

The Business Case for Complying with Bribery Laws

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International businesspeople report that bribery presents one of the most frequent and perplexing issues that they encounter.¹ Their confusion regarding corruption might seem disingenuous. The past fifteen years have witnessed an explosion of scholarly research on corruption.² The rules on bribery should pose little mystery for an international businessperson faced with a decision regarding a bribe. And yet, in what David Hess and Thomas Dunfee describe as “the paradox of corruption,” businesses continue to pay bribes.³ A closer examination of corruption

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¹See James H. Davis & John A. Ruhe, *Perceptions of Country Corruption: Antecedents and Outcomes*, 43 J. BUS. ETHICS 275, 276 (2003) (reporting that the World Bank considers corruption the greatest impediment to global commercial relationships); Margaret McNeil & Kerry Pedigo, *Western Australian Managers Tell Their Stories: Ethical Challenges in International Business Operations*, 30 J. BUS. ETHICS 305, 306 (2001) (discussing surveys that report that bribe requests are the most frequent ethical problem faced by Australian and U.S. businesspeople).

²See, e.g., George T. Abed & Sanjeev Gupta, *The Economics of Corruption: An Overview*, in GOVERNANCE, CORRUPTION, AND ECONOMIC PERFORMANCE 1, 1 (George T. Abed & Sanjeev Gupta eds., 2002); Daniel Kaufman, *Back to Basics—Ten Myths About Governance and Corruption*, FIN. & DEV., Sept. 2005, at 41, 41. As recently as a decade ago, scholars noted that research on corruption “is very much in its nascent stage.” J. Egarido Campos et al., *Corruption and Its Implications for Investment*, in CORRUPTION: THE BOOM AND BUST OF EAST ASIA 11, 21 (J. Egarido Campos ed., 2001).

³David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption)*, 33 CORNELL INT’L L.J. 593, 595 (2000); see also David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 312–13 (2008) (revisiting the paradox of corruption).

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research, with an eye toward the guidance that it provides to decision makers, provides some insight as to why this paradox persists.

From both a macro- and a microdeontological perspective, the rules regarding corruption are very clear. Every major school of thought includes rules against bribery⁴: the *Qur'an*, for example, proclaims that “Allah loveth not corrupters,”⁵ while the text shared by Judaism and Christianity admonishes “you shall not accept a bribe.”⁶ Sikh doctrine seeks “righteous rule,” which specifically excludes corruption,⁷ while the second moral precept of Buddhism “involves abstinence from all deceptive practices such as bribery that lead to moral disintegration.”⁸ Every country in the world prohibits bribery.⁹ The normative and legal rules coincide and could not be more clear¹⁰: do not pay bribes, even in an international context.

Social contracts also tell the local and transnational businessperson not to pay bribes. Thomas Donaldson and Thomas Dunfee, two leading social contract theorists, propose an Integrative Social Contract Theory

⁴Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 L. & POL'Y INT'L BUS. 305, 321–22 (1997).

⁵Sura 28:77 (Muhammad Marmaduke Pickhall trans., 1930); see also Mohammad Saeed et al., *International Marketing Ethics from an Islamic Perspective: A Value-Maximization Approach*, 32 J. BUS. ETHICS 127, 136 (2001) (stating that because of a core “regard for the societal welfare . . . Islam condemns bribery unequivocally in all its forms whether it represents protecting business interests and/or securing greater profits”).

⁶Deuteronomy 16:19 (English Standard Version); see also Menachem Elon, *The Sources and Nature of Jewish Law and Its Application in the State of Israel—Part IV*, 4 ISR. L. REV. 80, 99 (1969) (stating that the bribery laws of Israel are based on strong Jewish proscriptions of bribery); John T. Noonan Jr., *Bribery*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 741, 745–46 (1986) (describing an “intense spiritual hatred of bribery” in Christian literature).

⁷HARBANS SINGH, DEGH, TEGH, FAITH: SOCIO-ECONOMIC & RELIGIO-POLITICAL FUNDAMENTALS OF SIKHSIM 141 (1986).

⁸U. Dhammaratana, *The Social Philosophy of Buddhism*, in THE SOCIAL PHILOSOPHY OF BUDDHISM 1, 18 (Samdhong Rinpoche et al. eds., 1972).

⁹Hess & Dunfee, *supra* note 3, at 613 (citing JOHN T. NOONAN, BRIBES 702 (1984)); Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 391 (2010).

¹⁰The clarity of the rules does not, of course, ensure that they are correctly perceived. Chong-Yeong Lee and Hideki Yoshihara note the difference between perception and reality and report that a number of international businesspeople mistakenly believe that bribery is a normalized practice in other countries. Chong-Yeong Lee & Hideki Yoshihara, *Business Ethics of Korean and Japanese Managers*, 16 J. BUS. ETHICS 7, 10–11 (1997).

that includes very general macrosocial contracts but leaves open most moral space for the generation of microsocial contracts by local communities.¹¹ Both macrosocial and microsocial contracts, however, must comport with incontestable, nonnegotiated norms to which Donaldson and Dunfee give the appellation “hypernorms”: “a thin universal morality . . . principles so fundamental that, by definition, they serve to evaluate low-order norms . . . reaching to the root of what is ethical for humanity.”¹² Donaldson and Dunfee suggest that bribery violates a hypernorm of “necessary social efficiency,” which posits that all institutions and norms should operate to provide people with social goods.¹³ Andrew Spicer, building on the work of Donaldson and Dunfee, suggests that even if one sets aside a hypernorm prohibiting bribery, when it appears that local communities have negotiated a norm tolerating corruption their tolerance usually is only behavioral and they still retain a higher aspirational norm condemning corruption.¹⁴ Social contractarians tell businesspeople that they should not pay bribes.¹⁵

At the macro level, consequentialist discussions abound in accounts of corruption at the national and international level.¹⁶ Indeed, many observers attribute the shift in the global legal community’s willingness to discuss corruption to the transformation of that conversation from a moral

¹¹Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 *ACAD. MGMT. REV.* 252, 260–65 (1994).

¹²THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 43–44 (1999).

¹³*Id.* at 229–30. They also suggest that corruption usually violates a hypernorm providing for “a universal right to political participation.” Thomas W. Dunfee & Thomas J. Donaldson, *Untangling the Corruption Knot: Global Bribery Viewed Through the Lens of Integrative Social Contract Theory*, in *THE BLACKWELL GUIDE TO BUSINESS ETHICS* 61, 74 (Norman E. Bowie ed., 2002).

¹⁴Andrew Spicer, *The Normalization of Corrupt Business Practices: Implications for Integrative Social Contracts Theory (ISCT)*, 88 *J. BUS. ETHICS* 833, 837–38 (2009). Spicer does not take issue with Donaldson and Dunfee’s framework; rather, he uses their extensive analysis of corruption, which goes beyond simply finding corruption an illegitimate violation of a hypernorm, as an opening for his own exploration of the authenticity of local norms regarding corruption. *Id.* at 837.

¹⁵*See, e.g.*, Dunfee & Donaldson, *supra* note 13, at 74. Donaldson and Dunfee acknowledge that in some instances the admonition to not pay bribes is an incomplete solution and recommend a longer-term approach that combines “business pressure, legal enforcement, and political will.” DONALDSON & DUNFEE, *supra* note 12, at 230.

¹⁶*See* Kaufman, *supra* note 2, at 41 (noting that the majority of corruption research is empirical studies of its effects).

discourse to one that emphasizes economic consequences;¹⁷ Nii Lante Wallace-Bruce describes the shift “from the moral argument to the economic one” as “a masterstroke.”¹⁸ Scholars such as Susan Rose-Ackerman, Johann Lambsdorff, and Robert Klitgaard have thoroughly and convincingly marshaled together research that demonstrates the impediment to economic growth, degradation of social and political institutions, misallocation of resources and skills, impoverishment, and numerous other societal ills that corruption inflicts on polities and economies.¹⁹ As Steven Salbu points out, “no nation can miss the clear and highly publicized conclusion that corruption is economically devastating.”²⁰

Philosophers, theologians, and ethicists have clearly demonstrated the deontological and social contract proscriptions on bribery at both the macro and micro levels; economists and other social scientists have demonstrated the destructive consequences that bribery inflicts at the macro

¹⁷E.g., Padideh Ala'i, *The WTO and the Anti-Corruption Movement*, 6 LOY. U. CHI. INT'L L. REV. 259, 273–75 (2008); Beverly Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 208, 226 (1996); see also Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y & MARKETING 108, 109–10 (1998) (describing the positive effect that the change in emphasis has had on research).

¹⁸Nii Lante Wallace-Bruce, *Corruption and Competitiveness in Global Business—The Dawn of a New Era*, 24 MELB. U. L. REV. 349, 364 (2000). But see Chantal Thomas, *Does the “Good Governance Policy” of the International Financial Institutions Privilege Markets at the Expense of Democracy?*, 14 CONN. J. INT'L L. 551, 560 (1999) (lamenting the economic focus of the international financial institutions).

¹⁹See, e.g., ROBERT KLITGAARD, CONTROLLING CORRUPTION 38–48 (1988) (discussing and explaining the manners in which corruption causes misallocations of goods and services, the generation of negative externalities, inefficiencies, distortion of incentives, the creation of corrupt rents, popular alienation and disenfranchisement, distortions in administration and bureaucracy, and public outrage, at the societal level); JOHANN GRAF LAMBSDORFF, THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND REFORM: THEORY, EVIDENCE AND POLICY 58–134 (2007) (discussing voluminous empirical research on the damage at the societal level by corruption, developing new models to explain the relationships between corruption and societal damage, and developing and testing a model to show that corruption is not simply a transfer of rents); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM 9–26 (1999) (discussing and explaining how corruption leads to regulatory distortion and evasion, the entanglement of government and organized crime, market distortion and inefficiency, bureaucratic distortion and malfeasance, systemic degradation, and the delegitimization of and disengagement from government).

²⁰Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 446 (1999). Bill Shaw points out that the effects of bribery are particularly devastating for emerging economies. Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689, 691 (2000).

level. Why then is bribery “universally disapproved yet universally present”?²¹ The absence within the literature of a systematic analysis at the *firm level* of the consequences of breaching bribery rules, in the tradition of Rose-Ackerman, Lambsdorff, or Klitgaard, could contribute to the persistence of bribery. From the individual businessperson’s perspective, questions remain regarding the business case for complying with bribery laws. This article seeks to fill that gap.

