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The Dynamic of the Institutionalization of the OECD Anti-Bribery Collaboration

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THE DYNAMIC OF THE INSTITUTIONALIZATION OF THE OECD ANTI-BRIBERY COLLABORATION

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ABSTRACT

Grasping the dynamic of the institutionalization process of the anti-bribery collaboration from the FCPA to the OECD Anti-Bribery Convention is critical for the next step of analyzing the actual performance of these laws. Previous works, grounded in realist ideology, often reduce the dynamic process to a question of states' free will and rational responses to expected payoffs in relative legislative strategies. This realist approach offers only speculative and inaccurate explanations that cannot sustain an understanding of the operation of the anti-bribery collaboration at successive stages. Instead, this study employs a historical approach, stressing how decision makers were constrained by existing and evolving institutions through analyzing the process of intertwined interactions among involved political parties, and concludes that the institutionalization process is composed of a sequence of unavoidable choices by decision makers in a concrete, historical context. A lawmaking game among rational parties in an evolving context may plausibly result in altruistic consequences.

Key Words**:** institutionalization; OECD anti-bribery collaboration; realist analysis; historical analysis; coordination game; moral boundaries of law; institutional path dependence.

I. INTRODUCTION

At the outset of this Article, there are two critical concepts to be defined. The first is "transnational bribery." Transnational bribery[1] generally refers to one country's nationals or entities paying bribes to foreign public officials in international business transactions. The acts often take place in the home country of bribe payees, and the bribe payers often, although not always, seek to gain or retain business opportunities.[2] Transnational bribery used to be a legal business activity that enjoyed tax deductions.[3] The transformation of its legal status from a normal business activity to a criminal offense was a recent event.[4]

The second concept is the institutionalization of the global anti-bribery collaboration. In the discourse of this Article I refer to the establishment of central, national, and international laws, which criminalized transnational bribery. This institutional establishment took place between 1977 and the early 2000s, marked by the creation of the Foreign Corrupt Practices Act (FCPA) and the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention (the Convention).[5] In 1977, the U.S. enacted the FCPA, which, for the first time in history, criminalized acts of transnational bribery.[6] In 1997, major industrialized countries joined the U.S. and established the Convention.[7] Among a series of similarly themed anti-bribery agreements established during this period, the Convention is the most influential and enforceable.[8] It is also the first and only agreement that places central attention on the supply side control of transnational bribery.[9] Current anti-bribery scholarship generally regards the

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[1] Org. for Econ. Co-operation and Dev. [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 37 I.L.M. 1, 4 (1998) [hereinafter Convention] (defining transnational bribery as acts of "any person intentionally to offer, promise[,] or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.").

[2] *See* ASS'N OF CERTIFIED FRAUD EXAM'RS, BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 57–59, 62–63 (2013).

[3] LUCINDA A. LOW, THE U.N. CONVENTION AGAINST CORRUPTION: THE GLOBALIZATION OF ANTICORRUPTION STANDARDS 1-2 (2006), *available at* http://www.steptoe.com/assets/attachments/2599.pdf.

[4] *See* Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (1977).

[5] Convention, *supra* note 1.

[6] Ajani Harris, The Impact of the Foreign Corrupt Practices Act on American Business from 1977-2010 (Apr. 25, 2011) (unpublished senior thesis, Claremont McKenna College) [hereinafter Harris], *available at* http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1177&context=cmc_theses.

[7] *See* Christopher K. Carlberg, *A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards*, 26 B.C. INT'L & COMP. L. REV. 95, 98 (2003).

[8] *See* A. Keith Thompson, *Does Anti-Corruption Legislation Work?*, 7 WORLD CUSTOMS J. 39, 41 (2013).

[9] *See* MARK PIETH, THE OCED CONVENTION ON BRIBERY: A COMMENTARY 19–21 (Mark Pieth et al. eds., 2d ed. 2013).

Convention as the landmark legal instrument of the global campaign against transnational bribery.[10]

The enactment of the FCPA and the formation of the OECD Convention created two historical events suitable for theoretical analysis. First, because the FCPA unprecedentedly criminalized transnational bribery and relied on supply-side control of corruption and extraterritorial enforcement of criminal law, its wisdom was initially questioned.[11] Academic work in anti-corruption conducted before the formation of the Convention placed central attention on this issue.[12] Since the Convention's entrance into force in 1999, opinion shifted toward approval of the FCPA approach.[13] Academic focus shifted to the practical effects of the Convention in controlling transnational bribery. Accordingly, the central mission of present-day work in anti-corruption is to provide policy recommendations to improve enforcement of the Convention around the world.[14]

In order to offer successful policy recommendations for the collective enforcement against transnational bribery, we need to grasp operational factors of law enforcement at a systemic level. An even more fundamental prerequisite is to grasp the central dynamic behind the build up of institutions. The underlying forces of institutionalization that drove the process forward identify not only the target problem to be solved, but also the orientation of those established laws. In order to predict state compliance with the Convention and address any impediments, we need to understand the dynamic of the institutionalization in the first place.

However, current academic literature fails to give an adequate explanation of this topic. Far too many times previous works have only recounted the story of the institutionalization of the global anti-bribery collaboration, from the enactment of the FCPA to the formation of the Convention.[15] Within these discourses, the question of *how* institutions were built up was neatly undercut into the question of *why* states chose to legislate. The logic behind the buildup and incremental evolution of institutions approximates to the logic of free will choices of states in separate informational environments.

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[10] *See id.* at 8–9.

[11] *See* Thomas Pletscher & April Tash, *Beyond the 1997 Bribery Convention: The Business and Industry Advisory Committee's Work on Corruption*, *in* NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION 175, 176–77 (2000).

[12] *See generally* Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO ST. L.J. 1321, 1351 (2012) (explaining that the convention's supply side coverage does not furnish security against double jeopardy issues).

[13] *See* Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 338–40 (2013).

[14] *See generally* OECD, *OECD Working Group on Bribery: Annual Report on Activities Undertaken in 2012* (2013) [hereinafter *Annual Report*] (reporting from all the members of the OECD on the promotion and compliance from the Convention).

[15] *See, e.g.*, Elizabeth K. Spahn, *Implementing Global Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1, 1–14 (2013).

This standard account reflects and results from the centrality of realist thinking, which largely coincides with the rational choice theory in an academic analysis of international affairs. In this analytical logic, the U.S. and other regulatory states are anthropomorphized. Consciously or unconsciously, they are attributed with properties of natural persons such as intentions, moral sentiments, and interest rationality. The free will of states to make policy choices is stressed. In addition, the standard account also stresses the rationality of state behaviors and posits that they act strictly in an optimizing manner to seek maximal self-interest throughout their policy making process.

Following this presupposed behavioral logic, previous works in rational choice tradition often start with the binary opposition of moral values and material interests. These works both presume that either of these binary opposites has driven states, like the U.S. and its allies, to build up central anti-bribery institutions such as the FCPA and the Convention. Relevant policy choices of states are then labeled as irrational or rational according to whether the institutional construction is consistent with a given state's self-interest.[16] Scholars that presume a commitment to moral values as the motive of state actors to legislate against transnational bribery would then either support the FCPA style approach for its moral correctness,[17] or object to it for their pan-moralism.[18] Another group of scholars, who believe self-seeking purposes motivate states to legislate, tend to rationalize the FCPA approach as a result of trading conflicting interests and emphasize that the FCPA is a strategy that sacrifices short-term business interests for superior national interests.[19]

Despite the long-standing debate on state motives, either value-driven or interest-driven, and the wisdom of states' policy choices, either rational or irrational, the standard interpretive approach only reflects the dominance of the rational choice tradition in which any explanation of state policy choices must revolve.[20] This approach is based on the binary opposition of moral values and material interests and does not provide a suitable perspective. As this standard approach only allows a static perspective, it is therefore ill equipped to fully explain the institutionalization process of the collaboration, which, in nature, is an evolutionary event.

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[16] *See, e.g.*, Kevin E. Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery*, 4 AM. L. & ECON. REV., 314, 340 (2002) [hereinafter Davis, *Self-Interest*]. *See also* Kevin E. Davis, *Why does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?* 67 N.Y.U. ANN. SURV. AM. L.,497, 511 (2012) [hereinafter Davis, *Moralism*].

[17] *See* Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 260 (1999).

[18] *See* David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 465 (1999).

[19] *See* William James Buchholz, *A Vexing Conundrum: Bribery and Public Relations*, 1-20, MADISON NJ: FAIRLEIGH DICKINSON UNIV. (1989), *reprinted in* BENTLEY U., *available at* http://cyber.bentley.edu/faculty/wb/printables/bribery.pdf (last visited Feb. 18, 2015) (originally titled *A Vexing Conundrum: Bribery and Public Relations*).

[20] *See* Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 1 U. ILL. L. REV. 5, 10 (2007).

Viewed through the veil of a rational choice theory, the buildup of institutions is predefined as a story of free will—the rational choice of anthropomorphized states in a given informational environment.[21] Research then solely relies on the content of established decisions, rhetoric of political leaders, and precompiled knowledge of human beings to speculate as to the motives of states.[22] While the formulation of the standard account manages to explain the discontinuous legislative enactments (like the FCPA and the Convention) as to the results from the predefined behavioral logic of states, it avoids considering constraints on states' policy choices. Such constraints are defined by existing formal and informal institutions, such as the interactive mode of these parties in the negotiations which diverged on preferences but converged on an intention to reach a consensus. An example of these constraints can be seen in the government and Congress in FCPA negotiations, and the U.S. and European governments in Convention negotiations. These constraints are also defined by the incrementally evolving informal institutions, which continuously altered informational environments for deliberate legislative enactments across negotiations over time.

The standard approach is a good interpretative device to motivate the latent value of society and convince people of the wisdom of institution building, which was important in the earlier years when people faced ideological obstacles to understanding the wisdom of the FCPA and the Convention. However, it does not give a coherent and adequate explanation of the story of the institutionalization of the global anti-bribery collaboration. More profoundly, it fails to sustain a progressive manner of understanding the operation of collaboration at successive stages. After the Convention's ratification in 1999, academic attention has shifted from the wisdom of building up institutions to the actual effect of these institutions on controlling transnational bribery;[23] people need a more rigorous and less speculative analytical approach to analyze state compliance with the Convention. The standard account, which builds theories on a set of assumptions and allocates state actors with an unchanging behavioral logic, is too rigescent to adapt to new academic objectives brought by variations in real circumstances.

Based on this awareness, this Article addresses the seemingly outdated, yet unsolved, issues of the dynamic that governs the institutional generation and development of the global anti-bribery collaboration. It tells a story about historicity and analyzes how institutionalization was driven forward by choices of state actors from a set of alternatives, defined by established and evolving institutional settings of society. Methodologically, it does not take

[21] *See id.* at 34.
[22] *See id.* at 10–15.
[23] *See* Anna D'Souza, *The OCED Anti-Bribery Convention: Changing the Currents of Trade*, 97 J. OF DEV. ECON. 73, 78 (2012).

choice theory as the panacea, nor does it totally repudiate it, but rather analyzes how the continuous variations in institutional contexts change available choices for state actors and finally make certain legislative enactment an optimal strategy. Technically, it divides the historical context into three phases: the pre-FCPA era, the U.S.'s unilateral action era, and the post-Convention era. This categorization results from the consideration that the three historical eras brought about three salient increases in the number of regulatory states of transnational bribery, and each increase reflects the substantive strategic choices of those states. It provides the best angle to observe the existing state and evolution of the institutional context that underpinned deliberate legislative enactments.

This Article proceeds as follows: Part II analyzes how the U.S. endogenously created the FCPA in 1977 without the intervention of any external forces. It explores pre-FCPA history to probe whether the FCPA was an active choice of U.S. legislation or an unavoidable consequence of interactions among parties in a given social context. Part III analyzes how the U.S. attempts to open the FCPA up for participation by other nations in the 1990s finally resulted in the creation of the Convention. Similar to previous works, it highlights the central role of the U.S. in the formation of the Convention. However, it repudiates the notion that there is a direct causal relationship between U.S. strategies and European attitude changes, and instead explores how interactions between the U.S. and European governments gradually altered the informational context and finally aligned the optimal choice of Europeans to that of the U.S. Part IV analyzes the post-Convention era and how the OECD and existing collaborators have marketed the Convention norms to even more peripheral states since the 2000s. Based on the analysis of the preceding sections, Part V extracts how the path dependence principle defines the trajectory of institutionalization and how key operative factors define the content and mode of interactions among political forces in each phase of the institutional buildup.

II. THE FCPA: AN ANTI-BRIBERY LEGISLATION ENDOGENOUSLY GENERATED BY THE ECONOMIC CONTEXT OF THE U.S.

This part analyzes the dynamic process behind the creation of the FCPA in the U.S. during the 1970s under the condition that there was no intervention of external forces. The U.S. adopted the FCPA in 1977, which targeted combating transnational bribery through two channels: stringent terms on accounting and financial control, and criminal liability of transnational bribery.[24] Although all countries outlawed corruption much earlier,[25] the FCPA is

[24]Masako N. Darrough, *The FCPA and the OECD Convention: Some Lessons from the U.S. Experience*, 93 J. BUS. ETHICS 255, 255 (2009).

the first legislation in history to declare bribing foreign officials as an immoral, criminal offense.[26] For this reason, the FCPA was innovative and progressive. However, with no other states following this approach, the FCPA's prohibition on transnational bribery was a unilateral action with global effects that increased the costs for U.S. companies to bribe foreign officials in international markets.[27] Therefore, the U.S. business community and scholars criticized the FCPA for its serious side effects on U.S. business abroad.[28] Consequently, before the FCPA was opened up to other states in the 1990s, any academic justification or criticism of the FCPA cannot avoid explaining this paradox.

