is entirely debatable. No wars have been fought or boycotts implemented because, for example, U.S. entities must comply with and pay taxes according to the U.S. federal tax code regardless of where they earn income. The fact that U.S. firms must comply with U.S. accounting standards no matter where they are has not caused a great deal of consternation. And, most interestingly for the purposes of this debate, even though the United States Foreign Corrupt Practices Act has been in place for over twenty years, and even though at least sixteen cases involving actions in a dozen countries have been prosecuted under the Act, one cannot find a single meaningful diplomatic incident, a single war, a single trade boycott, or any other tangible repercussion to the United States or to global security as a result of the criminalization of transnational bribery. Indeed, the one scholar who empirically evaluated responses to the Foreign Corrupt Practices Act flatly contradicts any assertion of dangerous international tension. In a study of Middle East governments, Katherine Gillespie found minimal negative reaction among foreign governments with respect to the Foreign Corrupt Practices Act.

In sum, there is no credible evidence that the criminalization of transnational bribery antagonizes host countries. Indeed, it would be surprising if such evidence existed: the criminalization of transnational bribery touches only lightly on the host country, and actually gives voice to its own laws concerning bribery.

3.2. Empirical Observation Supports the Theory that Bribery Destabilizes Governments

In contrast, simple observation demonstrates that bribery has a devastating effect on the stability of governments. History is littered with

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*Criminal Jurisdiction,* 21 MELBOURNE U. L. REV. 411, 413–14 (1997) (listing the protective principle, the nationality principle, the passive personality principle, and the universality principle as means of extending jurisdiction).


examples of governments whose demise is attributable at least in part to corruption. More recently, the governments of France, India, South Korea, Mexico, and Venezuela have experienced electoral trauma, at least in part because of popular disgust with perceived corruption. From Asia to Latin America, leaders have been forced to resign as a result of bribery charges.

Professor Salbu’s assertions regarding global disharmony cannot stand in the face of the real, observable instability created by transnational bribery. Given the evidence, it is clear that the dangers attendant to an unchecked growth in transnational bribery far outweigh the possibility of frustration due to the extraterritorial prohibition of transnational bribery.

CONCLUSION

This paper examines the criminalization of transnational bribery in the context of one issue: global security. The primary threat to global security is no longer a nuclear confrontation between superpowers; the threat is now more diffuse and is based in the behaviors of nations or entities that do not have concrete relations with the rest of the globe.

133. See Christopher Fay, Political Sleaze in France: Forms and Issues, 48 PARLIAMENTARY AFF. 663 (1995) (describing political turmoil in France); Sumit Granjuly, India in 1996: A Year of Upheaval, 37 ASIAN SURVEY 126, 127 (1996) (corruption investigation launched by Prime Minister Rao resulted in Congress Party losing control in India); South Korea’s Lame Duck, ECONOMIST, Apr. 5, 1997, at 33–34 (noting that South Korea’s president is “reviled by the public” and battered by a previously amiable media over a corruption scandal); John Bailey & Arturo Valenzuela, The Shape of the Future, J. DEMOCRACY, Oct. 1997, at 43 (attributing defeat in general elections of the PRI, which had held power in Mexico since the 1920s, to reaction to corruption); Cardoso Furore Unsettles Markets, FIN. TIMES, May 26, 1999, at 4 (describing impact of corruption on Venezuela).

134. See Steve Ellner, A Tolerance Worn Thin: Corruption in the Age of Austerity, NACLAS REP. ON THE AMERICAS, Nov.–Dec. 1993, at 13–16 (Venezuelan President Andres Perez impeached on bribery charges); Larry Rohter, Ecuador: Ex-President Jailed, NY TIMES, March 18, 1999, at A6 (ex-President Fabian Alarcon jailed on corruption charges); Melina Selverston, The Unraveling of a Presidency, NACLA REP. ON THE AMERICAS, May–June 1997, at 11, 11–12 (Ecuadorean President Abdala Bucharam impeached on corruption charges); At Odds With Itself: Ecuador, ECONOMIST, Oct. 28, 1995, at 51 (Vice-President and economic mastermind Alberto Dahik fled country, causing “worst political crisis” in Ecuador’s political democratic history); The Mighty Fall in South Korea, ECONOMIST, Aug. 31, 1996 (reporting that former presidents Chun Doo Hwan and Roh Tae Woo, along with a dozen aides, were sentenced to jail for bribery).

135. See Augustus Richard Norton, Nontraditional Challenges: Religion, Violence and Change in the Third World, in U.S. NATIONAL SECURITY STRATEGY FOR THE 1990s, supra note 48, at 40, 41 (noting that the diffusion of power makes the Third World less stable and more inclined to violence); see also Oumirserik Kasenov, Central Asia: National, Regional and Global Aspects of Security, in SECURITY DILEMMAS IN RUSSIA AND EURASIA 188, 188 (Roy Allison & Christoph Bluth eds., 1998) (reporting that Kazakhstan, the Kyrgyz Repub-
Indeed, Robert Keohane and Joseph Nye’s observations are strikingly pertinent in current global conditions. When complex interdependence prevails, when healthy relationships on a number of issues through a number of channels cross borders, then countries are less likely to inflict damage upon one another.

Transnational bribery damages the quality of relationship and contributes to global instability. Bribery debilitates governments, and cripples a channel critical to transnational relations. Bribery distorts economies, affecting the primary driver of transnational relationships. And bribery corrodes support for democratic and market reform, thus diminishing the number of countries in which relationships can be formed.

It is overly simplistic to argue that home country criminalization of transnational bribery will damage global harmony. In the first place, such an argument mischaracterizes such criminalization. Home country criminalization of transnational bribery does not outlaw legitimate behavior in the host country—it simply requires nationals of the home country to obey the bribery laws of the host country. In the second place, the argument is simplistic because it reduces international law and international relations to single issues (and also harkens back to the days of realism.) Rhetoric aside, there simply is no credible evidence that indignation over the extraterritorial application of a law prohibiting transnational bribery ever has or ever will rise to the level that it impedes the myriad issues in which national governments have an interest and on which they must cooperate.

On the other hand, there is abundant evidence of the devastation and instability caused by bribery. One need look back no further than Indonesia in the last year. Looking back, however, is not as important as looking forward. Transnational bribery is a growing phenomenon, which threatens serious damage to transnational relationships. The criminalization of transnational bribery, by all countries, therefore is a desirable policy choice at the beginning of the new millennium.