There is a dearth of firm-level empirical data on the consequences of paying bribes. In the last decade, however, some scholars have conducted firm-level inquiries; their findings, combined with theoretical discussions of corruption and with the regulatory environment, allow for a reasonable discussion of the consequences at the firm level of paying bribes. Moreover, a survey of local laws and of international corruption regimes demonstrates the contingent legal liabilities for the payment of bribes. A very strong business case exists for complying with the rules regarding bribery.

This article first clarifies the definitions of bribery and corruption. The article then examines direct and indirect costs of paying bribes²² and the effect of corruption on potential relationships.²³ Finally, the article discusses potential criminal liability, particularly in light of the expansive international legal regime.²⁴ The totality of these costs and liabilities strongly suggests that the consequences for any given firm of paying a bribe would burden rather than benefit the firm.

I. DEFINITIONS AND MODES OF ANALYSIS OF CORRUPTION

A. *Definitions*

Corruption engenders complicated definitional and philosophical debates.²⁵ This article uses the most common definition of corruption:

²¹Hess & Dunfee, *supra* note 3, at 595.

²²*See infra* Part II.

²³*See infra* Part III.

²⁴*See infra* Part IV.

²⁵Arnold Heidenheimer suggests three broad categories of attempts to define public sector corruption: public office-centered, moral and public interest-centered, and market-based

abuse or misuse of a position of trust or responsibility for private gain rather than the purpose for which that trust or responsibility was conferred.²⁶ Corruption can manifest itself in numerous forms, such as nepotism, collusion, or theft.²⁷ This article deals primarily with the form of corruption known as bribery. Bribery consists of a transaction in which a person abuses or misuses a position of trust or responsibility, quid pro quo something of value.²⁸ Unfortunately, a great deal of the literature on corruption and bribery conflates the two terms, and many of the studies referred to in this article use the term “corruption” even though they examine bribery.²⁹ This article tries to, but cannot always, avoid confusion of terms when referring to these studies.

types of definitions. ARNOLD J. HEIDENHEIMER, *POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS* 4 (1970); see also Maryvonne Génaux, *Social Sciences and the Evolving Concept of Corruption*, 42 *CRIME L. & SOC. CHANGE* 13, 13–16 (2004) (discussing the continued relevance of Heidenheimer’s categorization).

²⁶Joseph Nye first offered a form of this definition. See Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 *AM. POL. SCI. REV.* 417, 419 & n.10 (1967); see also Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 *VA. J. INT’L L.* 413, 417 (2007) (referring to Nye’s as the “classic definition”). This general definition is used by nongovernment organizations such as Transparency International, which defines corruption as “the abuse of entrusted power for private gain,” *Frequently Asked Questions About Corruption*, TRANSPARENCY INT’L, http://www.transparency.org/news_room/faq/corruption_faq (last visited Oct. 1, 2011), and the World Bank, which defines corruption as “the abuse of public office for private gain,” World Bank Grp., *Helping Countries Combat Corruption: The Role of the World Bank*, WORLD BANK, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> (last visited Oct. 1, 2011) (emphasis removed). This definition allows for a general discussion of corruption; the legality or illegality of a particular action depends on the precise wording of the criminal laws of a government having jurisdiction over that action.

²⁷James P. Wesberry, Jr., *International Financial Institutions Face the Corruption Eruption: If the IFIs Put Their Muscle and Money Where Their Mouth Is, the Corruption Eruption May Be Capped*, 18 *NW. J. INT’L L. & BUS.* 498, 504 (1998); see also James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 *U. PA. J. INT’L L.* 125, 182–83 (2009) (describing other permutations of corruption).

²⁸ROSE-ACKERMAN, *supra* note 19, at 93; Stephen F. Smith, Essay, *Proportional Mens Rea*, 46 *AM. CRIM. L. REV.* 127, 142 (2009) (emphasizing that the U.S. federal bribery statute requires mens rea for an act to rise from a gratuity to a bribe).

²⁹See MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY* 20–21 (2005) (bemoaning the confusion of the terms in corruption literature).

Corruption and bribery can exist in interactions between firms and government or in interactions solely among private firms.³⁰ Most of the research discussed in this article takes account of interactions between firms and government. Private sector corruption—corruption in interactions between private firms—probably imposes tremendous costs on firms as well, and also merits serious scholarly attention.³¹ Good reasons exist, however, for the focus by scholars on public sector corruption. At the simplest level, scholars have access to more data concerning public sector corruption. Public sector corruption also preoccupies scholars because it implicates the viability of fundamental social institutions.³² Most of the lessons discerned from an examination of public sector bribery, however, translate to bribery in any interaction.

B. Dynamic Versus Static Analysis

To understand corruption, one must evaluate its effects dynamically rather than statically. Much of the older “grease money” literature suggested that, in an overly bureaucratized system, corruption allowed business firms to bypass bureaucracy and therefore lowered costs for those firms.³³ These analyses conceived of corruption as exogenous to the relationship between a firm and the bureaucracy.³⁴ According to this analysis, each bribe affects only that particular transaction: the background condition of corruption is

³⁰See Edward C. Banfield, *Corruption as a Feature of Governmental Organization*, 18 J.L. & ECON. 587, 591–99 (1975) (distinguishing private sector corruption from public sector corruption).

³¹See Blake E. Ashforth et al., *Re-Viewing Organizational Corruption*, 33 ACAD. MGMT. REV. 670, 672–76 (2008) (discussing research on the harms of private sector corruption at the firm, industry, national, and systems levels).

³²See Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1370 (1983) (“When an official is bribed, there is an immediate harm to the legitimacy of government regardless of the substantive ends the bribe is intended to achieve.”); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 463 (1998) (“The absence of exit or other forms of loss protection (i.e., diversification, insurance, etc.) provides some justification for less tolerance for public corruption relative to private corruption.”).

³³See, e.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 386 (1968); Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8, 11 (1964).

³⁴See Francis T. Lui, *An Equilibrium Queuing Model of Bribery*, 93 J. POL. ECON. 760, 762–66 (1985), for an example of this type of analysis.

not affected by the bribe, and bribes are not affected by the background condition of corruption.

Scholars with experience in corruption, however, describe corruption as dynamically involved with those bureaucracies. Susan Rose-Ackerman, a groundbreaking scholar on the political economy of corruption, addresses the exogenous perception of corruption head on: "I disagree. . . . [T]he authors [who suggest that routine corruption may confer benefits] assume that officials have only limited discretion. For example, the tax collector 'discovers' the tax liabilities of citizens and firms. In reality, he or she might 'create' tax liabilities as a bribe extraction device."³⁵ Field observation strongly supports Rose-Ackerman's argument. In the 1980s, Robert Wade described the relationships between rice farmers in southern India and officials of the Irrigation Department.³⁶ He observed that, among other things, bureaucrats hid information, delayed action, and obfuscated rules and facts so that they could leverage ever larger bribes from farmers who needed water.³⁷ Salim Rashid observed the degradation of a telephone system in India as bureaucrats created ever longer delays so that they could extract ever larger bribes.³⁸ By the 1990s, scholars generally agreed that dynamic analysis provides more accurate descriptions of the effects of corruption than does static analysis.³⁹ Dynamic analysis recognizes the "intertemporal linkages" between decisions: "decisions made today affect those to be made in the future."⁴⁰ Scholars also agreed that a dynamic analysis generally indicated that over time the costs of corruption generally outweigh any benefits.⁴¹

³⁵ROSE-ACKERMAN, *supra* note 19, at 16.

³⁶Robert Wade, *The System of Administrative and Political Corruption: Canal Irrigation in South India*, 18 J. DEV. STUD. 287, 287 (1982).

³⁷Robert Wade, *Irrigation Reform in Conditions of Populist Anarchy: An Indian Case*, 14 J. DEV. ECON. 285, 286-87 (1984); Wade, *supra* note 36, at 313-14.

³⁸Salim Rashid, *Public Utilities in Egalitarian LDC's: The Role of Bribery in Achieving Pareto Efficiency*, 34 KYKLOS: INT'L REV. FOR SOC. SCI. 448, 448-55 (1981).

³⁹See Ibrahim F.I. Shihata, *Corruption—A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 454-55 (1997).

⁴⁰MICHAEL R. CAPUTO, FOUNDATIONS OF DYNAMIC ECONOMIC ANALYSIS: OPTIMAL CONTROL THEORY AND APPLICATIONS ix (2005).

⁴¹See WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 14-15 (Sept. 1997), available at <http://www1.worldbank.org/publicsector/anticorrupt/>

Businesspeople instinctively recognize the dynamic effects of corruption, even if they do not always act rationally based on that recognition. Businesspeople recognize that one can earn a reputation as a dishonest actor or a corrupt business; earning a reputation takes time and occurs over several interactions. The qualitative literature on corruption overflows with accounts from businesspeople of the costs accumulated over time associated with the reputational effects of paying bribes.⁴² Two very experienced transnational corporate lawyers describe the experience of businesses in strong terms:

[W]hen a company first agrees to pay bribes, it is immediately tainted with a reputation for corruption that is virtually impossible to shake. Virtue, once lost, is rarely ever regained. One payment quickly becomes two, then four, and so on. The smell of corruption attracts other would-be bribees like flies, all of whom exert their leverage by threatening to report previous transgressions.⁴³

Elizabeth Spahn adds, simply, “The bribe price goes up.”⁴⁴

corruptn/corruptn.pdf (stating that, by using a dynamic analysis, what appears to be a short-term gain can be shown to impose tremendous costs in the long run); Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 LAW & POL’Y INT’L BUS. 95, 112 (1999) (“[P]resent corruption decreases future productivity, thereby reducing dynamic efficiency.”).

⁴²See ALEXANDRA ADDISON WRAGE, *BRIBERY AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS, AND SECURITY* 31 (2007) (“Representatives of multinational companies operating overseas describe a consistent trend. When these companies pay bribes to resolve some short-term nuisance, they report that the bribe-taker returns, the word spreads, and the demands multiply.”); Beverley Earle & Anita Cava, *Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and Their Impact on India and Multinational Corporations*, 31 U. HAW. L. REV. 59, 84 (2009) (discussing revelations of corporate counsels that paying bribes engenders a reputation that leads to greater bribe demands); Hess & Dunfee, *supra* note 3, at 609 (reporting discussions with business leaders regarding value of good reputation with respect to corruption); Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 86–87 (2008) (describing reputational costs experienced by firms that have paid bribes).