A. A HISTORICAL REVIEW: THE U.S.'S UNILATERAL ILLEGALIZATION OF TRANSNATIONAL BRIBERY

The climate change regarding transnational bribery in the U.S. took place even earlier than its official criminalization by the FCPA. A historical review of the pre-FCPA environment reveals that transnational bribery in the U.S. went through a phase of being legal before 1950,[29] to being uncertain by the early 1970s,[30] and finally being illegal in 1977.[31] Two events that marked the gradual attitude change toward transnational bribery were the U.S.'s abolition of tax deductions of transnational bribery in 1958[32] and the criminalization of transnational bribery by the FCPA in 1977.[33]

1. THE ABOLITION OF TAX DEDUCTION PROVISIONS

Transnational bribery in the U.S., as in many other industrial states, was formerly tax deductible as a business expense.[34] The tax deduction policy, as an active action of regulatory states, was an express declaration of transnational bribery's legality. The U.S. Internal Revenue Code of 1939 allowed deductions for transnational bribery in Section 23(a)(1) by stating that deductions would be allowed for

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[25] *See* Ellen Gutterman, *Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act*, 2013 FOREIGN POL'Y ANALYSIS 1, 4 (2012).

[26] *See* PIETH, *supra* note 9, at 6–8.

[27] *See id*. at 7–8.

[28] *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 255 (1997).

[29] *See generally* Darrough, *supra* note 24, at 255, 257 (explaining that the FCPA was the first concrete prohibition on international bribery in the U.S.).

[30] *See id.* at 257.

[31] *See id.* at 257–58.

[32] Christopher Alan Lewis, *Penalizing Bribery of Foreign Officials through the Tax Laws: A Case for Repealing Section 162(c)*, 11 U. MICH. J.L. REFORM 73, 73 (1977–1978).

[33] *See* Darrough, *supra* note 24, at 257–58.

[34] *See Text: "Transnational Bribery" a Chapter from the U.S. National Export Strategy Report*, AM. INST. IN TAIWAN (Nov. 14, 1996), http://www.ait.org.tw/en/officialtext-bg9640.html.

> [a]ll the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.[35]

The U.S. invalidated this tax deduction provision in 1958, which turned out to be decades earlier than other industrialized states.[36] The Technical Amendments Act of 1958, which amended the Internal Revenue Code of 1954, defined bribes to foreign officials as "improper payments" and stated that:

> [n]o deduction shall be allowed under subsection (a) for any expenses paid or incurred if the payment thereof is made, directly or indirectly, to an official or employee of a foreign country, and if the making of the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee.[37]

The abolishment of tax deductibility signaled that transnational bribery was no longer an officially supported business activity in the U.S. However, the Act described transnational bribery as "improper" instead of "illegal."[38] The new provision was not retroactive in terms of the effective date. The wording of the Act implied some leniency towards transnational bribery.[39]

2. THE FCPA ENACTMENT AND THE CRIMINALIZATION OF TRANSNATIONAL BRIBERY

The Watergate scandal and subsequent U.S. Securities and Exchange Commission (SEC) disclosure programs finally initiated a public debate on the legal status of transnational bribery.[40] In the early 1970s, an investigation over questionable funds given to President Nixon's presidential campaign led to the revelation of a series of false accounting methods for concealing transnational bribery.[41] Astonished by the false accounting issues, in 1975 and 1976 the SEC started disclosure programs that required publically listed companies to disclose questionable payments made to both domestic and foreign officials.[42] This program revealed that the frequency and actual amount of unreported questionable payments were staggering.[43] From the perspective of the SEC, the pervasion of transnational bribery among listed companies not only signaled the dishonesty in corporate behavior, but also brought about a

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[35] I.R.C. § 23(a)(1) (1939). This provision was kept by the 1954 version in Section 162(a)(3). *See* I.R.C. § 162(a)(3) (1954).
[36] *See* The Technical Amendments Act of 1958, Pub. L. No. 85-866, § 1, 72 Stat. 1606, 1606 (1958).
[37] *See id*. § 5(b).
[38] *Id.*
[39] *See id.*
[40] *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 938 (2012).
[41] *See id*. at 932–34.
[42] *See id.* at 933–35.
[43] *See* Paul D. Carrington, *Enforcing International Corrupt Practices Law,* 32 MICH. J. INT'L L. 129, 132 (2010).

question of their real competitiveness in the foreign marketplace.[44] At that time, prohibiting false accounting of listed companies to conceal transnational bribery was already an inevitable instrument to rebuild and maintain shareholders' faith in both the U.S. business system and the reputation of the U.S. business community.[45]

However, the real controversy was the disposal of the legal status of what false accounting methods concealed, which were bribes to foreign officials. Seeing as the Watergate scandal and subsequent SEC investigations had already brought the issue into public view, it was impossible for the government to retain an ambivalent attitude toward the legal status of transnational bribery.[46] The U.S. government had to make its position known.

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At the beginning of President Ford's Administration, he and his staff were only concerned with the dishonesty of false accounting, which hurt shareholders' interest and eroded public confidence in the U.S.'s corporate governance.[47] They drew fewer implications from the disclosure programs regarding the subject matter concealed by false accountings. For the purpose of protecting shareholders and the general public's right to be informed, the SEC and the Ford Administration intended only to ban concealing transnational bribery.[48] It should be noted that the Ford Administration did not overlook the issue of transnational bribery, but instead, consciously laid aside the issue of transnational bribery out of trade considerations.[49] For this argument, a 1976 SEC provided the following implications:

> The Commission believes that the question whether there should be a general statutory prohibition against the making of certain kinds of foreign payments presents a broad issue of national policy with important implications for international trade and commerce, the appropriateness of application of United States law to transactions by United States citizens in foreign countries, and the possible impact of such legislation upon the foreign relations of the United States.[50]

However, Congress advocated a full prohibition of corruption, both domestic and abroad, instead of merely prohibiting false accounting.[51] The reason given, like Theodore Sorenson stated in a 1976 House hearing was:

> The Ford [a]dministration . . . prefers to rely solely upon the offending corporation notifying the

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[44] Harris, *supra* note 6, at 19–22.
[45] *Id.* at 15–16.
[46] *See generally* Macleans A. Geo-JaJa & Garth L. Mangum, *The Foreign Corrupt Practices Act's Consequences for U.S. Trade: The Nigerian Example*, 24 J. BUS. ETHICS 245 (2000) (examining the history and current legal status of transnational bribery).
[47] *See id.* at 246.
[48] *Id.*
[49] *See* Elitza Katzarova, National Origin of the Global Anti-Corruption Business 5 (Mar. 16, 2011) (unpublished manuscript), *available at* http://citation.allacademic.com/meta/p_mla_apa_research_citation/5/0/0/4/8/pages500486/p500486-5.php.
[50] Seymour J. Rubin, *United States: Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices*, 15 I.L.M. 618, 627 (1976).
[51] *See* Gutterman, *supra* note 25, at 13.

> Department of Commerce of its misdeed . . . . What a pitifully pallid response to a major moral crisis. Have we learned nothing from the attempted [coverup] of Watergate? . . . How could this country continue to preach abroad the virtues of the free competitive market system and continue to call for economic justice and political integrity, how could we hope to avoid unreasonable restrictions and attacks on American corporations abroad, if we are unwilling to specially and directly prohibit and penalize this wasteful, corrosive, shabby practice?[52]

As a result, Congress rejected the draft legislation proposed by the Ford Administration in 1976, which did not prohibit transnational bribery.[53]

Negotiation surrounding transnational bribery fell into a deadlock until 1977, when President Carter took office and "pushed for legislation [criminalizing] the bribery of foreign public officials."[54] Soon after, Congress suggested legislation that not only had stringent accounting requirements, but also declared transnational bribery unlawful.[55] The legislation passed by a unanimous vote,[56] and is now well renowned as the FCPA. The FCPA prohibits acts of both public issuers and privately owned domestic concerns that are

> corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official[,] . . . foreign political party[,] or . . . any candidate for foreign political office for purposes of . . . obtaining or retaining business.[57]

The enactment of the FCPA was a revolutionary event in the history of the global anti-corruption campaign. It "marked the first important step" to holding transnational bribery as a sanctionable crime.[58] The FCPA also unprecedentedly institutionalized supply-side control of corruption independent of demand-side control of corruption of host countries.[59] Besides, by ceasing U.S. domestic concerns from corrupt behaviors both inside and outside U.S. territories, the FCPA routinized extraterritorial application of criminal laws, which once was an exceptional principle in conventional international law.[60]

When signing the FCPA into law, President Carter summarized the immorality and economical inefficiency of corporate bribery.[61] He stated that,

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[52] *Foreign Payments Disclosure: Hearings before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 2 (1976) (statement of Theodore Sorensen).
[53] *See* Koehler, *supra* note 40, at 992–94.
[54] PIETH, *supra* note 9, at 7.
[55] *See id.*
[56] Roberta Romano, *Does the Sarbanes-Oxley Act Have a Future?*, 26 YALE J. ON REG. 229, 234 (2009).
[57] 15 U.S.C. § 78dd-2(a) (2013).
[58] PIETH, *supra* note 9, at 6.
[59] *Id.* at 19–21.
[60] *Id.* at 20–22.
[61] *See* Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill, 2 PUB. PAPERS

> during my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. S. 305 provides that necessary sanction. I share Congress[']' belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.[62]

However, President Carter also showed his worries about the potential side effect of unilaterally enforcing the FCPA on U.S. overseas businesses, which was the major consideration that accounted for the Ford Administration's resistance to outlawing transnational bribery.[63] Carter encouraged other nations to make progress on negotiations for a multilateral anti-corruption treaty, stating that the effort to combat corporate bribery overseas "can only be fully successful . . . if other countries and business itself take comparable action."[64]

3. A CONSEQUENT QUESTION: THE SIDE EFFECT OF THE FCPA ON U.S. OVERSEAS BUSINESS

As noted above, the FCPA enactment was a strategy based on U.S. decision makers' full awareness of the immorality of transnational bribery and the side effects of such a unilateral prohibition. The immorality of transnational bribery was almost undisputable; however, there was also widespread consensus among U.S. officials that a unilateral prohibition of transnational bribery would impose additional constraints on U.S. corporations and would put them at a disadvantage in the overseas marketplace.[65] The core controversy between the Ford Administration and Congress (or the Carter Administration) was not whether side effects of unilaterally prohibiting transnational bribery existed, but whether such potential side effects justified a continuous laissez-faire attitude of regulators.[66]

Although the enactment of the FCPA officially answered this question in the negative, concern about FCPA side effects did not stop. The U.S. government was pressed to work out remedial measures to reduce the predictable side effects of the FCPA.[67] Therefore, the U.S. government never stopped trying to multilateralize the FCPA and establish an anti-bribery collaboration in the years surrounding the enactment of the FCPA.[68]

2157 (Dec. 20, 1977).

[62] *Id.*

[63] *See id.*

[64] *Id.*

[65] *See* Gutterman, *supra* note 25, at 2.

[66] *See id.* at 3.

[67] *See* INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, ADDRESSING THE CHALLENGES OF INT'L BRIBERY AND FAIR COMPETITION (2004).

[68] *Id.* at 4.

4. U.S. EFFORTS AND FAILURES TO MULTILATERALIZE THE FCPA

a. U.S. Efforts

While promulgating the FCPA to address the issue of transnational bribery, the U.S. also engaged in multiple approaches to multilateralize the FCPA to cope with the side effects generated by its unilateral enforcement.[69] On the one hand, the U.S. government tried to popularize the anti-bribery initiative through trade negotiations with other countries.[70] Senate Resolution 265, promulgated on November 12, 1975,[71] noted that the U.S. should immediately negotiate with other governments to develop proper norms to eliminate the issue of transnational bribery on an international scale:

> Directed mainly at the effect of such payments on international trade, that Resolution resolved that the appropriate governmental officials initiate at once negotiations within the framework of the current multilateral trade negotiations in Geneva, in other negotiations of trade agreements pursuant to the Trade Act of 1974 and in other appropriate international forums with the intent of developing an appropriate code of conduct and specific trading obligations among governments, together with suitable procedures for the settlement of disputes, which would result in elimination of such practices on an international, multi-national basis, including suitable sanctions to cope with problems posed by non-participating nations .[72]

On the other hand, the U.S. also endeavored to draw support from intergovernmental organizations to foster multilateral support its anti-bribery initiative.[73] As transnational bribery went against the basic pursuits of these international organizations, they soon endorsed the anti-bribery initiative of the U.S.

On July 10, 1975, the Organization of American States (OAS) issued the Permanent Council Resolution on the Behavior of Transnational Enterprises (CP/RES. 154 (167/75)).[74] The Resolution "condemn[ed] in the most emphatic terms any act of bribery, illegal payment, or offer of payment by any transnational enterprise; any demand for or acceptance of improper payments by any public or private person, as well as any act contrary to ethics and legal procedures," and "urge[d] the governments of the member states, insofar as necessary, to clarify their national

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[69] *See* David R. Slade, Comment, *Foreign Corrupt Payments: Enforcing A Multilateral Agreement*, 22 HARV. INT'L L.J. 117, 127 (1981).

[70] *Id*.

[71] S. Res. 265, 94th Cong. (as passed by Senate, Nov. 12, 1975).

[72] Rubin, *supra* note 50, at 618.

[73] *See generally* 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 PAC. RIM L. & POL'Y J. 549, 550-57 (1997) (discussing multilateral efforts made by various intergovernmental organizations to curb international bribery).