⁴³Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT’L L. & COM. REG. 389, 444 (1997).

⁴⁴Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT’L L. 861, 887 (2010); *see also* Krever, *supra* note 42, at 87 (“Moreover, an official who knows payments have been made in the past can increase bureaucratic interference to engender further bribes.”).

Daniel Kaufman and Shang-Jin Wei suggest dynamic analysis of corruption at the firm level.⁴⁵ They develop a theoretical model that looks beyond the effects of a single transaction. They base their model on a Stackelberg “game between a rent-seeking government official and a representative firm,” and then use backward induction to solve for the equilibrium level of official harassment and cost of time spent with government officials.⁴⁶ Their model predicts that “firms that pay more bribes not only face a higher nominal rate of harassment in equilibrium, but also have to deal with a higher effective rate of harassment.”⁴⁷ They therefore predict, based on this model, that in the real world firms that pay bribes will bear more, not less, costs due to bureaucratic interference.⁴⁸ Kaufman and Wei’s model suggests what many businesspeople already know: the dynamic effects of corruption apply at the firm level as well as at the country or regional level. These direct and indirect costs imposed on the firm are discussed in the next section of this article.

II. ENGAGING IN BRIBERY INCREASES DIRECT COSTS AND INDIRECT COSTS

Very few—if any—firms pay bribes in order to enhance the well-being of the bribe-taking government official. Firms pay bribes in hopes of obtaining a business advantage, such as lower costs, greater efficiencies, or access to relationships or markets.⁴⁹ A simplistic, static analysis of a bribe request might suggest that payment of a bribe could accrue an advantage. More sophisticated analysis, however, suggests the opposite; empirical evidence also indicates that corrupt behavior imposes costs on a firm.

⁴⁵Daniel Kaufman & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?* (World Bank Policy Research, Working Paper No. 2254, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629191.

⁴⁶*Id.* at 3. The Stackelberg Game is a non-zero-sum, two-player game in which the players do not have information about each other’s strategies. M. Simaan & J.B. Cruz, Jr., *On the Stackelberg Strategy in Nonzero-Sum Games*, 11 J. OPTIMIZATION THEORY & APPLICATIONS 533, 534 (1973).

⁴⁷Kaufman & Wei, *supra* note 45, at 5.

⁴⁸*Id.*

⁴⁹ROSE-ACKERMAN, *supra* note 19, at 92–93.

A. *Bribery Increases Direct Costs*

The most starkly demonstrated cost imposed by paying bribes is time spent dealing with bureaucracy. This may seem counterintuitive, particularly given slang terms for bribes such as “speed money.”⁵⁰ Understanding corruption as a dynamic process, however, casts light on the cost imposed by bribery. Corruption creates a relationship, perhaps between the bribe payer and a bribe-taking official, but certainly between the bribe payer and the bureaucracy.⁵¹ Power resides asymmetrically in the parties: the official has control over a resource or service desired by the firm, whereas the firm only has money.⁵² The official acts as an agent of the state for purposes of controlling the resource or service but acts out of self-interest when disbursing them, and thus is not well-constrained by the strictures of responsibility to the state; indeed, market forces may form a more powerful constraint on a corrupt bureaucrat’s behavior.⁵³ The firm has already indicated a willingness to pay an illicit fee in order to avoid bureaucratic delay or to secure administrative approval; nothing exists to prevent the official from creating new and greater delays or from simply renegotiating the size of the illicit fee.

⁵⁰See Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT’L L.J. 287, 310 (2000) (using the slang term).

⁵¹ROSE-ACKERMAN, *supra* note 19, at 113.

⁵²Ronald MacLean Abaroa, *Towards 2005: Profits, People, and the Future of the Regulatory State in the Free Market Model*, 30 LAW & POL’Y INT’L BUS. 131, 136 (1999); see also Nsongurua J. Udombana, *How Should We Then Live? Globalization and the New Partnership for Africa’s Development*, 20 B.U. INT’L L.J. 293, 343 (2002) (emphasizing the moral obligation of government to fight corruption given this asymmetry).

⁵³Ritva Reinikka and Jakob Svensson observed these market forces in operation: “These results suggest that public officials act as price (bribe) discriminators, demanding higher bribes (for a given public service) from firms that can afford to pay, and demanding lower bribes from firms that credibly can threaten to exit the market or use other means to acquire the service.” Ritva Reinikka & Jakob Svensson, *Measuring and Understanding Corruption at the Micro Level*, in CORRUPT EXCHANGES: EMPIRICAL THEMES IN THE POLITICS AND POLITICAL ECONOMY OF CORRUPTION 135, 143 (Donatella Della Porta & Susan Rose-Ackerman eds., 2002). Other factors, of course, constrain the bribe-seeking official. See Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amount Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 100–13 (2011) (describing factors considered by a public official contemplating a bribe, including criminal penalties, social costs, and psychic costs).

Jay Pil Choi and Marcel Thum label this process the “ratchet effect” of corruption.⁵⁴ Choi and Thum join Kaufman and Wei in developing theoretical models to describe the costs associated with the ratchet effect. Kaufman and Wei go on to test their theory regarding direct costs against empirical evidence. Using data from several thousands of responses to surveys conducted for the Global Competitiveness Report and the World Development Report,⁵⁵ holding other factors constant, and comparing bribe-paying and non-bribe-paying firms within the same countries, Kaufman and Wei find that “firms that pay more bribes, in equilibrium, experience more, not less, time wasted with the officials on matters related to regulations.”⁵⁶ The same is true when firms of similar size and other characteristics are compared.⁵⁷ The same is true when comparing only companies operating in Asia.⁵⁸ The same is true when different data sets are analyzed.⁵⁹ Firms that pay bribes spend more, not less, time and money in dealing with government.

Other empirical studies corroborate and amplify these findings. Alejandro Gaviria, for example, applies a slightly different model to firm-level data from Latin America and still finds—when directly comparing firms that pay bribes to firms that do not pay bribes—that the payment of bribes increases rather than lowers costs for an individual firm.⁶⁰ Jakob Svensson, using very detailed firm-level data from Uganda, finds no evidence for the

⁵⁴Jay Pil Choi & Marcel Thum, *The Dynamics of Corruption with the Ratchet Effect*, 87 J. PUB. ECON. 427, 428 (2003).

⁵⁵Kaufman & Wei, *supra* note 45, at 5–6.

⁵⁶*Id.* at 10; *see also id.* at 12 (“[F]irms that report paying more bribes also spend more time negotiating with the bureaucracies . . .”).

⁵⁷*See id.* at 9–10, 12.

⁵⁸*See id.* at 10. Kaufman and Wei separately analyzed companies operating in Asia because some people argue that the high growth experienced by many Asian countries indicates that corruption operates differently in Asia. *See, e.g.*, Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1329–30 (1997).

⁵⁹*See* Kaufman & Wei, *supra* note 45, at 12.

⁶⁰Alejandro Gaviria, *Assessing the Effects of Corruption and Crime on Firm Performance: Evidence from Latin America*, 3 EMERGING MARKETS REV. 245, 267 (2002).

“grease money” hypothesis but does find that paying bribes damages firm operations.⁶¹

Donato De Rosa, Nishaal Gooroochurn, and Holger Görg explicitly test, at the firm level, the hypothesis that bribery acts as “grease” that allows firms to escape burdensome regulation.⁶² They find no empirical evidence to support that hypothesis.⁶³ De Rosa, Gooroochurn, and Görg’s study also yielded two additional empirical observations quite pertinent to a business case to not pay bribes. They compare the costs imposed on a firm by the payment of bribes to the costs imposed by lengthy bureaucratic processes.⁶⁴ They find that the payment of bribes imposed real and significant costs on firms, but that—contrary to almost any prediction—the bureaucratic delay experienced by firms not paying bribes did not impose significant costs.⁶⁵ They also find that the costs imposed on firms by paying bribes were greater in countries that experienced higher background levels of corruption.⁶⁶ In other words, even though a firm might operate in a country where corruption seems “normal,” that firm would still accrue costs rather than benefits by paying bribes when compared to firms that do not pay bribes.

Kaufman and Wei also examined the cost of acquiring capital. In many countries bureaucrats can exert considerable control over the flow of capital.⁶⁷ If bribes do in fact facilitate government action, then firms that pay bribes should obtain capital at lower costs. In fact, Kaufman and Wei found the opposite to be true: “[F]irms that have paid more bribes also have a

⁶¹See Jakob Svensson, *The Cost of Doing Business: Firms’ Experiences with Corruption, in UGANDA’S RECOVERY: THE ROLE OF FARMS, FIRMS, AND GOVERNMENT* 319, 319–20 (Ritva Reinikka & Paul Collier eds., 2001).

⁶²Donato De Rosa et al., *Corruption and Productivity Firm-Level Evidence from the BEEPS Survey* 3–4 (World Bank Policy Research, Working Paper No. 5348, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630232.

⁶³*Id.* at 34.

⁶⁴*Id.* at 5.

⁶⁵See *id.* at 34.

⁶⁶See *id.* at 5–6.

⁶⁷See Christopher Gulino, *Engineering a Venture Capital Market and the Effects of Government Control on Private Ordering: Lessons from the Taiwan Experience*, 37 *GEO. WASH. INT’L L. REV.* 845, 845–47 (2005) (discussing these controls).

higher, not lower, cost of capital.”⁶⁸ In general, corruption increases the cost of raising capital through bonds and decreases the value of equity.⁶⁹

Paying bribes increases costs as well as the amount of time spent interacting with bureaucrats. These consequences alone create a strong business case against the payment of bribes. High direct costs, however, are not the only consequences of the payment of bribes.

B. Bribery Lowers Rates of Growth

Empirical studies indicate that firms that pay bribes experience lower rates of growth. Raymond Fisman and Jakob Svensson compare, at the firm level, the effect of the payment of bribes and the payment of taxes on firm growth.⁷⁰ Fisman and Svensson use firm-level data from firms in several industries in Uganda.⁷¹ They recognize that the *apparent* relationship between the payment of bribes and growth can be deceptive because high-growth or high-profit firms may choose to pay or be targeted for the payment of higher bribes.⁷² They therefore develop a model to factor out growth factors endogenous to corruption and compare firms with comparable characteristics.⁷³ They find “robust evidence that higher corruption is associated with lower firm growth.”⁷⁴ Specifically, they find that a one percent increase in the rate of bribery “is associated with a reduction in firm growth of more than three percentage points.”⁷⁵ Intriguingly, they

⁶⁸Kaufman & Wei, *supra* note 45, at 11.

⁶⁹Francisco Ciochini et al., *Does Corruption Increase Emerging Market Bond Spreads?*, 55 J. ECON. & BUS. 503, 512–13 (2003); Charles M.C. Lee & David Ng, *Corruption and International Valuation: Does Virtue Pay?*, 18 J. INVESTING 23, 31–33 (2005); *see also* Mark J. Garmaise & Jun Liu, *Corruption, Firm Governance, and the Cost of Capital*, ESCHOLARSHIP UNIV. OF CAL. 24–25 (Feb. 28, 2005), <http://repositories.cdlib.org/anderson/fin/1-05> (finding that corruption decreased firm value and thus increased the costs of raising capital).

⁷⁰Raymond Fisman & Jakob Svensson, *Are Corruption and Taxation Really Harmful to Growth? Firm-Level Evidence*, 83 J. DEV. ECON. 63, 63–64 (2007).

⁷¹*Id.* at 67–69.

⁷²*See id.* at 65.

⁷³*See id.* at 66–67.

⁷⁴Svensson, *supra* note 61, at 320.

⁷⁵Fisman & Svensson, *supra* note 70, at 64.

also find that the payment of bribes is three times more damaging to growth than payment of an equivalent amount of taxes.⁷⁶ These findings specifically include short-term growth.⁷⁷

Alejandro Gaviria does not examine the effect of paying bribes on general firm growth; rather, he examines at the firm level the effect of paying bribes on the growth of sales.⁷⁸ He uses survey data from more than twenty countries across Latin America.⁷⁹ Like Fisman and Svensson, Gaviria distinguishes his study from other research on the relationship between corruption and performance by engaging in firm-level analysis, factoring out other conditions that might affect comparative growth in sales.⁸⁰ As an empirical matter, Gaviria finds that the payment of bribes does not lead to more sales growth but in fact actually lowers sales growth.⁸¹ More generally, he also finds that the payment of bribes lowers investment and employment growth, which suggests lower overall growth.⁸²

None of these findings support an argument that bribery confers an advantage. Indeed, these studies suggest that the payment of bribes renders a firm less competitive. Lower rates of growth could in part be attributed to the additional costs accrued through paying bribes. Lower rates of sales growth, however, strongly suggest a negative dynamic effect of bribery: the payment of a bribe leads to more interference and more demands for bribes, igniting a vicious circle in which the payment of more bribes leads to demands for more bribes rather than to bureaucratic transparency and facilitation.

⁷⁶*See id.* at 70.

⁷⁷*Id.* at 73. Fisman and Svensson conclude, “[T]he evidence we have presented and complementary, qualitative information from firm managers, points in one direction—corruption is a serious constraint on doing business.” *Id.*

⁷⁸*See Gaviria, supra* note 60, at 245.

⁷⁹*Id.* at 250.

⁸⁰*See id.* at 245.

⁸¹*Id.* at 246.

⁸²*Id.*

C. Bribery Is Related to Lower Productivity

“Productivity,” in general, has to do with output per factor;⁸³ at the firm level one important measure has to do with the efficient relationship between capital and labor.⁸⁴ No empiricist has conducted firm-level research on the extent to which paying bribes affects productivity. Johann Graf Lambsdorff has, however, studied the effects of corruption on firm productivity through country comparison.⁸⁵ Lambsdorff predicts that corruption will decrease productivity because corruption distorts decision making, allocation of resources, and the creation of relationships.⁸⁶ Empirical analysis supports this prediction. Lambsdorff finds that corruption significantly reduces productivity: a ten percent increase in the average amount of corruption experienced by firms in the aggregate reduces productivity by two percent.⁸⁷ Using Tanzania and the United Kingdom as examples, he finds that if Tanzanian firms experienced the levels of corruption experienced by British firms, total output of the Tanzanian firms would increase by twenty percent.⁸⁸

Ernesto Dal Bó and Martín Rossi conduct a similar study, still comparing firms in the aggregate but comparing only firms within a single industry (electric utility companies) and a single region (Latin America).⁸⁹ Dal Bó and Rossi predict that bribery inhibits growth because “in a corrupt environment the fate of a firm is not tightly related to managerial efforts devoted to supervising and coordinating the use of productive factors.”⁹⁰ Turning to the empirical data, they too find a strong association between

⁸³D.W. Jorgenson & Z. Griliches, *The Explanation of Productivity Change*, 34 REV. ECON. STUD. 249, 250 (1967).

⁸⁴See Michael S. Knoll & Thomas D. Griffith, *Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities*, 116 HARV. L. REV. 987, 997 n.42 (2003).

⁸⁵Johann Graf Lambsdorff, *How Corruption Affects Productivity*, 56 KYKLOS: INT'L REV. FOR SOC. SCI. 457, 457–69 (2003).

⁸⁶See *id.* at 457.

⁸⁷*Id.* at 468.

⁸⁸*Id.* at 468–69.

⁸⁹See Ernesto Dal Bó & Martín A. Rossi, *Corruption and Inefficiency: Theory and Evidence from Electric Utilities*, 91 J. PUB. ECON. 939, 939–60 (2007).

⁹⁰*Id.* at 940.

experience with corruption and less productive use of capital.⁹¹ They too use countries to illustrate the magnitude of the effect; their research indicates that if electric utilities in Brazil experienced corruption only to the extent that companies in Costa Rica experienced corruption, those utilities would use seven percent fewer workers to provide the same amount of electricity that they provide today.⁹²

Lower productivity again demonstrates the dynamic effect of bribery and corruption. A firm that pays bribes becomes embroiled in a relationship in which it is to the bureaucrat's advantage to create delays and obstacles that the firm must then pay to have removed. Moreover, the firm may have no easy route for exit from this relationship. As Elizabeth Spahn points out, the bureaucrat has a strong incentive to maintain the relationship and can release embarrassing or incriminating information about the firm if the firm attempts to leave the relationship.⁹³

III. PAYING BRIBES NEGATIVELY AFFECTS RELATIONSHIPS

Bribery's effect on time, money, growth, and productivity is a product of the dynamic relationship between a bribe-paying firm and a bribe-taking public official. Bribery also diminishes relationships other than the relationship between the firm and the public official, and its effect on those relationships can impose indirect costs on a firm. Bribery affects both internal and external relationships; this part discusses each in turn.

A. Bribery Damages Internal Relationships

The payment of bribes creates a workplace in which employees are more likely to steal materials or opportunities from the employer. Many factors

⁹¹See *id.* at 958.

⁹²*Id.*

⁹³See Spahn, *supra* note 44, at 888–89. Spahn suggests that, in extreme situations, “drive-by shootings are a possible exit strategy for unwanted partners.” *Id.* at 889 (commenting specifically on experiences of Western business representatives in Russia). Her wry observation underscores the lack of transparent institutions to mediate the relationship between the bribe-paying firm and the bribe-accepting public official.

contribute to a decision by an employee to engage in misconduct.⁹⁴ The firm's "ethical climate," however, sends very powerful signals to employees about appropriate and acceptable behaviors.⁹⁵ Bart Victor and John Cullen created an early typography of ethical climates, describing them as self-interested, benevolent, or principled.⁹⁶ David Fritzsche points out that these three categories reflect three dominant categories of ethical frameworks: egoism, utilitarianism, and deontology.⁹⁷ Others have subsequently offered more nuanced categories.⁹⁸ Regardless of the schema used, the fact that a firm's organizational climate can create an environment of self-serving, egoistic behavior constitutes the salient insight.⁹⁹

Behaviors engaged in, condoned, or rewarded by managers play a large role in creating the ethical environment. Large firms seeking to enhance the ethical quality of their enterprises are advised to set the tone from the top.¹⁰⁰ The same is patently true of small firms; in a survey of small enterprise professionals, "[t]he majority of respondents reported that top management set the ethical tone for the organization and had the

⁹⁴See William T. Ross & Diana C. Robertson, *A Typology of Situational Factors: Impact on Salesperson Decision-Making About Ethical Issues*, 46 J. BUS. ETHICS 213, 228 (2003) (discussing their empirical study, which demonstrates that environmental and personal factors interact in complex ways to affect decisions about misconduct).

⁹⁵Mitchell J. Neubert et al., *The Virtuous Influence of Ethical Leadership Behavior: Evidence from the Field*, 90 J. BUS. ETHICS 157, 157 (2009). Bart Victor and John Cullen define an ethical climate: "A work climate is defined as perceptions that 'are psychologically meaningful molar descriptions that people *can agree* characterize a system's practices and procedures.' The prevailing perceptions of typical organizational practices and procedures that have ethical content constitute the ethical work climate." Bart Victor & John B. Cullen, *The Organizational Bases of Ethical Work Climates*, 33 ADMIN. SCI. Q. 101, 101 (1988) (quoting Benjamin Schneider, *Organizational Climate: An Essay*, 28 PERSONNEL PSYCH. 447, 474 (1975)) (emphasis added).

⁹⁶Victor & Cullen, *supra* note 95, at 104.

⁹⁷David J. Fritzsche, *Ethical Climates and the Ethical Dimension of Decision Making*, 24 J. BUS. ETHICS 125, 125 (2000).

⁹⁸See, e.g., Anke Arnaud, *Conceptualizing and Measuring Ethical Work Climate: Development and Validation of the Ethical Climate Index*, 49 BUS. & SOC'Y 345, 354–56 (2010) (proposing an Ethical Climate Index).

⁹⁹See Marshall Schminke et al., *The Power of Ethical Work Climates*, 36 ORG. DYNAMICS 171, 175 (2007) (discussing empirical research on the powerful effects of workplace ethics climates).

¹⁰⁰Al Y.S. Chen et al., *Reinforcing Ethical Decision Making Through Corporate Culture*, 16 J. BUS. ETHICS 855, 861 (1997).

most influence on unethical decisions.”¹⁰¹ Rule-breaking behavior by managers, therefore, creates a workplace environment in which employees consider self-serving behaviors acceptable.