[74] Org. of Am. States, *Organization of American States: Permanent Council Resolution on the Behavior of Transnational Enterprises*, 14 I.L.M. 1326, 1326–28 (1975).

laws with regard to the aforementioned improper or illegal acts."[75] On December 15, 1975, the General Assembly of the United Nations (U.N.) issued Resolution 3514(XXX) "condemning all corrupt practices, including bribery, in international commercial transactions."[76] Resolution 3514(XXX) also emphasized that any country was entitled to legislate anti-bribery laws and take action against corruption.[77] In 1976, the OECD issued the OECD Guidelines for Multinational Enterprises (1976 Guidelines),[78] which absorbed provisions against bribery of foreign officials in international trade by stating that enterprises should "not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office."[79] In 1977, the International Chamber of Commerce (ICC) provided a positive response to the FCPA by issuing the *Rules of Conduct to Combat Extortion and Bribery (ICC Rules)*.[80] It called for cooperation by governments, intergovernmental organizations, and the business community to combat extortion and bribery in international business transactions.[81]

b. U.S. Failures and Possible Reasons

U.S. efforts to multilateralize the FCPA achieved little success in the 1970s and the 1980s.[82] The lateral or multilateral anti-bribery norms written into trade treaties were basically unenforceable moral standards.[83] Although the U.N. considered the U.S. initiative as "generally appreciated and welcome by many delegations,"[84] its attempts at multilateralism failed because "it was either perceived as an act of expansive moralism or [the other countries] suspected a hidden [hegemonial] trade-agenda."[85]

It is self-evident that Europeans considered economics when refusing the U.S. proposal to outlaw transnational bribery. While there were a series of domestic factors in the U.S. that fostered the FCPA enactment, other

[75] *Id.*
[76] G.A. Res 51/191, ¶ 1, U.N. Doc. A/RES/51/191 (Dec. 16, 1996).
[77] Rubin, *supra* note 50, at 618.
[78] Orginisation for Economic Co-operation and Development, *A Chronology of Main Events in 1976*, 1979 EUR. Y.B. 165, 193.
[79] *Id.*
[80] INT'L CHAMBER OF COMMERCE, COMBATING EXTORTION AND BRIBERY: ICC RULES OF CONDUCT AND RECOMMENDATIONS 10 (2005), *available at* http://www.giaccentre.org/documents/ICCRulesofConduct.2005.pdf.
[81] *See id.* at 10–13.
[82] *See* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. LEGAL STUD. 141, 162 (2002).
[83] *See* PIETH, *supra* note 9, at 9.
[84] Rubin, *supra* note 50, at 620.
[85] Mark Pieth, *International Efforts to Combat Corruption*, INT'L ANTI-CORRUPTION CONF., http://9iacc.org/papers/day1/ws6/d1ws6_mpieth.html.

industrialized states did not share the same social contexts.[86] Therefore, there were no incentives to change an unproblematic status quo.[87] Furthermore, as noted previously, the increase or decrease of overseas business was a critical consideration for both the U.S. and other industrialized states.[88] The overseas contracts secured by paying bribes were still a dominant component of national welfare.[89] When the U.S., which was superior to many other states in terms of competitiveness, self-disarmed by adopting the FCPA, there were no reasons for other states to join.[90] They simply preferred to continue to enjoy the competitive advantages brought by the FCPA's enactment.[91]

Equally salient hindering factors were ideological obstacles.[92] Although political corruption was criminalized early in the collective history of humankind, a popular, if not dominant, view on corporate bribery at that time was that it was conditionally necessary.[93] Due to its extraterritorial nature, transnational bribery was even more remote from the concerns of national prosecutors than domestic corporate bribery.[94] Besides, the concepts of globalization and global welfare, which were critical for understanding the evils of transnational bribery, remained unpopular.[95] In contrast, European officials questioned the legitimacy of the extraterritorial enforcement of the FCPA and dismissed it as a kind of imperialism that disturbed the business atmosphere of host states.[96] The assertion about imperialism or culture invasion concerned U.S. officials as well.[97] On June 5, 1975, in the hearings before the Subcommittee on International Economic Policy and Trade, State Department Deputy Legal Advisor Mark Feldman stated the following about the enforcement of the FCPA:

> [E]nforcement of such legislation . . . would involve surveillance of the activities of foreign officials as well as U.S. businessmen and would be widely resented abroad. Extraterritorial application of U.S. law—which is what such legislation would entail—has often been viewed by other governments as a sign of U.S. arrogance or even as interference in their internal affairs. U.S. penal laws are normally based on territorial jurisdiction and, with rare exceptions, we believe that is sound policy.[98]

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[86] *See* KENNETH W. ABBOTT & DUNCAN SNIDAL, FILLING IN THE FOLK THEOREM: THE ROLE OF GRADUALISM AND LEGALIZATION IN INTERNATIONAL COOPERATION TO COMBAT CORRUPTION 23 (2002), *available at* http://www.international.ucla.edu/media/files/Duncan_Snidal.pdf.

[87] *See* Davis, *Self-Interest*, *supra* note 16, at 317.

[88] *See* Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill, *supra* note 61.

[89] *See* Salbu, *supra* note 28, at 262.

[90] *See* Patrick Glynn, Stephen J. Kobrin & Moisés Naím, *The Globalization of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 7, 22 (Kimberly Ann Elliot ed., 1997).

[91] *See id.*

[92] *See* Michael D. Breidenbach, *Towards a Global Ethic: An Analysis of and Proposal for Antibribery Legislation and Practices*, 1 NW. INTERDISC. L. REV. 163, 182 (2008).

[93] Abbott & Snidal, *supra* note 82, at 158–160.

[94] *See id.* at 166–167.

[95] *See generally* S.A.B. Page, *The Revival of Protectionism and its Consequences for Europe*, 20 J. COMMON MKT. STUD. 17 (1981) (discussing Europe's shift away from free trade).

[96] *See* Salbu, *supra* note 28, at 261.

[97] *See* Koehler, *supra* note 40, at 966–68.

[98] *The Activities of American Multinational Corporations Abroad: Hearings Before the H.R. Subcomm. on Int'l Econ.*

These disputes between the U.S. and European governments suggested that, in the historical context of the 1970s, following the U.S.'s lead meant there would be large scale reform of existing legal frameworks for purposes that were not guaranteed to be beneficial. European resistance to a U.S. led policy initiative was understandable, and without European support, the enactment of the FCPA would remain a unilateral policy of the U.S. government.

B. THE STANDARD RATIONAL CHOICE ACCOUNT OF THE FCPA AND ITS LIMITS

Though there was consensus within the American public regarding the immorality of transnational bribery, Americans were split on the wisdom of the FCPA's unilateral nature. Between the 1970s and the early 2000s, scholars tended to focus on the motives, rather than the wisdom, of the FCPA's implementation.[99] In order to categorize the U.S. government's motivation for passing the FCPA, previous research primarily emphasized rational choice theory before shifting to a binary framework focusing on morality and self-interest.[100]

Some scholars highlighted the plausible altruism of unilateral enforcement of the FCPA—that the FCPA seemed to reflect moral values of the U.S. at the cost of overseas business—and thus were convinced that the FCPA was a product of the U.S.'s morals.[101] Starting from the same ideological stance, scholars held different opinions as to the wisdom of the FCPA. One group of scholars believed that the immorality of transnational bribery was sufficient to explain the wisdom of the FCPA, while dissenters argued that the immorality of transnational bribery was insufficient to justify unilateral implementation, condemning the FCPA as an outcome of pan-moralism.[102]

Other scholars argued that unilateral implementation of the FCPA was a wise strategy.[103] As history shows, U.S.

Pol'y of the Comm. on Int'l Relations, 94th Cong. 24 (1975) (statement of Mark B. Feldman, Deputy Legal Adviser, Dep't of State), *available at* http://catalog.hathitrust.org/Record/011340574.

[99] *See, e.g.,* Michael W. Maher, *The Impact of Regulation on Controls: Firms' Response to the Foreign Corrupt Practices Act*, 56 ACCT. REV. 751, 751–756 (1981).

[100] *See* Abbott, *supra* note 20, at 10. *See also* Bill Shaw, *Foreign Corrupt Practices Act: A Legal and Moral Analysis*, 7 J. BUS. ETHICS 789, 789–91 (1988).

[101] *See* U.S. GEN. ACCOUNTING OFFICE, AFMD-81-34, REPORT TO THE CONGRESS OF THE U.S.: IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 16 (1981); Paul J. Beck & Michael W. Maher, *Competition, Regulation and Bribery*, 10 MANAGERIAL AND DECISION ECON. 1, 9 (1989); Jack G. Kaikati & Wayne A. Label, *American Bribery Legislation: An Obstacle to International Marketing*, 44 J. MARKETING 38, 39–40 (1980); Suk H. Kim, *On Repealing the Foreign Corrupt Practices Act: Survey and Assessment*, 16 COLUM. J. WORLD BUS. 16, 17–18 (1981); Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, GEO. J. INT'L L. 53, 53 (1999); William M. Carley, *Evading an Edict: Grumman Board Finds Payoffs Continued Despite Board's Policy*, WALL ST. J., February 28, 1979, at 1, 35; Press Release, U.S. Dep't of Justice, FCPA and Related Enforcement Actions (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html; Salbu, *supra* note 28, at 275–280.

[102] *See* Christopher Baughn et al., *Bribery in International Business Transactions*, 92 J. BUS. ETHICS 15, 27–29 (2010); Peter M. German, *To Bribe or Not to Bribe—a Less than Ethical Dilemma, Resolved?*, 9 J. FIN. CRIME 249, 250 (2002); Leslie Holmes, *Good Guys, Bad Guys: Transnational Corporations, Rational Choice Theory and Power Crime*, 51 CRIME L. SOC. CHANGE 383, 395–96 (2009); Philip M. Nichols, *Outlawing Transnational Bribery through the World Trade Organization*, 28 LAW & POL'Y IN INT'L BUS. 305, 375–77 (1997); Hung-En Sung, *Between Demand and Supply: Bribery in International Trade*, 24 CRIME L. SOC. CHANGE 111, 125–26 (2005); Nichols, *supra* note 17, at 259.

[103] *See* PIETH, *supra* note 9, at 8; Abbott & Snidal, *supra* note 86, at 162; Nichols, *supra* note 17, at 257.

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policymakers had a clear understanding of the potentially adverse consequences of unilaterally enforcing the FCPA; therefore, they believed that the FCPA was likely in the U.S.'s interest.[104] The FCPA was not a move of altruism or self-interest, but rather a move of rationality and wisdom. In other words, the FCPA was the best decision in terms of the U.S. government's national interests.

In general, the arguments based on rational choice theory included a fundamental assumption in international relations—the rationality of state actors.[105] These rational choice scholars were not concerned whether the immorality of transnational bribery sufficiently justified the FCPA. Instead, they sought to reconcile the necessity of eliminating immoral transnational bribery with the harmful consequences of unilaterally enforcing the FCPA.[106] Some of them achieved this by explaining the FCPA as a trade-off between conflicting national interests.[107] Under this interpretation, the FCPA was created to achieve the long-term benefits of reduced transnational bribery at the expense of short-term U.S. overseas business.[108] Specifically, some argued that although transnational bribery accelerated short-term overseas business, a laissez-faire policy may lead U.S. companies to become too dependent on paying bribes to the point that they become less competitive.[109] Therefore, the U.S. sought to prohibit transnational bribery in order to maintain the long-term competitiveness of U.S. companies.[110] Some have also argued that the U.S. only engaged in such an unprecedented action for the purpose of rebuilding the reputation of the business community.[111] Others argue that the FCPA was enacted to limit the added costs of transnational bribery, or to limit interference with the U.S. government's foreign policy. Despite the variations between arguments, these scholars essentially contended that the U.S. enacted the FCPA out of a holistic consideration of national interests. Unilateral enforcement of the FCPA might have a negative impact on short-term U.S. business interests, but it would benefit the overall U.S. economy in the end.

Compared with the first school of thought, which concerned the immorality of transnational bribery and the justification of unilateral FCPA enforcement, the second set of arguments was more instructive. They rationalized the

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[104] *See generally* Abbott & Snidal, *supra* note 86, at 163 (noting both domestic and international benefits).

[105] Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, *in* NEOREALISM AND ITS CRITICS 158, 164–65 (Robert O. Keohane ed., 1989).

[106] *See, e.g.*, Shaw, *supra* note 100, at 792–94.

[107] *See id.* at 794.

[108] *See* sources cited *supra* note 101.

[109] Brian K. Gose, FOREIGN CORRUPT BRIBERY ACT: LONG-TERM BENEFITS SHOULD OUTWEIGH SHORT-TERM BURDENS 29 (November 28, 2011) (Senior Thesis, Claremont McKenna College).

[110] *See* PIETH, *supra* note 9, at 8. This viewpoint is also underpinned by U.S. officials. *See* David T. Johnson, *Keeping Foreign Corruption out of the United States*, 32 DEF. INST. OF SECURITY ASSISTANCE MGMT. J. OF INT'L SECURITY ASSISTANCE MGMT. 94, 94–95 (2010).

[111] *See* Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 750 (2011).

FCPA and highlighted the shortsightedness of the idea that international operations of U.S. businesses could only prosper through bribery. Utilizing rational choice theory gives greater insight by better accounting for the complexity of U.S. national interests.