Empirical studies have directly linked the payment of bribes by firms to self-serving misbehaviors by employees. In controlled laboratory experiments, participants who were rewarded by supervisors for cheating by offering bribes during games were more likely than other participants to engage in self-serving behaviors.¹⁰² A survey of municipal office workers found that the single greatest factor contributing to self-serving behavior was the observation of bribe-taking by managers.¹⁰³ Indeed, mere *exposure* to the tolerance of bribe-giving in a firm has been found to significantly contribute to self-serving misbehavior.¹⁰⁴ Conversely, studies of South African firms in which purchasing departments adhered to high standards of conduct found that a strong and shared ethical climate constituted a critical element in the departments’ good performances.¹⁰⁵

Self-serving misbehavior imposes very burdensome costs on firms. Kickbacks, for example, rob firms of discounts or other savings that should accrue to the firm or burden the firm with shoddy goods and services.¹⁰⁶ Workplace theft and fraud impose even greater costs. “The Association of Certified Fraud Examiners . . . has reported that the typical U.S. firm loses six percent of its annual revenues to employee fraud.”¹⁰⁷ This translates to almost seven hundred billion U.S. dollars lost each year to employee

¹⁰¹Scott J. Vitell et al., *Ethical Problems, Conflicts and Beliefs of Small Business Professionals*, 28 J. BUS. ETHICS 15, 22 (2000).

¹⁰²William A. Weeks et al., *The Role of Mere Exposure Effect on Ethical Tolerance: A Two-Study Approach*, 58 J. BUS. ETHICS 281, 282 (2005).

¹⁰³See Willa Bruce, *Ethical People Are Productive People*, 17 PUB. PRODUCTIVITY & MGMT. REV. 241, 248 (1994).

¹⁰⁴See Weeks et al., *supra* note 102, at 289.

¹⁰⁵See J.A. Badenhorst, *Unethical Behaviour in Procurement: A Perspective on Causes and Solutions*, 13 J. BUS. ETHICS 739, 743 (1994).

¹⁰⁶See Daniel T. Ostas, *When Fraud Pays: Executive Self-Dealing and the Failure of Self-Restraint*, 44 AM. BUS. L.J. 571, 572–73 (2007) (discussing enormous amount of money lost to kickbacks).

¹⁰⁷Elletta Sangrey Callahan, *Beyond the Ethics Course: Making Conduct Count*, 39 MCGEORGE L. REV. 757, 757 (2008) (citing Cary Meiners, *Employee Fraud: Detecting and Eliminating the Unintentional Perk*, RISK MGMT., April 2005, at 50, 51 (citing ASS’N OF CERTIFIED FRAUD EXAM’RS, 2004 REPORT TO THE NATION ON OCCUPATIONAL FRAUD AND ABUSE (2004))).

misconduct.¹⁰⁸ Worldwide data is difficult to obtain, but the numbers that are available depict a staggering problem. Employee theft—a subset of employee misconduct—imposes serious costs; by one estimate employee theft costs firms around the world over one hundred billion dollars each year.¹⁰⁹ Chinese firms lose over nineteen billion U.S. dollars to employee theft alone;¹¹⁰ even Australian and New Zealand firms lose almost a billion dollars each year.¹¹¹ These hits to the bottom line have profound and tangible effects: “The U.S. Chamber of Commerce estimates that . . . 30% of corporate bankruptcies are a direct result of employee theft.”¹¹²

Empiricists who study the connection between firm bribery and self-serving misbehavior by employees reach consensus on the means to reduce the harmful misbehavior inside the firm: managers should stop paying or tolerating the payment of bribes to parties outside of the firm.¹¹³ Those bribes create an environment in which employees are more likely to consider self-serving misbehavior appropriate. The actions, such as office theft, which are associated with an environment in which people consider self-serving misbehavior to be appropriate, constitute a significant cost associated with paying bribes.

B. Bribery Damages or Precludes External Relationships

The payment of a bribe could affect relationships with a potential customer of goods or services. Little empirical research exists to show the extent to

¹⁰⁸*Id.*; see also Sharon Goott Nissim, *Stopping a Vicious Cycle: The Problems with Credit Checks in Employment and Strategies to Limit Their Use*, 18 GEO. J. ON POVERTY L. & POL’Y 45, 49 n.24 (2010) (stating that employee theft costs U.S. retailers thirty billion dollars each year).

¹⁰⁹Roberto Concepcion, Jr., *Pre-Employment Credit Checks: Effectuating Disparate Impact on Racial Minorities Under the Guise of Job-Relatedness and Business Necessity*, 12 SCHOLAR 523, 538 n.73 (2010) (citing William I. Sauser, *Employee Theft: Who, How, Why, and What Can Be Done*, S.A.M. ADVANCED MGMT. J., Summer 2007, at 13).

¹¹⁰Tang Zhihao, *Businesses Lose Billions; Consumers End Up Paying*, CHINADAILY (May 12, 2011, 10:24 AM), http://www.chinadaily.com.cn/bizchina/2011-05/12/content_12496247.htm.

¹¹¹*Shoplifting Costing up to \$800m a Year*, NZ HERALD (Oct. 20, 2010, 10:11 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10681819.

¹¹²Terence Daryl Shulman, *Hard Times Lead to Increase in Stealing, Overshopping, and Overspending?*, ANNALS AM. PSYCHOTHERAPY ASSOC., Spring 2009, at 32, 32.

¹¹³See Badenhorst, *supra* note 105, at 744; Bruce, *supra* note 103, at 249; Vitell et al., *supra* note 101, at 22.

which this happens, but at least two aspects of this consequence merit attention.

First, to the extent that customers include members of the general public, in most countries that public despises corruption. Survey after survey demonstrates that even in countries experiencing endemic corruption people dislike the practice and understand the harm it inflicts on their society. Sahr John Kapundeh, for example, found that even while Sierra Leone suffered myriad nation-threatening crises, respondents to his survey singled corruption out for particular condemnation.¹¹⁴ Surveys reveal high levels of societal rebuke in countries in a variety of economic or political states including, for example, Cameroon,¹¹⁵ Kazakhstan,¹¹⁶ Peru,¹¹⁷ Romania,¹¹⁸ and South Asia,¹¹⁹ as well as students in Bulgaria, Mongolia,¹²⁰ and Russia.¹²¹ Anecdotal evidence suggests that after the collapse of the corrupt Suharto regime in Indonesia, firms that collaborated with Suharto had difficulty marketing within Indonesia.¹²² Firms

¹¹⁴Sahr John Kapundeh, *Politics and Corruption in Africa: A Case Study of Sierra Leone* 109, 115 (1995).

¹¹⁵CENTRE DE RECHERCHE ET D'ÉTUDES EN ÉCONOMIE ET SONDAGE, ENQUÊTE NATIONALE 2006 AUPRÈS DES ENTREPRISES SUR LA CORRUPTION AU CAMEROUN 15 (2007), available at http://www.transparency.org/content/download/16826/226689/file/Comeroon_Rapport_final%20crites_EntreprisesFINAL.pdf.

¹¹⁶Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT'L ECON. L. 863, 923 (2001).

¹¹⁷World Bank Inst., *Voices of the Misgoverned and Misruled: An Empirical Diagnostic Study on Governance, Rule of Law and Corruption for Peru*, WORLD BANK 8–10 (Sept. 10, 2001), http://info.worldbank.org/etools/docs/library/206576/peru_voicesreport.pdf.

¹¹⁸WORLD BANK, *Diagnostic Surveys of Corruption in Romania* 19 (2001), available at <http://www1.worldbank.org/publicsector/anticorrupt/romenglish.pdf>.

¹¹⁹TRANSPARENCY INT'L, *Corruption in South Asia: Insights and Benchmarks from Citizen Feedback Surveys in Five Countries* 16 (2002), available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan019883.pdf>.

¹²⁰Philip M. Nichols et al., *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEXAS INT'L L.J. 215, 231 (2004).

¹²¹Paul Temple & Georgy Petrov, *Corruption in Higher Education: Some Findings from the States of the Former Soviet Union*, 16 HIGHER EDUC. MGMT. POL'Y 83, 92 (2004).

¹²²See generally Mark Kantor, *International Project Finance and Arbitration with Public Sector Entities: When Is Arbitrability a Fiction?*, 24 FORDHAM INT'L L.J. 1122, 1126–46 (2001) (discussing difficulties faced by foreign companies in attempting to enforce relationships tainted by corruption from the Suharto era).

should recognize the possibility of damage to relationships with the broad pool of potential customers, even though the damage is inchoate.

Second, the payment of bribes definitively precludes relationships with a growing number of specific customers. Most international financial institutions, as well as many governments, maintain lists of suppliers and consultants debarred from contracts or projects due to involvement in corruption.¹²³ The World Bank, for example, not only debar firms and consultants who have acted corruptly in association with a World Bank project, but it also debar firms and consultants that have been debarred by the Asian Development Bank and European Bank for Reconstruction and Development.¹²⁴ China excludes corrupt actors from government projects,¹²⁵ as does the United States.¹²⁶ Exclusion from custom with these institutions and governments is not inconsequential; these bodies are involved in trillions of dollars of projects each year.¹²⁷

Firms that pay bribes also severely constrict the number of foreign parties with whom they can form other relationships. Several empirical studies have found that foreign investors avoid corrupt countries in general. Paolo Mauro conducted one of the earliest of these studies.¹²⁸ He finds a “negative association between corruption and [foreign] investment,

¹²³See A. Timothy Brown, *Corruption and Improper Payments: Global Trends and Applicable Law*, 36 ALBERTA L. REV. 416, 436–37 (1998) (discussing debarment lists).

¹²⁴*World Bank Listing of Ineligible Firms & Individuals*, WORLD BANK, <http://web.worldbank.org> (in search box, type “World Bank Listing of Ineligible Firms & Individuals”; then follow the first hyperlink).

¹²⁵See Tong Xinchao, *Chinese Procurement Law: Current Legal Frameworks and a Transition to the World Trade Organization’s Government Procurement Agreement*, 17 TEMP. INT’L & COMP. L.J. 139, 163–64 (2003) (describing the list and stating that firms may be kept on the list for one to three years).

¹²⁶Federal Acquisitions Regulations System—Causes for Debarment, 48 C.F.R. § 9.406–2 (2011).

¹²⁷See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010 (2009) (estimating \$3.55 trillion in 2010 U.S. expenditures); *Projects & Lending*, WORLD BANK, <http://web.worldbank.org/> (in search box, type “Projects & Lending”; then click on first hyperlink) (placing World Bank lending for FY 2010 at \$72 billion); *Chinese Government Revenue and Trends*, STARMASS INT’L, http://www.starmass.com/china_review/government_finance/government_finance_trends.htm (last visited Oct. 10, 2011) (citing Chinese government expenditures of ¥7630 billion, approximately US\$1114.7 billion, in 2009).

¹²⁸Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 681 (1995); see also Earle & Cava, *supra* note 42, at 67 (lauding Mauro).

as well as growth, [that] is significant in both a statistical and an economic sense.”¹²⁹ Numerous studies, using differing methodologies and sets of data, corroborate Mauro’s findings. Victor M. Gastanaga, Jeffrey B. Nugent, and Bistra Pashamova, for example, examine corruption and other possible inhibitors of foreign investment in the context of the effects of government reforms and find that corruption diminishes foreign investment.¹³⁰ Beata K. Smarzynska and Shang-Jin Wei use a finer data set, analyze from a firm level, focus particularly on the effects inside emerging economies, and find that “more corruption in a host country is associated with a lower probability of [foreign] investment.”¹³¹ Mohsin Habib and Leon Zurawicki find that corruption inhibits foreign investment but also find that the effect is amplified as the distance grows between the level of corruption in the host country and the home country of the investor.¹³² In other words, a firm located in a country with relatively high levels of corruption faces obstacles in forming investment relationships with foreign parties, and even greater obstacles creating investment relationships with foreign parties who are themselves not prone to act corruptly.

Many reasons probably explain the decision at the individual firm level to resist forming investment relationships in relatively more corrupt countries. Corrupt relationships, as has been discussed in this article, impose direct costs; rational investors would choose to avoid those costs.¹³³

¹²⁹Mauro, *supra* note 128, at 705; *see also* Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross Country Analysis*, in *CORRUPTION AND THE GLOBAL ECONOMY* 83, 91 (Kimberly Ann Elliott ed., 1997) (finding that a measurable decrease in corruption in a country would increase its investment to gross domestic product ratio by almost four percent and the annual growth of its gross domestic product per capita by almost half a percent).

¹³⁰Victor M. Gastanaga et al., *Host Country Reforms and FDI Inflows: How Much Difference Do They Make?*, 26 *WORLD DEV.* 1299, 1310–11 (1998).

¹³¹Beata K. Smarzynska & Shang-Jin Wei, *Corruption and Composition of Foreign Investment: Firm Level Evidence* (World Bank, Policy Research Working Paper No. 2360, 2000), available at <http://library1.nida.ac.th/worldbank/fulltext/wps02360.pdf>. Smarzynska and Wei also find that foreign investors other than high-tech companies are more likely to use the joint venture form to invest into more corrupt countries. *Id.* at 12.

¹³²Mohsin Habib & Leon Zurawicki, *Corruption and Foreign Direct Investment*, 33 *J. INT’L BUS. STUD.* 291, 303 (2002).

¹³³*See* Victor Dragotă et al., *Some Considerations on the Relationship Between Corruption and Economic Growth*, in *RISK MANAGEMENT AND VALUE: VALUATION AND ASSET PRICING* 71, 75 (Mondher Bellalah et al. eds., 2008) (noting this possibility but observing that investors are not always rational).

Corruption creates an environment of opacity, obfuscation, and delay, which often repels potential investors.¹³⁴ Corruption creates uncertainty and instability, which discourages investment.¹³⁵

All of these studies and observations treat the potential investment destination in the aggregate. An individual firm located in a country with a relatively high level of corruption might think that because all potential investment partners outside of its country face these generic difficulties regardless of whether that particular company pays bribes, paying bribes will not cause further negative consequences. Such reasoning, of course, is not correct: at the local level a firm that pays bribes has greater costs and uses resources less effectively, and it would probably be unattractive to a foreign firm on that basis alone. Regardless, one factor that repels foreign relationships does so at the firm level and absolutely flows from the actions of the individual firm: liability.

The next section of this article discusses criminal liability as a consequence of the payment of a bribe. Criminal liability for the payment of bribes can be severe.¹³⁶ Firms understandably seek to avoid those penalties and seek to avoid relationships that will expose them to liability. Indeed, a survey of international businesses commissioned by Deloitte found that in one year nearly two-thirds of those firms had abandoned projects involving the creation of an international relationship due to concerns over potential liability for the payment of bribes.¹³⁷ A great number of relationships can create such exposure.

The United States' Foreign Corrupt Practices Act¹³⁸ imposes criminal liability for the payment or offer of bribes to foreign officials. As it is one of

¹³⁴Gastanaga et al., *supra* note 130, at 1301; Habib & Zurawicki, *supra* note 132, at 292.

¹³⁵Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547, 590 (2000).

¹³⁶*See infra* notes 177–231 and accompanying text (discussing penalties).

¹³⁷DELOITTE FINANCIAL ADVISORY SERVICES LLC, LOOK BEFORE YOU LEAP: MANAGING RISK IN GLOBAL INVESTMENTS 7 (2011), available at http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Content/Articles/Financial%20Advisory%20Services/us_fas_Look%20Before%20You%20Leap_012711.pdf [hereinafter DELOITTE].

¹³⁸Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213 (codified as amended in scattered sections of 15 U.S.C. § 78), amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 (codified as amended in scattered sections of 15 U.S.C. § 78), and

the older laws imposing such liability, it serves well as an illustration of the extent to which relationships with corrupt actors can extend liability.¹³⁹ The Foreign Corrupt Practices Act generally extends jurisdiction over U.S. firms and individuals for their own actions.¹⁴⁰ U.S. entities can, however, also be held liable for the actions of parties with whom they have certain relationships. When a U.S. firm acquires, merges with, or in some cases even acquires the assets of a foreign firm, it also assumes exposure for criminal liability for bribes that that foreign firm has paid.¹⁴¹ Parent companies can often be found criminally liable for bribes paid by subsidiaries, on the theory that the parent is aware or constructively aware of the bribe;¹⁴² U.S. firms can even be found liable for bribes paid by foreign firms in which they own

International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (codified as amended in scattered sections of 15 U.S.C. § 78).

¹³⁹Some mistakenly believe that the Foreign Corrupt Practices Act had no analogs. In fact, Sweden also enacted a law that prohibited the bribery of foreign officials. See David R. Slade, Comment, *Foreign Corrupt Payments: Enforcing a Multilateral Agreement*, 22 HARV. INT'L L.J. 117, 122 n.22 (1981) (discussing the statute, an amendment to the Swedish Penal Code). The law, however, was drafted in a manner that made application of jurisdiction very difficult. See generally Michael Bogdan, *International Trade and the New Swedish Provisions on Corruption*, 27 AM. J. COMP. L. 665 (1979) (evaluating and criticizing the law).

¹⁴⁰As explained in the next section, the United States also extends jurisdiction over a number of foreign actors. See *infra* Part IV.

¹⁴¹See H. Lowell Brown, *Successor Corporate Criminal Liability: The Emerging Federal Common Law*, 49 ARK. L. REV. 469, 477–82 (1996) (discussing criminal liability for successor companies); Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 252–53 (2010) (pointing out the Securities and Exchange Commission's (SEC) recent attention to mergers and acquisitions); Carolyn Lindsey, *More than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 966 (2009) (noting liability for predecessor's violations). H. Lowell Brown points out that attempting to circumvent successor liability through creative transactions rarely succeeds. Brown, *supra*, at 484–99.

¹⁴²H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 18–19 (1998); Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503, 516–17 (2006). A parent is constructively aware if, among other things, it actively ignores important facts, the corrupt payment is recorded on the subsidiary's books, or the subsidiary repeatedly pays bribes. Brown, *supra*, at 31, 37–38.

large percentages of shares.¹⁴³ Parent companies can be held criminally liable for bribes paid by *agents* of subsidiaries.¹⁴⁴ U.S. firms are criminally liable for bribes paid by employees or agents.¹⁴⁵ U.S. firms are also liable for bribes paid by any third party or intermediary acting on behalf of the U.S. firm.¹⁴⁶ Justin Marceau predicts that U.S. franchisors will be found criminally liable, when constructive knowledge can be established, for bribes paid by foreign franchisees.¹⁴⁷ Debra Maryanov points out that because the Foreign Corrupt Practices Act imposes criminal liability for payments to third parties if the U.S. firm knows or constructively knows that some or all of that payment will be used to pay a bribe, then U.S. firms can be held criminally liable for payments made to suppliers if they constructively know that those suppliers use part of the payment to fund bribes.¹⁴⁸

Given the severe criminal liability that can accrue simply from entering into a relationship with a bribe payer, U.S. firms are advised to be extremely cautious about entering into relationships.¹⁴⁹ U.S. firms are not alone. Most of the major trading countries in the world have enacted similar legislation.¹⁵⁰ As just one example, the German Criminal Code states that “[w]hoever commits the crime himself or through another shall be punished as a perpetrator.”¹⁵¹ Germany has explicitly warned that

¹⁴³See Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 *FORDHAM J. CORP. & FIN. L.* 285, 305 (2007) (describing such liability and explaining that constructive knowledge of the bribe must be demonstrated).

¹⁴⁴Brown, *supra* note 142, at 18–19.

¹⁴⁵*Id.* at 35–36; Anupam Chander, *Googling Freedom*, 99 *CALIF. L. REV.* 1, 41 (2011); Marceau, *supra* note 143, at 298–300.

¹⁴⁶Marceau, *supra* note 143, at 298; Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 *GA. L. REV.* 489, 545 (2011).

¹⁴⁷Marceau, *supra* note 143, at 302.

¹⁴⁸Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 *LEWIS & CLARK L. REV.* 397, 441–42 (2010).

¹⁴⁹DELOITTE, *supra* note 137, at 3; Lindsey, *supra* note 141, at 982–83.

¹⁵⁰See *infra* Table 1 (discussing legislation).

¹⁵¹STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, TEIL I [BGBL. I] 945, as amended, § 25(1) (Ger.), translation available at *Criminal Code (Strafgesetzbuch, StGB)*, COMP. L. SOC'Y, <http://www.iuscomp.org/gla/statutes/StGB.htm>.

this provision will be used to hold German companies liable for bribes paid by related parties outside of Germany.¹⁵² Bulgaria imposes administrative rather than criminal liability on artificial persons.¹⁵³ The actions of employees, agents, representatives, or firms to which the Bulgarian firm has a connection expose Bulgarian firms to administrative liability;¹⁵⁴ Bulgaria has made clear that this liability extends to the payment of bribes.¹⁵⁵ These are but two examples of the general point: business firms expose themselves to risk when they enter into relationships with firms that pay bribes, which engenders reluctance on the part of those firms to enter into relationships with firms that pay bribes.