However, this interpretative approach is too speculative to discover and explain new facts in evolutionary contexts. Academic analysis is so path dependent that we rely on established knowledge to discover and understand new facts. Scholars need a progressive, interpretative approach that applies to the subject matter in a given moment and enables continuous explanation across time and space. With the rise of a series of international anti-bribery agreements in the 1990s,[112] scholars needed to predict the performance of these agreements and probe potential enforcement problems. Explaining the FCPA as a consequence of trading off conflicting interests rationalized the FCPA at the cost of accuracy. For interpretative purposes, it oversimplified the complexity of the decision making procedures to a linear calculation of conflicting interests. However, this logic is too ambiguous to identify real world interests and draw deterministic conclusions.[113] In addition, this approach also overlooked the variation in the value of interests in the eyes of different domestic groups and obscured the dynamic of repeated negotiations, conflicts, and compromises between these groups. Therefore, when this interpretative approach managed to convince people of the rationality of the FCPA, it told an inaccurate story.

C. THE FCPA AS AN OUTCOME OF COORDINATING MULTIPLE DOMESTIC DEMANDS WITHIN THE BOUNDARIES OF DEMOCRATIC VALUES

Other than a rational choice account that assumes the optimizing manner of the U.S. and speculates as to its motives, an exploration of how the U.S. legislature considered and acted in the historical context would be more relevant to understand why the U.S. endogenously created the FCPA. For this purpose, we should not only emphasize the variety of interest demands on U.S. values (like economic and reputational interests), but also highlight, instead of avoid, the fact that different domestic political forces had their own preferences, albeit with roughly equal discursive powers in post-Watergate negotiations regarding legislative remedies. In a democratic society where citizenry and governmental departments have their own channels to express and realize their interest demands, especially those with a complex structure of stakeholders in the society, legislative activity is less likely to be a process of allocating certain values to different interest demands, and more likely to sacrifice inferior values for

[112] OECD, *International Investment Law: Understanding Concepts and Tracking Innovations*, at 140 (2008).
[113] Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 599 (2010).

superior ones. It is characterized more by a legislative effort to coordinate these divergent demands through negotiations rather than to achieve a high degree of consensus among different stakeholders.[114] Conflicts take place, but under many situations, the demands of various stakeholders are not completely irreconcilable and can be coordinated on a common ground. Therefore, the final decision does not often reflect any superior interest demand; rather, it is nearly always reached through negotiations, confrontations, and concessions among various stakeholders. During the process, rational stakeholders constantly adjust their expectations to realize their self-interest in the largest practical extent possible.[115]

How were the divergent demands of different stakeholders in the post-Watergate years reconciled by the FCPA? As the Watergate scandal and SEC disclosure programs exposed the false accounting that concealed transnational bribery to the general public, all stakeholders of this issue would have a responsive attitude toward it.[116] Stakeholder's interest demands were quite different. For example, the SEC, which was committed to improving corporate governance and spoke on behalf of public shareholders, was concerned with the false accounting that violated public investors' right to know, which in turn affected the public confidence in the U.S. business system.[117] Accordingly, it only demanded effective "disclosure of material foreign corporate payments to investors."[118] The Defense Department however was concerned that U.S. companies' participation in corrupt behaviors in foreign military sales would undermine the U.S.'s defense interest, and thus required legislative remedies to "keep [the] private sector[s] from interfering with U.S. foreign policy and national security interests."[119] The State Department spoke on behalf of holistic national interests and was more ambivalent than others. On the one hand, it was more concerned about the negative consequence of unilaterally criminalizing transnational bribery than other governmental departments;[120] on the other hand, officials in Congress were also worried that if the U.S. had a laissez-faire attitude, a revelation of transnational bribery would embarrass friendly governments and negatively

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[114] *See* William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 368 (2013).

[115] *See id.* at 366–369. *See also* Ahdieh, *supra* note 113, at 600–603.

[116] *See* Koehler, *supra* note 40, at 932, 934–36.

[117] SECURITIES AND EXCHANGE COMMISSION, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 57 (1976) ("[T]he question of illegal or questionable payments is obviously a matter of national and international concern, and the Commission, therefore, is of the view that limited-purpose legislation in this area is desirable in order to demonstrate clear Congressional policy with respect to a thorny and controversial problem.").

[118] Koehler, *supra* note 40, at 961.

[119] PIETH, *supra* note 9, at 7.

[120] *See* Koehler, *supra* note 40, at 964–69.

impact economic and political relations with those states.[121] For other governmental agencies like the Department of Revenue, although there were no solid historical records, it had an inner demand for honest accounting as well.

Although these examples oversimplify the variety of stakeholders and their concerns, they have broadly illustrated the divergence of stakeholders and their demands. Due to this divergence, between June 1975 and September 1977 there were repeated exchanges of views among these governmental departments and around twenty bills were introduced to address the problem.[122] As the New York City Bar Association commented, "[n]o single issue of corporate behavior has engendered in recent times as much discussion in the United States—both in the private and public arenas— . . . as payments made abroad by corporations."[123]

In theory, in order to adopt appropriate strategies to coordinate these divergent domestic demands, it is critical to identify the "interoperability" of them. In his theory on the coordination game, Professor Ahdieh describes the term interoperability as the compatibility and reconcilability of different things.[124] In this case, it means the common core of all these demands. Essentially, the plausibly divergent demands converged on the need to recover the supervisory control of the U.S. government and general public over the corporate behaviors in overseas areas.[125] To that effect, a necessary and sufficient legislative remedy was to stringently prohibit false accounting. Once false accounting was prohibited, the U.S. government and its citizens would be better equipped to monitor corporate behaviors and immediately respond to any negative effects. Therefore, in 1976 the Ford Administration suggested a bill prohibiting false accounting, but laid aside the highly controversial issue of transnational bribery.[126]

Unfortunately, that was the end of the coordination game in regard to the U.S.'s legislative activity at the time; however, it was not the end of the story. In addition to coordinating divergent domestic demands of stakeholders at an efficient equilibrium, an equally if not more fundamental function of law is to reflect and safeguard commonly held social values by way of defining good behaviors and orienting citizens toward them.[127] This normative function identifies the law's stringent commitment to moral correctness. Well-established moral values act as a baseline that any code of law cannot actively or inferably go against.

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[121] *See Hearing*, *supra* note 98, at 4.
[122] Order Denying Defendants' Motion to Dismiss, United States v. Carson, No. SACR 09–00077–JVS, 2011 WL 5101701 (C.D. Cal. Sept. 20, 2011).
[123] *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 63 (1977).
[124] *See* Ahdieh, *supra* note 113, at 590–91.
[125] *See* Abbott, *supra* note 20, at 161.
[126] *See* Katzarova, *supra* note 49, at 5.
[127] JAQUELINE MARTIN & TONY STOREY, UNLOCKING CRIMINAL LAW 4 (4th ed. 2013).

Although the immorality of transnational bribery had not amounted to public opinion around the world, the U.S. already declared transnational bribery as immoral as early as it abolished tax deductions for it.[128] Besides, during the two-year long discussions on specific bills to deal with transnational bribery, immorality became an explicit talking point for both officials and citizens alike. Consequently, no matter how the discussion among governmental agencies finally defined the relevance of outlawing transnational bribery in regard to U.S. national interests, the immorality of transnational bribery became an increasingly accepted fact.[129] This fact ensured that new laws coming into place could not expressly or impliedly send signals of encouragement or tolerance of transnational bribery.

What makes the continuation of a laissez-faire attitude in the U.S. a signal of encouragement or toleration of transnational bribery in the new context? People may argue that since the U.S. asserted the immorality of transnational bribery in the 1950s, but did not take further action against it for two decades, it did not have to expressly outlaw it during the 1970s either. However, the situation changed with the combination of the Watergate scandal and the SEC disclosure programs. Due to the close ties between the issues of transnational bribery and the necessity to prohibit false accounting, there would no longer be any uncertainty as to the legal status of transnational bribery.[130] Either action or inaction of the U.S. government would act as an official declaration regarding the legal status of transnational bribery. Congress was destined to reject the law drafted by the Ford Administration, as it merely prohibited false accounting.[131]

It is noteworthy that emphasizing the normative function and moral relevance of the law is not synonymous with arguing that one branch of the standard rational choice analysis, in which the FCPA was founded on, was based on U.S. moralism. Ending false accounting and transnational bribery was not originally intended by many governmental agencies participating in the discussion, but became an unavoidable choice in the end.[132] Here, a paradox arose: Although prohibiting transnational bribery was not necessarily good—it was predictably bad for overseas business—but not forbidding it was even more prohibitive.[133] During this process, the U.S. government did not autonomously sacrifice its overseas business interests due to a moral high ground or other superior national

[128] *See* The Technical Amendments Act of 1958, Pub. L. No. 85-866, § 1, 72 Stat. 1606, 1606 (1958).
[129] *See* Koehler, *supra* note 40, at 943.
[130] *Id* at 943.
[131] *See id.* at 988–90.
[132] *See id.* at 961–71.
[133] *See* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 392–95 (2010).

interests. Its final strategies were limited within the boundaries of the established value system of its society.

Summarily, there were three key phases that lead to the consequent creation of the FCPA: First, the Watergate scandal and SEC disclosure programs brought about divergent domestic demands of a variety of stakeholders and forced the need of legislative remedies to coordinate these demands.[134] Second, the lawmaking mechanism of society determined that the initial versions of the proposed laws would result in repeated negotiations, confrontations, and concessions among the different political forces and eventually coordinate divergent demands once a common ground had been found.[135] Lastly, the final version of the law would be ultimately shaped within the existing value system of the society.[136]

More profoundly, the FCPA (a consequence of the Watergate scandal and the change from the Ford Administration to the Carter Administration) was an inevitable product of the economic context of the U.S. during that time.[137] The development of modern corporate systems required a strong corporate governance structure and exposed corporate behavior to public scrutiny. Once this new economic pursuit was confirmed by the legal system, the inherent demand for transparency in corporate governance would objectively squeeze the space for transnational bribery. For example, once false accounting was prohibited, the act of bribing U.S. corporations could be exposed. Foreign states and officials as well as the U.S. government and American corporations would be embarrassed, which would lead to more economic, moral, and diplomatic problems.[138] Therefore, the issue of transnational bribery was marginalized by a modern society with stable values and new economic pursuits. However, in the U.S. the FCPA was waiting for its time to make an appearance. This would then become the most fundamental source for endogenously creating the FCPA.

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III. THE OECD CONVENTION AS A "U.S. INDUCED" INSTITUTION

This portion analyzes the historical context of the FCPA after its creation in 1977 in order to better understand the central dynamic that lead to the establishment of the Convention in 1997. After the U.S. enacted the FCPA, but

[134] *Id*. at 359.
[135] *See* Koehler, *supra* note 40, at 961–71.
[136] *See id*. at 941–43.
[137] *See id*. at 995–97.
[138] RALPH H. FOLSOM, ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: TRADE AND ECONOMIC RELATIONS 392 (2005) ("The FCPA is a response to real and perceived harm to U.S. foreign relations with important, developed friendly nations, and the interest of the United States to prevent U.S. persons from making payments which might embarrass the United States in conducting foreign policy.").

failed to multilateralize it, the side effects of the FCPA became a salient concern.[139] In the late 1980s, the U.S. government began a new round of diplomatic efforts to multilateralize the FCPA, achieving rapid progress in the early 1990s; this ultimately culminated in the passing of the Convention in 1997.[140] Different from the enactment of the FCPA, the formation of the Convention was closely associated with the U.S.'s diplomatic strategies.[141] Just as addressing the tension between the necessity to combat corrupt corporate behavior and its predictable side effects is central to understanding the FCPA's creation, identifying the U.S.'s role in the Convention is central to understanding the formation of the OECD anti-bribery collaboration.

A. A HISTORICAL REVIEW: THE ROLE OF THE U.S. IN THE CREATION OF THE CONVENTION

1. U.S. MOTIVES TO ESTABLISH A CONVENTION

Since the 1980s, loud voices had criticized the FCPA's side effects on the U.S. economy. A popular view of the time was that the FCPA decreased U.S. business in corrupt countries.[142] President Clinton suggested in 1998, at the formation of the Convention, that the unilateral enforcement of the FCPA had "resulted in losses of international contracts estimated at $ 30 billion per year."[143] In contrast to the sentiments President Clinton shared, there were also proponents of the act contending that the FCPA did not actually cause a reduction in the U.S. economy.[144] However, the complaints regarding detrimental impacts on U.S. business interests greatly concerned the U.S. government.

Previously, there were discussions concerning whether the FCPA should be repealed. Essentially, two approaches emerged to reduce the side effects of the FCPA on overseas business transaction: to repeal the FCPA or to popularize it.[145] Given the failure to achieve multilateral cooperation in the 1970s, loud domestic voices called

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[139] *See* Presidential Statement, *supra* note 61.

[140] Spahn, *supra* note 15, at 5–6.

[141] Court E. Golumbic & Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L 1, 12 (2011).

[142] Roberto Ramos, *Banning US Foreign Bribery: Do US Firms Win?* 24–26 (Ctr. For Monetary and Fin. Studies, Working Paper, 2012); James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995).

[143] Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998).

[144] Barry Richman, *Can We Prevent Questionable Foreign Payments*?, 22 BUS. HORIZONS 14, 14–19 (1979). *See* J. DAVID RICHARDSON, SIZING UP U.S. EXPORT DISINCENTIVES 131 (2nd ed.1993); John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. INT'L BUS. STUD. 107, 107 (1996).

[145] *See* Michael Copeland & Robert F. Scott, *Efforts to Combat Transnational Bribery: Problems with and Alternatives to the Foreign Corrupt Practices Act*, 22 J. SECURITY ADMIN. 47, 50–51.

for abolishing the FCPA.[146] However, it was unrealistic for the U.S. to repeal the FCPA for several reasons.