When, therefore, a firm pays a bribe, it precludes itself from entering into relationships with a vast number of transnational entities. Precluding these relationships is not inconsequential. The extent to which a relationship with a foreign business will benefit any particular firm depends on complex interactions of idiosyncratic characteristics.¹⁵⁶ In general, however, relationships with foreign entities often represent the most effective means of acquiring new machineries or technologies,¹⁵⁷ developing and implementing management and governance skills,¹⁵⁸ creating broader

¹⁵²Organisation for Econ. Co-operation & Dev. [OECD], *Germany: Phase 3: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, at 18-19 (Mar. 17, 2011), available at <http://www.oecd.org/dataoecd/5/45/47416623.pdf>.

¹⁵³Administrative liability results in fines and debarment. OECD, *Bulgaria: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, at 9 (Mar. 18, 2011), available at <http://www.oecd.org/dataoecd/16/20/47468296.pdf>.

¹⁵⁴LAW ON ADMINISTRATIVE OFFENCES AND SANCTIONS art. 83a(1) – (2) (Bulg.).

¹⁵⁵OECD, *supra* note 153, at 10.

¹⁵⁶Klaus E. Meyer & Evis Sinani, *When and Where Does Foreign Direct Investment Generate Positive Spillovers? A Meta-Analysis*, 40 J. INT'L BUS. STUD. 1075, 1076 (2009).

¹⁵⁷Kamal Saggi, *Trade, Foreign Direct Investment, and International Technology Transfer: A Survey*, 17 WORLD BANK RES. OBS. 191, 228–29 (2002).

¹⁵⁸OLIVIER BLANCHARD, *THE ECONOMICS OF POST-COMMUNIST TRANSITION* 77–88 (1997).

networks of relationships,¹⁵⁹ and accessing capital.¹⁶⁰ A firm that pays bribes risks cutting itself off from factors that will allow it to grow and to flourish in the future.

IV. CRIMINAL LIABILITY

When considering the consequences of paying a bribe, a person or firm must take into account the potential for criminal sanction.¹⁶¹ Criminal sanctions adhere to bribery through at least two frameworks: through local laws and through laws sanctioning the bribery of foreign public officials. Not every jurisdiction imposes criminal liability on legal persons, although a growing number of countries do so.¹⁶² This article speaks generally of criminal liability and tries to include both real persons and firms when it is appropriate to do so.

A. Local Law

Virtually every country in the world criminalizes the bribery of its own officials.¹⁶³ Albania, for example, prohibits payments to a government official “to have him act or refrain from acting on an action connected to

¹⁵⁹Robert E. Lipsey, *Home- and Host-Country Effects of Foreign Direct Investment*, in CHALLENGES TO GLOBALIZATION: ANALYZING THE ECONOMICS 333, 365 (Robert E. Baldwin & L. Alan Winters eds., 2002).

¹⁶⁰Sophia P. Dimelis, *Spillovers from Foreign Direct Investment and Firm Growth: Technological, Financial and Market Structure Effects*, 12 INT’L J. ECON. BUS. 85, 85–87 (2005).

¹⁶¹See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 10 (stating that a rational actor considers costs of criminal penalties); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 55 (2005) (stating that actors take potential costs of criminal sanctions into account).

¹⁶²See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482 (2009) (noting that many jurisdictions are creating corporate criminal liability); Edward B. Diskant, Note, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 129 (2008) (noting that not all countries impose criminal liability on artificial persons). Whether corporate criminal liability should exist raises complicated issues not addressed in this article other than to note that, regardless of whether it should exist, it is widely imposed on companies that have paid bribes. For a discussion on the complexities of corporate criminal liability, see generally William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307 (2007).

¹⁶³Hess & Dunfee, *supra* note 3, at 613; Vega, *supra* note 9, at 391.

his duty or service, or to use his influence toward other authorities in order to insure favors, courtesies and any other benefits.”¹⁶⁴ Zambia, more verbosely, imposes criminal penalties on

[a]ny person who by himself, or by or in conjunction with any other person, corruptly gives, promises or offers any gratification to any public officer, whether for the benefit of that public officer or of any other public officer, as an inducement or reward for doing or forbearing to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned.¹⁶⁵

Persons who pay a bribe in Albania or Zambia or any country in between¹⁶⁶ expose themselves to a risk of criminal liability.

Some countries do not enforce these laws with vigor, which may lead some firms to believe that the risk of prosecution equals zero. Such thinking grossly miscalculates the risk. In general, current failure to enforce a given law does not drain that law of its legal vitality.¹⁶⁷ Prosecution for

¹⁶⁴CRIMINAL CODE [CRIM. C.] art. 245 (Alb.).

¹⁶⁵Anti-Corruption Commission Act of 1996, Cap. 91, 7 LAWS OF REP. OF ZAMBIA (2006) § 29(2).

¹⁶⁶Alphabetically (in English), Afghanistan precedes Albania and Zimbabwe follows Zambia; each of these countries, however, is experiencing profound change and their laws may be in a state of flux. Nonetheless, both criminalize bribery. Afghanistan for the moment still uses a penal code enacted in 1976. See PENAL CODE, OFFICIAL GAZETTE NO. 347 (Afg.). Chapter Three of that code lays out extensive provisions regarding bribery. The law prohibits giving or promising to give “any money, good or other benefit . . . for the purpose of performance of or abstention from or disruption of a duty which is assigned to him.” *Id.* arts. 254–55. Afghan law also prohibits an interesting version of bribery: “A person who forces an official of public services through oral or material pressure to do an unrightful work, or hinders the performance of his job obligation or disrupts it, shall be considered as briber and shall be sentenced to its fixed punishment.” *Id.* art. 257. As part of the nation-building process in Afghanistan, Italy has taken the lead role in a United Nations project to reform Afghan law and build legal capacity; the eventual status of the Penal Code is unclear. M. Cherif Bassiouni & Daniel Rothenberg, An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan 10 (unpublished manuscript), available at http://www.law.depaul.edu/centers_institutes/ihrli/pdf/rome_conference.pdf. At the time of the writing of this article, Zimbabwe is in a chaotic state while the military junta that has backed President Robert Mugabe attempts to comprehend the democratic impulses that have overtaken the nation. See Jeremiah I. Williamson, Note, *Seeking Civilian Control: Rule of Law, Democracy, and Civil-Military Relations in Zimbabwe*, 17 IND. J. GLOBAL LEGAL STUD. 389, 401–11 (2010) (describing contestation of law in Zimbabwe). Zimbabwe’s current criminal code, promulgated in 2004, prohibits bribery of public officials. Criminal Law (Codification and Reform) Act [ch. 9:23], June 3, 2005, art. 170(1)(b) (Zim.).

¹⁶⁷Alexander Black turns to Shakespeare: “The law hath not been dead, though it hath slept.” Alexander J. Black, *Legal Principles Surrounding the New Canadian and American Arctic Energy*

violation of a generally unenforced statute *always* remains a possibility.¹⁶⁸ Indeed, aggressive prosecutors can use rarely enforced laws to target or harass people or firms for which they have some degree of animus.¹⁶⁹ Historically, prosecutors have used corruption laws to target persons or entities.¹⁷⁰

There is good reason to be especially sensitive to the possibility of prosecution for payment of a bribe. Laws sometimes lapse into unenforced status because they no longer, or never did, align with underlying social norms.¹⁷¹ These statutes are left in criminal codes because the transaction costs of removing them exceed the burden imposed on the general public¹⁷² of leaving them in the codes.¹⁷³ Prosecutorial discretion aligns the lack of enforcement with extant norms, which minimizes the public's impulses to repeal these laws.¹⁷⁴

Debate, 23 ENERGY L.J. 81, 110 (2002) (quoting WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2).

¹⁶⁸LON FULLER, THE PROBLEMS OF JURISPRUDENCE 108 (1949).

¹⁶⁹See Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN'S L.J. 1, 25 (2000) (describing potential aggressive uses of rarely enforced laws); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1011 (1995) (condemning the use of unenforced laws for harassment).

¹⁷⁰Indeed, much of the consternation over the recent prosecution of former Prime Minister Yulia Tymoshenko of Ukraine stems from a concern that her prosecution is politically motivated. See David M. Herszenhorn, *New Charges Against Ex-Leader of Ukraine*, N.Y. TIMES, Nov. 12, 2011, at A9 (discussing the prosecution of Tymeshenko and reaction in other countries).

¹⁷¹See Melissa J. Mitchell, Comment, *Cleaning Out the Closet: Using Sunset Provisions to Clean up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1675–77 (2005).

¹⁷²Of course, a distinct class of people may be significantly burdened by unenforced laws. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110 (2000) (arguing that even unenforced laws are not harmless because they create a criminal class).

¹⁷³See Donald J. Boudreaux & A.C. Pritchard, Essay, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 9 (1994) ("Repealing statutes has its costs. These costs might be very low when a statute forbids widely practiced behavior generally regarded as harmless to society. But the benefits of repealing these statutes are nonexistent. Such statutes remain on the books by default, bothering few, if any, people.").

¹⁷⁴Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 150 n.192 (1993); Mitchell, *supra* note 171, at 1681.

The opposite is true of bribery laws. Rather than functioning to accurately reflect extant norms, the lack of enforcement of bribery laws occurs because of a malfunction in the legal process.¹⁷⁵ The general public deeply despises corruption and perceives the failure to enforce corruption laws as a problem.¹⁷⁶ The nonenforcement of bribery laws, therefore, occurs due to a malfunction of the process of law; to the extent that the quality of law improves or a different malfunction occurs, then the likelihood of prosecutions of bribery should change and the risk of criminal punishment could increase substantially.

The penalties imposed for bribery vary but generally involve imprisonment and fines. Some countries impose the death penalty for bribery.¹⁷⁷ Albania, referenced above, imposes an unspecified fine and imprisonment of up to five years;¹⁷⁸ Zambia requires disgorgement of the benefit and imposes a prison sentence of up to twelve years.¹⁷⁹ Table 1 outlines the criminal penalties for simple bribery¹⁸⁰ of domestic public officials in polities that are among the twenty most active in international trade or are among the twenty greatest destinations for inward foreign

¹⁷⁵See Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 367–69 (1997) (distinguishing between nonenforcement of law by well-functioning systems and nonenforcement due to malfunction of systems).