First, the endogenous creation of the FCPA suggested that the U.S.'s real expectation was to popularize, rather than repeal, the FCPA. Fully aware of the FCPA's side effects prior to its enactment, U.S. policymakers were unlikely to repeal it for the same reason. Second, the U.S. could not threaten to repeal the FCPA for strategic purposes. In an international circumstance where other states were not convinced of their benefits in combating transnational bribery, neither the enactment nor the abolishment of the FCPA would alter their strategic choices.[147] Third, repealing the FCPA would be troublesome for the U.S. because of the "stick[iness]" of anti-corruption laws.[148] Institutional stickiness means the ability or inability of institutional change to take hold where it is transplanted.[149] At that time, the FCPA had been enforced for years and had been applied to the investigation of more than a dozen bribery cases.[150] Repealing the FCPA would make it difficult to deal with these established decisions.

Since a repeal was infeasible, the U.S. alternatively sought to soften the side effects with two options:[151] First, the U.S. government could withhold efforts during FCPA enforcement. As FCPA enforcement was at the discretion of the SEC and the Department of Justice (DOJ), they could control the level of enforcement and therefore guide its negative economic consequences to fall within an acceptable range.[152] Second, the U.S. could modify the FCPA and symbolically soften some of its harsh terms. In 1988, Congress passed the Omnibus Foreign Trade and Competitiveness Act (OFTCA), which revised conviction standards of the 1977 version of the Act.[153] While the 1977 version prohibited payments that a payer knew, or had a reason to know, were for illegal purposes, the 1988 version of the OFTCA only prohibited payments where the payer had actual knowledge.[154] Furthermore, two

[146] Copeland suggested that "if no treaty comes into force, we will no longer put our business community at a competitive disadvantage by enforcing the Act . . . . This simply is not a battle which can be fought unilaterally, for we cannot afford to wage a war in which we are the only combatants and, therefore, the only casualties . . . ." *Id.* at 50, 51. "US business interests argued for substantial modification or repeal of the FCPA so as to create a 'level playing field' in international markets." Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 3 VA. J. INT'L L. 665, 674 (2004).

[147] *See* Magnuson, *supra* note 114, at 392.

[148] Abbott & Snidal, *supra* note 86, at 161.

[149] *See* Magnuson, *supra* note 114, at 392.

[150] *See FCPA and Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited Feb. 18, 2015).

[151] *See* Magnuson, *supra* note 114, at 384–85.

[152] *See* Carrington, *supra* note 43, at 134; McSorley, *supra* note 111, at 751.

[153] Spalding, *supra* note 133, at 390.

[154] *Id.* at 393.

affirmative defenses were added to the 1988 version that relieved defendants of liability.[155]

Although expedient, softening the FCPA's side effects by withholding efforts had limited success. Popularizing the FCPA norms remained the best approach for the U.S. to get out of this dilemma. For this reason, the 1988 Amendment to the FCPA explicitly urged the President to negotiate with OECD member countries to adopt the FCPA.[156] The central work of the U.S. then focused on implementing a new round of strategies to recruit allies.

2. U.S. STRATEGIES TO ESTABLISH A CONVENTION

When the Clinton Administration took office in 1993, the U.S. government began to adopt aggressive foreign policies to multilateralize the FCPA.[157] Scholars often categorize these U.S. strategies as either interest-based strategies or value-based strategies.[158] Interest-based strategies refer to the U.S.'s use of economic leverage to press anti-bribery terms upon others through bilateral or multilateral trade treaties or other channels.[159] The rationale of this strategy is to impose incentives and disincentives to influence the responsive strategies of other states. Value-based strategies refer to the U.S.'s attempts to use its discursive power in international affairs in order to make normative persuasion and define "right" and "wrong."[160] This distinction, which juxtaposes interest and value, is employed for analytic clarity. As it is in international politics, interests and values are often interconvertible; no specific strategy is purely interest-based or value-based.[161] Accordingly, the U.S. would employ several major strategies to combat opposition to multilateralization.

a. The Strategy of Pressing Anti-Bribery Terms by Trade Treaties

The U.S. began to press anti-bribery terms on other states through treaties and industry associations in the 1970s.[162] This tool was used even more aggressively in the 1990s. The U.S. considered other governments' refusals

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[155] *Id.* at 365–66.

[156] *See* 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, 527 (1997).

[157] *See* Abbott and Snidal, *supra* note 82, at 163–64.

[158] *See id.* at 176–77.

[159] *Id.* at 162.

[160] *Id.* at 144 (quoting MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 1 (1998)).

[161] *See id.* at 142–47.

[162] The North American Free Trade Agreement (NAFTA) is one example of this sort of achievement. "Entered into force" on January 1, 1994, NAFTA established "the world's largest free trade area." *North American Free Trade Agreement*, OFFICE OF THE U.S. TRADE REP., http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-

to accept anti-bribery terms to be a "trade policy matter."[163]

The U.S.'s tool that sought to exchange trade treaties for anti-bribery cooperation can be understood as either a strategy of side payment or a strategy of "tit-for-tat." In treaty negotiations, when the expected treaties are likely to benefit some negotiators but are unhelpful or even harmful for other negotiators, the potentially benefited signatories can pay a price to compensate the potentially disadvantaged ones to elicit a cooperative decision.[164] The compensation made by the potential winners is known as a "side payment."[165] The strategy of making side payments aims to draw ambivalent parties into agreement. The tit-for-tat strategy is also a private relief measure in international relations, and is used to retaliate defectors toward cooperation.[166] It means that disadvantaged cooperators often take a retaliatory action in the next round to offset a defecting cooperator's unjust enrichment, and to protect themselves from further potential loss.[167]

Regardless of labels, the rationale behind using this tool was that the U.S., as the strongest economic power, was able to use its leverage in international economic affairs to trade off preferential terms for anti-bribery terms. By this approach, it appeared that the U.S. intended to alter the payoffs of other states and their strategies on whether to accept the FCPA-style norms.[168] This followed the basic logic of a rational choice theory.[169]

The U.S.'s strategy to popularize anti-bribery norms through trade treaties seemed to be a feasible vehicle; however, it had limited effects. Due to the multifaceted nature of transnational bribery, real opposition against it demands intervention by national powers, as well as cooperation by many governmental and non-governmental departments. The U.S.'s economic leverage might be able to press anti-bribery terms upon economically interdependent states, but it was unable to bring about high-level and holistic legislative changes.

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agreement-nafta (last visited Feb. 18, 2015). As Boris Kozolchyk explains, this treaty reflected the requirement of non-corruption business activities. *See* Boris Kozolchyk, *NAFTA in the Grand and Small Scheme of Things*, NAT'L LAW CTR. FOR INTER-AMERICAN FREE TRADE (May 3, 1994), http://www.iatp.org/files/NAFTA_in_the_Grand_and_Small_Scheme_of_Things.htm.

[163] Tarullo, *supra* note 146, at 679.

[164] Bård Harstad, *Do Side Payments Help? Collective Decisions and Strategic Delegation*, 6 J. EUR. ECON. ASS'N 468, 468 (2008).

[165] In fact, the subjects who make side payments are not necessarily winners, and the subjects who accept side payments are not necessarily losers. *Id.* It is more likely an issue of subjective will, which is probably, but not necessarily, a reflection of the potential benefits in the collective decisions. *See id.*

[166] George Bunn & Roger A. Payne, *Tit-for-Tat and the Negotiation of Nuclear Arms Control*, 9 ARMS CONTROL TODAY 207, 207–09, 213 (1988).

[167] *See id*. at 207.

[168] *See* Tarullo, *supra* note 146, at 667.

[169] *See* Abbott, *supra* note 20, at 34 and accompanying text.

b. The Strategy of "Public Diplomacy"

An equally important U.S. strategy was using European political forces to press anti-bribery terms on European governments. While Tarullo phrased this strategy as one of "public diplomacy,"[170] Abbott and Snidal referred to it as "value tactics."[171] Several similar versions have circulated regarding how the U.S. made use of a series of corruption scandals in Europe in the 1990s to publicize the damaging effects of corruption on European citizens.[172] Essentially, the U.S. utilized the public hostility toward corruption to sway the European resistance towards legislating against transnational bribery. In order for this strategy to work, two basic factors needed to be present. First, and regardless of the interest considerations of the decision makers, the public opinion often supported the right decisions instead of interest maximizing decisions.[173] The remoteness of common people from the economic relevance of transnational bribery even oriented them towards the U.S. claims. Second, European governments not only acted to optimize material interests in international trade, but also felt they should respond to the value demand of their own people.

In the early 1990s when several European corruption scandals were revealed, European citizens began to demonstrate increasing hostility toward corruption. The voice of the media gradually shifted to the U.S.'s side and urged their countries to adopt stringent measures to control corruption.[174] The domestic climate, with an increasing hostility toward corruption, converged into a rising pressure on European governments. Both the external pressure and domestic atmosphere nibbled away at the European governments' interested-based resistance to the U.S. initiative.[175] As Tarullo suggested, this strategy of "public diplomacy" worked to "shift the positions taken by European governments which, until that point, had been recalcitrant."[176]

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c. The Strategy of Normative Persuasion through International Organizations

Apart from imposing either direct or indirect pressure on European governments, the U.S. also relied upon international organizations to perform normative persuasion. This strategy had a strong flavor of "value strategy" through all its measures. As mentioned above, the European states' long-term resistance to the U.S. initiative was

[170] Tarullo, *supra* note 146, at 680.
[171] Abbott & Snidal, *supra* note 82, at 163.
[172] *See, e.g.*, *id*. at 164; Tarullo, *supra* note 146, at 679–80; Magnuson, *supra* note 114, at 387.
[173] *See* Magnuson, *supra* note 114, at 387.
[174] *See* Tarullo, *supra* note 114, at 679–80.
[175] *See id*.
[176] *Id*. at 680.

not simply interest-based; it also included ideological obstacles, which affected their understanding of the action's legitimacy.[177] In the years surrounding the early 1990s, the immorality and inefficiency of commercial corruption remained an unpopular view.[178] Furthermore, the international relevance of transnational bribery only added to such complications. In view of this, and while using economic leverage, the U.S. also used its discursive power in international occasions to induce an attitude change toward transnational bribery.

Although the deleterious effect of transnational bribery remained an unpopular argument in the early 1990s, the global, economic, and political climate at the time was well prepared for an attitude change. A widely held view is that "the fall of the Soviet Union" after the Cold War provided an impetus to expanding international markets and democratic values.[179] Frequent multilateral transactions made the concept of globalization increasingly popular.[180] In this context, international cooperation, as opposed to conflict, gradually became the dominant approach for states to maximize their national interests.[181] Intergovernmental organizations (IGOs) and nongovernmental organizations (NGOs) that purported to speak for the welfare of the overall international community grew and evolved to play a greater role in international affairs.[182] Viewed from the prism of global welfare, the immorality and economic inefficiency of commercial corruption became self-evident. In 1995, Transparency International[183] began working with experts to issue the Corruption Perception Index (CPI) which ranks the level of corruption across 200 countries.[184] The CPI succeeded in drawing people's attention to the issue of corruption and in convincing them of its deleterious effects.[185] Additionally, the OECD made an effort to convince private actors of the significance of corporate ethics and perfect competition in the international marketplace.[186] International banking organizations, such as the World Bank and the International Monetary Fund (IMF), published stricter lending policies to enhance

[177] *See id*. at 680.
[178] Tarullo, *supra* note 146, at 675.
[179] Magnuson, *supra* note 114, at 387.
[180] *See* Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEGAL STUD. 375, 380 (1996).
[181] *Id*.
[182] *See generally* Kim D. Reimann, *A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs*, 50 INT'L STUD. Q. 45 (2006) (providing an explanation for the rapid growth of nongovernmental organizations in the postwar period).
[183] Established in 1993, Transparency International is an organization that targets corruption. *See* Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 GLOBAL GOVERNANCE 25, 31 (2001).
[184] *Id*. at 33.
[185] *Id*. at 35. Prior to 1999, Transparency International only issued the Corruption Perceptions Index (CPI), which ranks countries by their perceived levels of corruption as determined by expert assessments and opinion surveys. Since 1999, awareness regarding the prevalence of cross border bribery increased, and Transparency International began to issue the Bribe Payers Index (BPI) to measure the supply side of bribery. *See* TRANSPARENCY INTERNATIONAL, TRANSPARENCY INTERNATIONAL'S BRIBE PAYERS SURVEY 1999 (Jan. 20, 2000), *available at* http://www.transparency.org/content/download/2850/17712.
[186] *See* PIETH, *supra* note 9, at 16, 23.

organizational surveillance over the disbursement of funds to client countries.[187]

Once attitudes towards commercial corruption changed, the evil of transnational bribery became self-evident. The U.S.'s initiative to outlaw transnational bribery was endorsed by IGOs and NGOs alike.[188] For example, the U.N. issued General Assembly Resolution 51/59[189] on December 12, 1996, and General Assembly Resolution 51/191[190] on December 16, 1996, which required member countries to "take effective and concrete action to combat all forms of corruption, bribery[,] and related illicit practices in international commercial transactions."[191] While domestic corruption in host countries was a global concern highlighted by IGOs, it was logical to establish the regulatory responsibility of countries home to multinational corporations.[192] As Professor Tarullo opined, some political leaders of developing countries criticized European countries for their corporations' acts of bribery that impeded their economic development and political integrity.[193]

Within a political climate becoming increasingly intolerant of corruption, and during a time in which home countries were increasingly held responsible for regulatory oversight, European states had no reason to refuse the U.S.'s anti-bribery initiative. For many European states, the negotiations with the U.S. were no longer a question of whether or not to outlaw transnational bribery, but a question of how and when.

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3. U.S. ACHIEVEMENTS: OECD CONVENTION AND OTHER AGREEMENTS

During the 1990s, the U.S. was targeted at the Convention as the organizer of an anti-bribery collaboration.[194] Professor Mark Pieth summarized several reasons for why the U.S. chose the OECD as the coordinator. First, the OECD was the best place to eliminate the side effects of the unilateral enforcement of the FCPA.[195] As the OECD was comprised of major competitors of the U.S. in the overseas marketplace, an anti-bribery collaboration in this

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[187] *See* INT'L BANK FOR RECONSTRUCTION AND DEV., WORLD BANK GRP., PRIVATE CAPITAL FLOWS TO DEVELOPING COUNTRIES: THE ROAD TO FINANCIAL INTEGRATION 53 (Oxford Univ. Press 1997).

[188] *See* Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 279 (1997).

[189] G.A. Res. 51/59, U.N. Doc. A/RES/51/59 (Dec. 12, 1996).

[190] G.A. Res. 51/191, *supra* note 76.

[191] *Id.* at Annex ¶ 1.

[192] *See* Peter Muchlinski, *Regulating Multinationals: Foreign Investment, Development and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalized World*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 30, 56–58 (Jose E. Alvarez et al. eds., 2011).

[193] *See* Tarullo, *supra* note 146, at 679–80.

[194] *See* PIETH, *supra* note 9, at 9. According to Mark Pieth, other organizations such as the UN, the GATT and the G7 had all once been options, but were abandoned by the U.S. for various reasons. *Id.* at 8.

[195] *Id*. at 7–9.

arena obligated these competitors to regulate transnational bribery.[196] It was the most efficient approach to cancel out the self-imposed cost of the FCPA.[197] Second, OECD members were more economically motivated to accept an anti-bribery collaboration than other international organizations.[198] In 1998, the total exports represented by the OECD members accounted for more than 75% of the global exporting industry.[199] Corruption in the importing countries was more likely an impediment to business transactions and an additional expenditure that could have been avoided by collective action among regulatory states.[200] Finally, the U.S. also counted on the OECD's peer-review monitoring system to ensure state compliance.[201]

After years of negotiations, in 1994, the OECD released the Recommendation of the Council on Bribery in International Business Transactions (1994 Recommendation).[202] This document officially required member states to criminalize transnational bribery.[203] As a working document only applying to OECD member states, the 1994 Recommendation was not legally binding, but it was the first declaratory statement to indicate that a global collective action against transnational bribery was on the way.[204] Soon after the 1994 Recommendation's publication, many agencies inside the OECD, like the Committee on Fiscal Affairs (CFA), published special recommendations in support.[205] In 1996, the OECD published another recommendation of the OECD Council on the Tax Deductibility of Bribes for Foreign Public Officials.[206] Even though the U.S. took actions against the tax deductibility of transnational bribery in 1958, this was the first time it had been disallowed by an IGO.[207]

Meanwhile, there was also progress in the EU and the OAS. On September 27, 1996, the EU issued the first protocol to the Convention on the Protection of the European Communities' Financial Interests, which focused on

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[196] *Id*.

[197] U.S. officials were satisfied with the coverage of the Convention and optimistic about the recruitment of new members: "[O]ur major competitors will be obligated to criminalize the bribery of foreign public officials. . . . The existing signatories already account for a large percentage of international contracting, but they also plan an active outreach program to encourage other nations to become parties." Presidential Statement, *supra* note 143.

[198] *See* PIETH, *supra* note 9, at 9.

[199] *See* D'Sauza, supra note 23, at 73.

[200] *See* Pieth, *supra* note 89, at 2–3.

[201] *See* PIETH, *supra* note 9, at 9–10.

[202] OECD, *Recommendation of the Council on Bribery in International Business Transactions*, C(94)75/FINAL (July 11, 1994).

[203] *Id*. at 2.

[204] *See* Mark Pieth, *From Ideal to Reality: Making the New Global Standard Stick*, *in* NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION 51, 54 (2000).

[205] Martine Millet-Einbinder, *No More Tax Breaks for Bribes*, *in* NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION 67, 67 (2000).

[206] OECD, *Recommendation of the OECD Council on the Tax Deductibility of Bribes for Foreign Public Officials*, C(96)27/FINAL (Apr. 17, 1996).

[207] *See* OECD, BRIBERY AWARENESS HANDBOOK FOR TAX EXAMINERS 5 (2009).

the issue of transnational bribery in Europe.[208] On May 26, 1997, the Convention Against Corruption Involving Officials was adopted to "fight corruption involving European officials or national officials of Members States of the European Union."[209] This Convention required member countries to criminalize the payment and acceptance of bribes and other corrupt behaviors.[210] In March of 1996, twenty-one members of the OAS signed the Inter-American Convention Against Corruption, with the initiative to develop an enforcement regime against transnational corruption, establish a legal framework, and develop model laws.[211]

On December 17, 1997, the text of the Convention was finalized, and on February 15, 1999, the Convention entered into force.[212] By May of 2014, all signatories, including thirty-four OECD members and seven non-members, ratified the Convention and incorporated its obligations into their national laws.[213] The thirty-three original exporting countries that participated in the OECD anti-bribery conventions during the 1990s became the first generation of signatories of the OECD Convention.[214]

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a. The Standard Rational Choice Account of the Convention and its Limits

Given the U.S.'s central role in establishing the Convention, the functional mechanisms of U.S. strategies are critical to understanding its establishment. Following the same logical line regarding the U.S.'s explanations in creating the FCPA, scholars adopted an interest-based, a value-based, or a combination approach to explain how U.S. strategies lead to a change of European attitudes toward the U.S. anti-bribery initiative.[215] One popular interest-based argument considers such an attitude change to be a rational response to U.S. provided external incentives and disincentives.[216] Fitting within the rational choice tradition, existing academic and policy literature provide two explanations for the incentives and disincentives behind European attitude changes.

The first explanation was a story about the U.S.'s threat of trade sanctions and the fact that they altered the

[208] 1996 O.J. (C 313) 1.
[209] 1997 O.J. (C 195) 1.
[210] *Id*. at 4.
[211] Inter-American Convention against Corruption, Mar. 29, 1996, O.A.S.T.S. No. B-58.
[212] Convention, *supra* note 1, at 6, 40.
[213] OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014* (May 21, 2014).
[214] The term "founders" is used to differentiate between the countries that participated in the original OECD anti-bribery Convention negotiations and the countries that joined later. *See id.*
[215] Both the interest-based and the value-based explanations have followers. In most situations, scholars blend the two approaches together. *See* Abbott & Snidal, *supra* note 82, at 141–43. *See also* Tarullo, *supra* note 146, at 693.
[216] *See* Abbott & Snidal, *supra* note 82, at 141–42.

expected payoffs of European states, which thereby led to their attitude change regarding transnational bribery.[217] The U.S. saw the concession of European states as a strategic means to remove diplomatic pressure.[218] Therefore, the fact that European states agreed to outlaw transnational bribery does not necessarily mean that they indeed want to enforce these laws.[219] As Professor Tarullo suggests, "nothing in these explanations[,]" regarding "rational-choice premises" of how states entered into the agreement "in game theory[,] suggests that these governments intended the resulting Convention actually to repress overseas bribery."[220]

The second explanation told a story about the U.S. persuading European states as to the deleterious effects of transnational bribery on economic development.[221] European states voluntarily took collective action against transnational bribery for a common pursuit of perfect competition and clearer international markets.[222] The essence of the anti-bribery collaboration was a "public good" game that would produce common interests.[223] Following this logic, the motives for signatories to legislate and enforce against transnational bribery were identical when they signed the Convention. Although the two explanatory approaches predicted different prospects for the enforcement of the Convention and anti-bribery laws, they converged on the belief that European states agreed to establish the Convention for self-seeking purposes.

Equally widespread was the value-based explanation, which describes European strategies as resulting from their commitment to an increasingly common value.[224] European governments were convinced of the immorality of transnational bribery and established relevant anti-bribery institutions for moralism instead of self-interested purposes.[225] With regard to the role of the U.S., this explanation supports that it was the U.S.'s normative persuasion instead of its economic leverage that mattered.[226]

Categorizing the motives behind European governments changing their attitudes toward the U.S.'s anti-bribery initiative regarding interest and value-based reasons helps to identify multiple factors that may have fostered the Convention's establishment. However, the explanatory power of this distinction is limited due to the ambiguity

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[217] Tarullo, *supra* note 146, at 677-80.
[218] *See* Abbott & Snidal, *supra* note 82, at 162–64.
[219] Tarullo, *supra* note 146, at 681.
[220] *Id*.
[221] *See id*. at 675–76.
[222] *Id*. at 681.
[223] Magnuson, *supra* note 114, at 376–78. *See* Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 310 (2010).
[224] Abbott & Snidal, *supra* note 82, at 151–52.
[225] *Id*. at 160.
[226] *See id*. at 163–64.

between interests and values. In international politics, it is indeed difficult to distinguish value-based purposes from interest-based purposes. The value pursuit of state actors, if understood broadly, can be explained as a special manifestation of nonmaterial interests, or as an indicator of material interests in prospect.[227] For example, the pursuit of fairness in international business competition could be considered a moral value *and* an effective market mechanism to pursue long-term economic interests. Abbott and Snidal juxtaposed interests and values to analyze the operation of international legalization for clarity.[228] However, they also stressed that "value considerations can often be understood in interest terms."[229] One particular example of this subject was the U.S.'s strategy of spurring public opinion, although it was not necessarily the triumph of value considerations over interest considerations.[230] European governments' acknowledgement of public sentiments against transnational bribery can be embraced by a rational choice argument, as the governments needed to respond to domestic demands. When Abbott and Snidal stressed the role of this strategy by stating that, "in the OECD, interest-based resistance to [antibribery] rules on the part of European governments was overcome only after the United States resorted to aggressive value tactics that mobilized domestic political pressure in Europe," they only reconfirmed the difficulty in distinguishing between interests and values in international affairs.[231] Because of the intertwined relationship between the two concepts, this binary explanation does not truly help discover more facts about how U.S. strategies lead to the attitude change of European states.

These arguments, based on the binary opposition of self-interest and moral values, once more reflect the centrality of the rational choice analytical tradition, which assumes that variations in state strategies result from variations in payoff structures.[232] Explaining European strategies as rationally resulting from an attempt to remove U.S. diplomatic pressure split the motives behind lawmaking and law enforcement.[233] Any ineffectiveness of law enforcement became predictable due to the states never intending to take relevant laws seriously.[234] Alternatively, explaining European strategies as rationally resulting from their pursuit of a common good (like perfect competition in overseas markets) presumes that they outlawed transnational bribery because they wanted to eliminate it.[235]

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[227] *Id.* at 146–47.
[228] *See id.* at 142.
[229] *Id.* at 143.
[230] Tarullo, *supra* note 146, at 680.
[231] Abbott & Snidal, *supra* note 82, at 163.
[232] *See id.* at 152.
[233] *Id.*
[234] *See* Tarullo, *supra* note 146, at 687–89.
[235] *Id.* at 667.

Accordingly, any unfavorable law enforcement could be considered to be a story about the "collective action problem," "prisoner's dilemma," and "free riders."[236] Conventional explanations and solutions to the exploitability of individual contributions in cooperation would be available. On the other hand, under the rationality assumption, a pure commitment to moralism or altruism constitutes an irrational strategy that would not go far.[237] Therefore, explaining the attitude changes of European states as resulting from value motivations predicts a dismal outcome for law enforcement and makes explaining unfavorable enforcement of anti-bribery laws rather simple. Thus, these arguments are set on the assumption that variations in payoff structures cause variations in strategies.

This standard account, which explains the relationship between variations in state strategies and payoff structures, implies a direct cause and effect relationship between U.S. strategies and changed European government attitudes. This simplifies the dynamic interactions between the U.S. and European governments and completely avoids the consideration of other IGOs' relevance in international, political, and economic contexts. In particular, the formation of the Convention was characterized by repeated consultations, negotiations, and concessions between U.S. and European states in successive stages.[238] The negotiation would not succeed before a consensus was reached.[239] These dynamic interactions among parties indicate that rational state actors should not only actively respond to incentives or disincentives in a given informational environment, but also be reactively bound by their actions in previous rounds of negotiations.[240] After this happens, the path dependency rationale normally enters.[241] From an overall standpoint, state actors' attempts to maximize their self-interest might be consistent, but their strategies were highly unlikely to produce intended results. The existence of a direct cause and effect relationship between U.S. strategies and attitude changes of European governments distorted the analysis of the real dynamics surrounding the formation of the Convention.[242]

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B. THE CONVENTION AS AN OUTCOME OF A CHAIN REACTION INITIATED BY THE U.S.

[236] Branislav Hock, Intimations of Global Anti-Bribery Regime and the Effectiveness of Extraterritorial Enforcement: From Free-Riders to Protectionism? (Aug. 2013) (unpublished Master thesis, Tilburg University School of Law) (on file with Tilburg University).
[237] *See* Abbott & Snidal, *supra* note 82, at 155–57.
[238] *See generally* ABBOTT & SNIDAL, *supra* note 86, at 20–36 (detailing the events and time periods surrounding the Convention's creation).
[239] *See* Abbott & Snidal, *supra* note 82, at 168.
[240] *See id.* at 148–49.
[241] *See* ABBOTT & SNIDAL, *supra* note 86, at 7.
[242] *Id.* at 162.

To understand the U.S.'s role in the negotiations, this subsection focuses on two key points. The first is the gradual attitude change of European governments in successive episodes of negotiations. The second is how their optimal strategies in each episode were limited by accessible information and their prior decisions.

Let us contrast the story of the Convention's formation with the FCPA's creation once more. The Watergate scandal and subsequent SEC disclosure programs brought transnational bribery into public view, and thus aroused divergent interest demands from different domestic groups around the issue.[243] This was the prerequisite for any discussions on legislative remedies. In the case of the Convention, the U.S. exogenously brought the issue of transnational bribery to the international level.[244] With aggressive political and economic strategies, European governments had this issue imposed upon them and were therefore forced to address the legal status of transnational bribery.[245]

In the case of the FCPA, the U.S.'s passing of legislation against transnational bribery was a gradual reinforcement and popularization of an unexpressed societal value: the evil of transnational bribery.[246] Similarly, European governments' acceptance of anti-bribery terms in trade treaties, despite the limited political influence and binding force of these terms, was an official endorsement of the illegality of transnational bribery. This sense of value was further reinforced in the international ideological atmosphere that increasingly grew against corruption.[247] European governments had no excuse to give an overall denial of the U.S. anti-bribery initiative. Once they entered into negotiations about how to establish an anti-bribery collaboration, they knew they could not go back.[248] After the negotiations, there was no longer a question of whether to establish an agreement, but a question of how and when to establish the agreement.

Following the negotiations, all the parties began to work towards a common goal. By now, in terms of understanding the dynamics surrounding the Convention's formation, an observation of what European governments intended, yet failed to achieve, is highly relevant. It is noteworthy that European governments once suggested a draft agreement that only criminalized their nationals' acts of paying bribes in only the states that were parties to the

[243] *See* Koehler, *supra* note 40, at 932–33, 939–41.
[244] Magnuson, *supra* note 114, at 386.
[245] Abbott & Snidal, *supra* note 82, at 162–63.
[246] Davis, *Moralism*, *supra* note 16, at 501.
[247] *See* ABBOTT & SNIDAL, *supra* note 86, at 29.
[248] Abbott & Snidal, *supra* note 82, at 167–68. *See* Peter J. Boettke, Cristopher J. Coyne & Peter T. Leeson, *Institutional Stickiness and the New Development Economics*, 67 AMER. J. ECON. & SOC'Y 331, 332 (2008).

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agreement.[249] This meant that if host countries did not outlaw their own companies' transnational bribery acts abroad, then they would not prohibit their corporations from paying bribes in those host countries.[250] For example, a German company that paid bribes to a Canadian official (a member country) would constitute an offense under German law, but paying bribes to an official of India (a nonmember country) would not. Essentially, it was a scheme that determined the liability of bribe-paying corporations according to the nationalities of the bribe payees. The underlying logic implied that to European governments, transnational bribery was an offense to the welfare of host countries rather than the home countries of bribe payers or business competitors. Their prohibition of transnational bribery was an altruistic action that would benefit others. However, they tended to only offer this advantage in a mutually beneficial manner to those who provided the same advantage to them.

For Europe, this scheme was already sufficient to coordinate the demands of all parties. First, this approach was expected to level the playing field for overseas business competition and remove diplomatic pressure from the U.S. on European governments.[251] Second, declaring an attitude to combat transnational bribery was expected to help appease the sentiments of European citizens.[252] Third, as it prohibited corporations from paying bribes in member states, it was expected to cut one channel of importing bribes and to keep corruption outside their boundaries.[253] Meanwhile, since it did not prohibit corporations from paying bribes in nonmember states, which were often assumed to be more corrupt developing countries, they did not need to waste judicial resources and risk their business opportunities to fight with the cultures of outsider countries.[254]

However, the draft agreement was destined to be rebuffed. As noted in the story behind the FCPA's enactment, lawmaking is not only supposed to coordinate interest demands of different parties, but also serve a normative function to define right and wrong behaviors.[255] The baseline that delimits the lawmaking is that it cannot expressly or inferably go against the public values of society. For the general public, the criminalization of transnational bribery signaled that it was an action morally wrong and legally forbidden. The draft treaty, which conditionally prohibited transnational bribery according to the place of occurrence, violated the tenet of rule of law. Consequently,

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[249] *See* Abbott & Snidal, *supra* note 82, at 168.
[250] *Id.* at 171.
[251] *See id.* at 162–65.
[252] *Id.*
[253] *Id.*
[254] *See* Tarullo, *supra* note 146, at 678–79, 681–83.
[255] *See* Graham Hughes, *Morals and the Criminal Law*, 71 YALE L. J. 662, 668 (1962).

the Convention entailed a complete prohibition of transnational corporate bribery.[256]

After the passing of the Convention, it was clear that its formation was an activity initiated by the U.S. and participated in by European states and several other countries. The U.S. did not construct the Convention and press it upon other states straightforwardly, but was more likely an actor that brought the topic of regulating transnational bribery into international arenas and mobilized latent values in a well-fermented, ideological atmosphere in the early 1990s. Once the tap of value was opened, it caused a domino effect and made it unwise for states in the midst of negotiation to resist. Even though the U.S. initiated the process with European governments, it cannot be completely attributed to them because the Convention became a different model from the FCPA. For this reason, I label this dynamic process of the formation of the Convention and the anti-bribery collaboration as an exogenously induced model of institutional establishment.

IV. THE POST-CONVENTION ERA: "OECD-DOMINATED" INSTITUTIONAL EXPANSION TO NON-COLLABORATORS

This part analyzes the dynamic of the further expansion of the community of collaborators in the post-Convention era. Due to the power of existing collaborators and the popularization of the notion that transnational bribery is evil, the interactive model between collaborators and non-collaborators was structured fairly simply. Furthermore, this model can be summarily characterized by rational choice decision making.

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A. AN ATTEMPT BY EXISTING COLLABORATORS TO EXPAND THE COMMUNITY

The creation of the Convention indicated that thirty-four countries, representing approximately three-fourths of global exports,[257] would criminalize transnational bribery. In order to expand the community of collaborators, the OECD Working Group on Bribery (WGB) never stopped recruiting nonmembers, who represented the remaining one-fourth of global exports and stood beyond the arrangement of the Convention.

Article 13 of the Convention explains that it is "open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business

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[256] Abbott and Snidal explained it as an effect of the indivisibility of values. *See* Abbott & Snidal, *supra* note 82, at 167–68.

[257] James K. Jackson, CONG. RESEARCH SERV., RS21128, THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT 1 (2012).

Transactions."[258] Apart from Article 13, relevant efforts can be traced back to the 1994 Recommendation, which encouraged member countries to recruit more members.[259] In the 1996 Tax Deductibility Recommendation, two OECD agencies were required to promote the application of relevant regulatory instruments by making contact with non-member states.[260] In November 2004, the WGB issued a questionnaire to assess non-member states' applications for participation and accession to the 1997 Anti-Bribery Convention.[261]

B. A HISTORICAL REVIEW: OECD EFFORTS TO EXPAND THE COMMUNITY OF COLLABORATORS

1. OECD EFFORTS TO RECRUIT NEW MEMBERS INTO THE CONVENTION

There were twenty-nine OECD member states and five non-member states (the Slovak Republic, Chile, Argentina, Brazil, and Bulgaria) that signed the Convention in 1997.[262] By 2013, another six states participated in the Convention: Slovenia, Estonia, South Africa, Israel, Russia, and Colombia.[263] As the timing and motivations of these signatories were different from those of the first generation of signatories, I refer to these six states as second-generation signatories.

A general approach of the OECD was to set membership within the Convention as a basic condition of admission for second-generation signatories.[264] Slovenia was one of the first new signatories to the Convention in 2010.[265] It submitted its application for membership to the WGB in 2000, became a party to the Convention in 2001, and became a full member of the OECD in 2010.[266] Estonia was another new signatory to the Convention, joining in 2004,[267] and joining the OECD on December 9, 2010.[268] South Africa participated in the Convention in

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[258] Convention, *supra* note 1, at 7.

[259] OECD, *Recommendation of the Council on Bribery in International Business Transactions*, C(94)75/FINAL (July 11, 1994).

[260] OECD, *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, C(96)27/FINAL (Apr. 17, 1996).

[261] OECD, Working Grp. on Bribery in Int'l Bus. Transactions (Inv. Comm.), *Questionnaire to Countries Seeking Participation in the Working Group on Bribery in International Business Transactions and Accession to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, DAFFE/IME/BR/WD(2004)9, (Nov. 3, 2004).

[262] OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Instruments*, *available at* http://www.oecd.org/gov/ethics/2406452.pdf (last visited Feb. 18, 2015).

[263] *Annual Report*, *supra* note 14, at 44.

[264] *Id*.

[265] Slovenia signed the Convention on July 21, 2010. *Slovenia's Accession to the OECD*, OECD, http://www.oecd.org/slovenia/sloveniasaccessiontotheoecd.htm (last visited Feb. 18, 2015).

[266] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, *supra* note 213.

[267] *Id*.

[268] OECD, *Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public*

2007 but has not yet fully joined the organization.[269] In May 2007, the OECD Council stepped into negotiations with Chile, Estonia, Israel, Russia, and Slovenia.[270] For Israel and Russia, which were not signatories to the Convention, the OECD Council suggested that one basic condition for their accession to the OECD was their participation in the Convention.[271] Israel formally applied for membership in the WGB in February 2008, ratified the Convention in 2009,[272] and became a full member of the OECD in September 2010.[273] Russia formally applied for WGB membership in February 2009 and became a signatory to the Convention in 2012.[274] Colombia submitted its application for the membership to the Convention in 2011, and became a signatory in 2013.[275]

Basically, a rational choice analysis grasps the motivation behind this second generation of signatories in joining the collective action, since most of the second-generation signatories are states from the EU and Latin America where regional anti-bribery treaties were already created.[276] These states also have close political and economic interdependence with first-generation signatories, which attributed to their signing of the Convention. Because of their frequent interactions and contacts, the first-generation signatories are definitely powerful enough to popularize the Convention terms to those states. Precisely for this reason, the first and second generations of signatories are mainly comprised of traditional industrialized states, as well as some other EU and OAS states, which can use their political and economic leverage to press the Convention terms. However, for those politically and economically remote and independent from the existing signatories (especially emerging Asian economies), the major method adopted by the WGB to reach these states is to strengthen contacts between them and existing signatories.

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Officials in International Business Transactions: Estonia, (Sep. 17, 2008) *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/42098364.pdf.

[269] OECD, *Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: South Africa*, (Feb. 14, 2011), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/42103193.pdf.

[270] Press Release, OECD, Accession: OECD Welcomes Chile, Estonia, Israel and Slovenia (May 27, 2010), *available at* http://www.oecd.org/newsroom/accessionoecdwelcomeschileestoniaisraelandslovenia.htm.

[271] *See* OECD, *OECD Working Group on Bribery Annual Report 2008*, (00 2008 79 1P) – No. 88817 – 2008 (2009).

[272] OECD, Directorate for Fin. and Enter. Affairs, *Israel: Phase 1 Review of Implementation of the Convention and 1997 Revised Recommendation*, at 4, (Mar. 19, 2009).

[273] *OECD Working Group on Bribery Annual Report 2008*, *supra* note 271, at 3.

[274] Press Release, OECD, Russia Joins OECD Anti-Bribery Convention (Feb. 17, 2012) *available at* http://www.oecd.org/daf/anti-bribery/russia-oecdanti-briberyconvention.htm.

[275] *See* OECD, *Columbia – OECD Anti-Bribery Convention*, http://www.oecd.org/daf/anti-bribery/colombia-oecdanti-briberyconvention.htm (last visited Feb. 18, 2015). For information about how the abovementioned states participated in the OECD, see OECD, *supra* note 268.

[276] Spahn, *supra* note 15, at 29–30.

2. OECD EFFORTS TO COLLABORATE WITH NON-MEMBERS

The WGB is actively working with non-signatories and seeking to popularize the anti-corruption standards to a wider arena.[277] As noted previously, in May of 2007 the OECD Council began negotiations with Russia and four other countries regarding OECD membership.[278] During this time, the OECD organized a program of "enhanced engagement" to China, India, Indonesia, South Africa, and Brazil, attempting to seek stronger ties and to explore the possibility of recruitment.[279]

Because these states enjoy more economic independence than the second-generation signatories, the traditional approach of imposing group pressure through the EU or OAS would not work. Essentially, it is not quite effective enough to popularize the Convention terms by imposing trade sanctions and policies alike. However, with the acceleration of global economic integration, both signatories and non-signatories exist in a large international network. With an increasingly greater number of international organizations initiating actions against corruption, the depth and breadth of international cooperation has expanded. It is possible for existing signatories, the stronger power in international economic affairs, to impose a "soft pressure" on non-signatories in other occasions where the non-signatories have a membership (like in the G20, the U.N., and the World Trade Organization (WTO)).[280]

One exemplary case of the soft pressure was the G20. The G20 is the premier forum for international cooperation in economic affairs and consists of the EU and nineteen states.[281] Sixteen of these states are either full OECD members or have participated in the Convention. Therefore, it is possible for them to disseminate the spirit of the Convention and exert influence over non-signatory countries. In 2010, the G20 adopted an Anti-Corruption Action Plan, which called for all G20 countries to adopt and enforce laws and related measures to combat transnational bribery, and to keep close contact with the WGB.[282] One consequence of the G20's influence was that

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[277] OECD, *The OECD's Relations with its Key Partners* (May 23-24, 2012), *available at* http://www.oecd.org/general/50452501.pdf.

[278] *OECD Working Group on Bribery Annual Report 2008*, *supra* note 271, at 9.

[279] *See* OECD, *Working Group on Bribery: 2010 Data on Enforcement of the Anti-Bribery Convention* (Apr. 2011), *available at* http://www.oecd.org/dataoecd/47/39/47637707.pdf.

[280] Tord Skogedal Lindén, *EU and OECD Advice and Changes in German Family Policy: Can Reforms be Attributed to Participation in Learning Processes?*, *in* THE ROLE OF INTERNATIONAL ORGANIZATIONS IN SOCIAL POLICY: IDEAS, ACTORS AND IMPACT 111, 127 (Rune Ervik et al. eds., 2009).

[281] *The G20: Representation*, AUSTL. GOV'T, http://www.dfat.gov.au/trade/g20/ (last visited Feb. 18, 2015).

[282] *See* OECD, *G20 Anti-Corruption Action Plan: G20 Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment*, *available at* http://www.oecd.org/daf/anti-bribery/G20_Anti-Corruuption_Action_Plan.pdf (last visited Feb. 18, 2015).

in 2011, China amended its penal code to criminalize transnational bribery.[283]

C. THE EXPANSION OF THE COLLABORATION: ANTI-BRIBERY INSTITUTIONS IMPOSED ON NON-COLLABORATORS BY EXISTING COLLABORATORS

The popularization of the Convention's terms in the 2000s and 2010s was most likely a result of the powerful political and economic leverage from first-generation signatories. After the creation of the Convention, these signatories, together with IGOs, NGOs, and International Financial Organizations (IFOs), established an international network which constantly squeezed the space of dissidents, both morally and materially.[284] On one hand, they used a normative persuasion strategy to make the deleterious effects of transnational bribery an indisputable belief. The value of the collective delegitimization of transnational bribery has gradually become common sense. Furthermore, the existing signatories to the Convention, together with IGOs, NGOs, and IFOs, have powerful economic leverage in international affairs. Such signatories, especially those who have close economic ties with collaborators elsewhere, are able to alter the payoff structure of non-collaborators and press the Convention terms upon them in a more efficient fashion. Although many emerging economies that represent an increasingly large share of the international commerce presently stand out of the Convention, we have the evidence to predict that the coverage of the Convention terms will continue to increase.

On the other hand, the participation of non-member countries in the Convention, or acceptance of the Convention's terms, is not out of indigenous needs but is instead an approach they must follow for dialogue with other players in the international arena. Since non-member countries are less equipped to control corruption and are less active in the international marketplace, they are not as sensitive to the deleterious effects of transnational bribery when compared to traditionally industrialized countries. This is because traditionally industrialized countries have accumulated effective anti-corruption techniques and have played a significant role in international markets over the past century. Instead, non-member countries acceptance of the Convention's terms is more likely a result of diplomatic considerations. Compared with the endogenous creation of the FCPA in 1977 and the exogenously induced formation of the Convention by first-generation signatories in the 1990s, the expansion of the community of collaborators was completely exogenously initiated and dominated.

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[283] Samuel R. Gintel, *Fighting Transnational Bribery: China's Gradual Approach*, 31 WIS. INT'L L.J. 1, 1 (2013).
[284] Indira Carr & Opi Outhwaite, *The Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice*, 44(3) SUFFOLK U. L. REV. 615, 615–19 (2011).

V. INSTITUTIONALIZING THE COLLABORATION: AN EVOLUTIONARY EVENT DEFINED BY PATH DEPENDENCE

Preceding sections have sketched out three phases of institutional development of the anti-bribery collaboration. Essentially, the dynamics of the institutionalization process can be categorized into three modes: the endogenously created mode, which characterizes the enactment of the FCPA by the U.S. in a context where there were no precedents or external interventions in the 1970s; the exogenously induced mode, which characterizes the formation of the OECD Convention in the 1990s; and the exogenously dominated mode, which characterized the expansion of the community of collaborators in the post-Convention era. Like any others, the inaccuracy of this categorizing is self-evident as it is probable that some founders of the Convention in the 1990s were exogenously motivated to participate in the collaboration. Nevertheless, we can view the institutional development of the collaboration broadly as primarily being the product of endogenous or exogenous factors in each of the three phases. Now we are in a position to address the central puzzle of this Article: What is the fundamental rationale that defines the dynamic process of the institutionalization of the anti-bribery collaboration from the FCPA to the post-Convention stories?

At the outset of the Article, I specified that the objective of this analysis is not limited to tell a detailed story of how each signatory was motivated to participate in the collaboration, but also to provide a progressive manner of understanding a very current topic: the practical effect of the Convention. Standard accounts in previous works, which employed the rational choice theory to explain the motives of states to participate in the collaboration, have followed this tradition to make assumptions on, and give explanations of, state compliance with the Convention at the present stage.[285] This standard account is functionally flawed because it does not fully explain why a given country outlawed and enforced against transnational bribery. However, given the deep embedment of this interpretative logic in the thinking of scholars, practitioners, and ordinary people, we cannot fully lay bare its limits without penetrating deeply into its structural defects. Therefore, in the following subsections I will extract the fundamental rationale behind the argument of the historical approach of this Article, and contrast it with the rationale behind the standard rational choice account.

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[285] *See, e.g.*, Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 367–71 (1998).

A. THE RELEVANCE OF PATH DEPENDENCE TO THE WHOLE STORY

The explanation of the three phases' institutional development have suggested that the dynamic process of the institutionalization of the anti-bribery collaboration is not simply characterized by free will choices and the self-seeking intentions of state actors. It is also characterized by the constraints on the free will choices and self-seeking intentions of state actors imposed by the established institutions. Basically, it presents a dynamic of institutional path dependence.

Generally, a dynamic of path dependence implies that "history matters" and highlights that, as Scott Page states, "[c]urrent and future states, actions, or decisions depend on the path of previous states, actions[,] or decisions."[286] Regarding this topic, it captures how factors like the established value system of the society (a condemnation of corruption) and political structure of the community (the relationship between the U.S. government and Congress, and the relationship between U.S., European governments, and International Organizations) defined the way states interacted and reshaped their expectations. It also explains how these interactions created new institutions (e.g. a moral condemnation of transnational bribery) and then systematically drove forward the institutionalization of the anti-bribery collaboration. If the standard rational choice account tells a story of how free will actors sought self-interest maximization in a given informational environment, this argument tells a story of how actors' free will to seek self-maximization in each given informational environment is locked in a trajectory, defined by the established and evolving institutional context.[287] In contrast to the standard rational choice account, which is ahistorical and explains the dynamic of institutionalization as a natural result of the free will and rationality of state actors, the argument of this article is historical and explains the dynamic of institutionalization as a result of the constraints of historical forces on the same.

While the principle of path dependence defined the basic trajectory of interactions among different actors throughout the whole story, there is a set of operative factors that defined the content and the pattern of their interactions in each episode of building central institutions of the anti-bribery collaboration. The following subsection outlines how these operative factors performed their functions in each phase of the institutionalization process and brought about relevant institutions.

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[286] Scott E. Page, *Path Dependence*, 1 Q. J. OF POL. SCI. 87, 88 (2006).
[287] *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (Cambridge Univ. Press, 1990).

B. KEY OPERATIVE FACTORS IN EACH PHASE

1. AN INITIATOR OF THE DISCUSSION

A logical prerequisite of official discussion regarding the disposal of transnational bribery is that something brings the subjective matter onto the conference table. It could take place independently of any political forces' conscious arrangements. For example, the discussion on whether to enact the FCPA in the U.S. was initiated by the Watergate scandal and post-Watergate SEC disclosure programs.[288] Certain political forces could have also consciously pursued it. For instance, the U.S. government actively initiated international discussion in establishing the Convention. The post-Convention story becomes even more straightforward. The WGB, as the coordinator of the collaboration and the representative of existing collaborators, became the initiator of discussion with non-collaborators regarding the proposal of outlawing transnational bribery in those countries.[289] My categorization of the three phases of the institutionalization in preceding sections is correct according to the origins of the initiators of the three phases' stories and their control over the whole event.

Regardless of the beginning of the stories, once the subject matter was brought into public discussion it was locked in a trajectory and defined by existing institutional settings of the community. For the issue of transnational bribery, once it was open to public discussion its incompatibility with democratic values and its illegality became self-evident. Different stakeholder groups further discussed this concept by expressing their own expectations regarding transnational bribery. Consequently, the immorality of transnational bribery was transformed from a latent value of the society into an express one. A similar story took place in the formation of the Convention. The U.S. consciously brought the issue of transnational bribery into international forums. Despite the early unpopularity of the idea that transnational bribery was evil, the conventional condemnation of corruption and recent globalization determined that the evil of transnational bribery would be transformed from a U.S. value to a global value.

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2. DIVERGENT INTEREST DEMANDS OF PARTIES AND THE COORDINATION FUNCTION OF INSTITUTIONS

Once discussion on whether to legislate against transnational bribery began, all involved stakeholders would have an interest demand and would try to maximize the benefits from the outcome. Soon after, there would be a

[288] *See* Davis, *Moralism*, *supra* note 16, at 498–99.
[289] *See* Ben Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, 85(3) FOREIGN AFF. 75, 80–86 (2006).

need to coordinate the preferences of these parties to an effective equilibrium. As noted above, the coordination function of the institutional arrangement is a key operative factor that clearly distinguishes the argument of this Article from that of the standard rational choice account.

Under the rubric of state anthropomorphization, it is assumed that different interest demands regarding an event have common values. These values are constant across the community and allow anthropomorphized state actors to work out an optimal strategy by trading off conflicting interests.[290] In contrast, this article emphasizes that the interest preferences of parties involved in the negotiations were likely divergent, and these parties had roughly equal discursive powers in the negotiations. As the values of different interest demands were different in the eyes of separate parties, it would be impossible to trade them off in a mathematical model. The only feasible approach was to encourage negotiations, concessions, or even side payments to reach a position. It is noteworthy that this argument does not assert that a dynamic of trading off conflicting interests is irrelevant to this subject matter; on the contrary, a dynamic of trading off conflicting interests precisely grasps the story of the post-Convention era. What I argue is that the relevance of the dynamic of trading off conflicting interests is conditional and only applies to subdominant parts of the overall story.

Furthermore, as the coordination theory can accommodate variations and individual strategies in an informational context, it gives a more accurate explanation of long stories with a set of episodes and interactions among parties than does a rational choice account. The application of the rational choice account is limited to a given informational environment. When information is accessible and the optimizing manner of individual actors is controlled, the optimal strategies for actors are deterministic. However, across a long story with successive episodes of interactions, accessible information changes, payoff structures change, and the optimal choices for actors change therewith. As an individual actor's intention to optimize its strategy continues, the subsequent optimal choices become profoundly discontinuous. This is where a long story fails the rational choice accounts, much like the negotiation for the Convention. The negotiations between the U.S. and European governments failed in the 1970s and in the 1980s, because the European pursuit to prohibit transnational bribery during that time was inconsistent with the goals of the U.S.[291] However, in the 1990s, as new economic pursuits were chased, domestic public

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[290] *See* Shaw, *supra* note 100, at 792–94.
[291] *See* Pieth, *supra* note 85; Glynn et al., *supra* note 90, at 22.

opinions changed, and the evil of transnational bribery became an increasingly popular concept.[292] This altered the informational environment for European governments and reshaped their optimal choices in each episode of negotiation.[293] Eventually, though the intention of Europeans to maximize their own welfare might have been the same as in the beginning, their optimal choices had become compatible with those of the U.S., which laid the groundwork for establishing an agreement.

3. THE NORMATIVE FUNCTION OF LAW THAT DELIMITS THE MORAL BOUNDARIES OF INSTITUTIONS

Another operative factor is the normative function of law, which delimits the moral boundaries of legislative activities.[294] Law, as the most important form of institution in our social life, also performs a responsibility of defining and encouraging morally correct behaviors.[295] Therefore, lawmaking is strictly bound to moral correctness. It can never explicitly or implicitly encourage established values of a society. Therefore, the original versions, which reflect the optimal coordination equilibrium of interest demands of stakeholders, should be amenable to these moral boundaries. Once necessary, the moral relevance of law would sacrifice the optimal equilibrium of interest demands for moral values. It shapes the final outcome of coordination in successive episodes of the institutionalization of the global anti-bribery collaboration.

It is now clear that the dynamic of the institutionalization of the anti-bribery collaboration, as an evolutionary event from the FCPA to the expansion of the community of collaborators in the post-Convention era, was defined by the constraining forces of established institutions and the inherent functions of laws. Following this thought process, regular interactions between political forces, which perform in a strictly optimizing manner may result in altruistic consequences across negotiations in an evolutionary context. The standard rational choice argument, that this process is defined by an unchanging optimizing manner of state actors and a course of trading off conflicting interests, completely overlooked both the divergence of interest demands of independent parties in negotiations and how variations in informational environment reshapes optimal choices across negotiation.

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[292] *See* Tarullo, *supra* note 146, at 679–80; Magnuson, *supra* note 114, at 387.
[293] *See* Tarullo, *supra* note 146, at 679–80.
[294] G.L.F., *The Distinction between the Normative and Formal Functions of Law in H. L. A. Hart's The Concept of Law*, 65(7) VA. L. REV. 1359, 1361–62 (1979).
[295] G. Marcus Cole, *What is the Government's Role in Promoting Morals? . . . Seriously?*, 31 HARV. J.L & PUB. POL'Y 77, 78–79 (2008).

VI. CONCLUSION

A simple conclusion of this Article is that the dynamic process of the institutionalization of the anti-bribery collaboration cannot be well understood without paying close attention to the intertwined interactions among political forces in the historical context. The analysis of this Article reveals that a simple economic approach cannot give an accurate explanation of the dynamic of the institutionalization process because it fails to account for the constraints on discontinuous individual strategies imbedded in an incrementally evolving institutional context. Our collective social life is path dependent, and so is the academic analysis. At the macro level it is the continuity and evolvability of the institutional context, rather than the unchanging utility function of state choices, that provides a better nexus for academic analysis of the operation of the anti-bribery collaboration in successive stages.