¹⁷⁶See *supra* notes 114–22 and accompanying text.

¹⁷⁷See John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 194 n.58 (1998) (discussing imposition of the death penalty for bribery); Frank E. Vogel, *The Trial of Terrorists Under Classical Islamic Law*, 43 HARV. INT'L L.J. 53, 60–61 (2002) (discussing the application of the death penalty to corrupt acts under Islamic law). *But see* Matthew Bloom, Note, *A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 YALE J. INT'L L. 177, 194 (2008) (stating that China is considering abolition of the death penalty for corruption crimes so that European nations will be more likely to honor extradition requests).

¹⁷⁸CRIM. C. art. 245 (Alb.).

¹⁷⁹Anti-Corruption Commission Act of 1996, Cap. 91, 7 LAWS OF REP. OF ZAMBIA (2006) art. 41. Afghanistan, referenced above, *supra* note 166, imposes a prison sentence of two to ten years and a fine equal to the bribe. PENAL CODE, OFFICIAL GAZETTE NO. 347 art 255 (Afg.). The bribe itself will be confiscated. *Id.* art. 262. Zimbabwe imposes a prison sentence of not more than twelve years and a fine not greater than three times the amount of the bribe. Criminal Law (Codification and Reform) Act [ch. 9:23], June 3, 2005, art. 170(1)(b) (Zim.).

¹⁸⁰Some jurisdictions apply additional penalties for bribery of specific officials, or for bribery that occurs in specific circumstances.

investment¹⁸¹—in other words, countries with which an international businessperson is most likely to interact.

Table 1: Criminal Penalties for Bribery of Domestic Public Officials

<i>Country</i>	<i>Imprisonment</i>	<i>Fine</i>	<i>Corp. Liability</i>
Australia ¹⁸²	up to 10 years	statutory	yes ¹⁸³
Belgium ¹⁸⁴	6 months to 5 years	not specified	yes ¹⁸⁵
Brazil ¹⁸⁶	2 to 12 years	not specified	no ¹⁸⁷
Canada ¹⁸⁸	up to 5 years	not specified	yes ¹⁸⁹
China ¹⁹⁰	according to seriousness ¹⁹¹	unlimited for legal persons	yes
France ¹⁹²	up to 10 years	€150,000	yes ¹⁹³
Germany ¹⁹⁴	3 months to 10 years	not specified	yes ¹⁹⁵
Hong Kong ¹⁹⁶	up to 10 years	up to HK\$500,000	possible ¹⁹⁷
India ¹⁹⁸	up to 1 year	unlimited	yes ¹⁹⁹
Ireland ²⁰⁰	up to 10 years	unlimited	yes ²⁰¹
Italy ²⁰²	6 months to 5 years ²⁰³	not specified	yes ²⁰⁴
Japan ²⁰⁵	up to 3 years, & hard labor	up to ¥2,500,000	no ²⁰⁶
Mexico ²⁰⁷	up to 14 years	not specified	no ²⁰⁸
Netherlands ²⁰⁹	up to 12 years	€760,000 ²¹⁰	yes ²¹¹
Russia ²¹²	up to 8 years	yes ²¹³	yes ²¹⁴
Saudi Arabia ²¹⁵	up to 10 years	Riyal 1,000,000	no
Singapore ²¹⁶	up to 7 years	up to S\$100,000	yes ²¹⁷
South Korea ²¹⁸	up to 5 years	up to ₩20,000,000	yes ²¹⁹
Spain ²²⁰	up to 10 years	10 x benefit of transaction	yes ²²¹
Sweden ²²²	up to 2 years	statutory	possible ²²³
Switzerland ²²⁴	up to 5 years	unlimited	yes ²²⁵
Taiwan ²²⁶	1 to 7 years	TWD 3,000,000	no
United Kingdom ²²⁷	up to 7 years	unlimited	yes ²²⁸
United States ²²⁹	up to 15 years ²³⁰	3 x benefit obtained	yes ²³¹

¹⁸¹This list is based on International Monetary Fund estimates for 2010. See *Coordinated Direct Investment Survey*, INT'L MONETARY FUND, <http://cdis.imf.org/> (last visited Oct. 13, 2011) (listing country-specific data).

¹⁸²Criminal Code of 1995 (Cth) pt 7.6, div. 141.1(5) (Austl.).

¹⁸³*Id.* pt 2.5 div 12.1.

¹⁸⁴Loi relative à la répression de la corruption [Bribery Prevention Act] of Feb. 10, 1999, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 23, 1999, 9281.

¹⁸⁵CODE PÉNAL [C.PÉN.] art. 5 (Belg.).

¹⁸⁶CÓDIGO PENAL [C.P.] art. 317(6) (Braz.).

¹⁸⁷Draft Bill number 6826/2010, submitted to the Brazilian legislature in 2010, imposes criminal liability on legal persons for the crime of bribery. See OECD, *Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Brazil*, at 2 (June 6, 2011), available at <http://www.oecd.org/dataoecd/15/25/42097321.pdf>.

¹⁸⁸Criminal Code, R.S.C. 1985, c. C-46, s. 121(3) (Can.).

¹⁸⁹*Id.* ss. 22.1, 22.2.

¹⁹⁰Zhongguo Renmin Gongheguo Xingfa [Criminal Law] (promulgated by the Fifth National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 389 (China).

¹⁹¹Sentences can include life imprisonment. *Id.* art. 390.

¹⁹²Loi 2000-595 du 30 juin 2000 modifiant le code pénal et le code de procédure pénale relative à la lutte contre la corruption [Law 2000-595 of June 30, 2000 Amending the Criminal Code and the Code of Criminal Procedure Relating to the Fight Against Corruption], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 1, 2000, p. 9944.

¹⁹³CODE PÉNAL [C. PÉN.] art. 121-22 (Fr.).

¹⁹⁴STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, TEIL I [BGBL. I] 945, as amended, §§ 334-35 (Ger.).

¹⁹⁵Ordnungswidrigkeitengesetz [OWiG] [Administrative Offences Act], May 24, 1968, BUNDESGESETZBLATT, TEIL I [BGBL. I] (Ger.). Germany has long resisted imposing criminal liability on legal persons, instead imposing nearly identical penalties through an administrative process. See Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETH. INT'L L. REV. 333, 343-44 (2009).

¹⁹⁶Prevention of Bribery Ordinance, (1997) Cap. 201, § 12(1)(9) (H.K.).

¹⁹⁷Courts in Hong Kong have begun to impose criminal liability on corporations, although not yet for crimes involving bribery. See Melanie Pritchard, *Corporate Manslaughter: The Dawning of a New Era?*, 27 H.K. L.J. 40, 55-57 (1997).

¹⁹⁸Punishment for Bribery, No. 39 of 1920, PEN. CODE (1975), § 171E (India).

¹⁹⁹The Indian Supreme Court has ruled that corporations can be held criminally liable, although this holding has not been applied to bribery. *Standard Chartered Bank and Others v. Directorate of Enforcement*, A.I.R. 2005 S.C. 2622 (India).

²⁰⁰Prevention of Corruption (Amendment) Act of 2001 (Act No. 27/2001) (Ir.), available at <http://www.irishstatutebook.ie/pdf/2001/en.act.2001.0027.pdf>.

²⁰¹*Id.* s. 9.

²⁰²CODICE PENALE [C.p.] art. 322 (It.).

²⁰³Italy distinguishes between bribery to induce a public official to perform a legal act, for which the penalty is imprisonment for between six months and two years, and bribery to

induce a public official to commit an illegal act, for which the penalty is imprisonment for between two years and five years. *See id.*

²⁰⁴Like Germany, Italy imposes administrative rather than criminal liability on artificial persons for crimes including bribery. *See* Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 *BUFF. CRIM. L. REV.* 89, 131 (2004).

²⁰⁵КЕИHŌ [KEIHŌ] [PEN. C.] art. 198 (Japan).

²⁰⁶Japan does in some circumstances impose criminal liability on legal persons for bribery of foreign officials. OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan*, at 17 (Dec. 2011), available at <http://www.oecd.org/dataoecd/59/51/49377330.pdf>.

²⁰⁷Codigo Penal Federal [CFP] [Federal Criminal Code], as amended Diario Oficial de la Federacion [DO], Oct. 24, 2011, art. 222 (Mex.).

²⁰⁸Mexico does impose criminal liability on legal persons for bribery of foreign officials. *Id.* art 222 *bis*.

²⁰⁹WETBOEK VAN STRAFRECHT [SR] § 178 (Neth.).

²¹⁰The Netherlands also confiscates the proceeds of the transaction. *Id.*

²¹¹*Id.* § 51.

²¹²УГОЛОВНЫЙ КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ [UK RF] [Criminal Code] art. 291 (Russ.).

²¹³The fine levied will be two hundred to one thousand times the current minimum wage or an amount equal to between seven and twelve months of the income of the bribing person. *Id.*

²¹⁴КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ РФ ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ [KOAP RF] [Code of Administrative Violations] art. 19.28 (Russ.).

²¹⁵Combating Bribery Law, Official Gazette No. 3414, art. 1 (July 31, 1992) (Saudi Arabia), reprinted in *Saudi Arabia: Anti-Bribery Law*, 9 *ARAB L.Q.* 283 (1994).

²¹⁶Prevention of Corruption Act, ch. 241, § 7 (1960) (Sing.).

²¹⁷*Id.* §§ 10–12.

²¹⁸Hyongpop [Criminal Code], art. 133(1) (S. Kor.).

²¹⁹*See* Young-Cheol Jeong, *Legal Compliance and Korea's Financial Services Market: A Strategic Approach*, 20 *PAC. RIM L. & POL'Y J.* 483, 518 (2011) (describing the creation of sentencing guidelines that apply criminal sanctions on legal persons for the crime of bribery).

²²⁰CÓDIGO PENAL [C.P.] [Criminal Code] art. 423 (Sp.).

²²¹Like Germany and Italy, Spain imposes administrative rather than criminal liability. *See* David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 *BERKELEY J. INT'L L.* 334, 370 (2011).

The number of years a person may spend in prison for paying a bribe varies in different jurisdictions, as does the amount of money a firm may pay as a fine. In some jurisdictions an actor may perceive the risk of detection and prosecution as low. The risk, however, is never zero and a firm contemplating paying a bribe must always understand that criminal sanction is a potential consequence.

B. Laws Prohibiting Bribery of Foreign Officials

A person or firm that pays a bribe also exposes itself to prosecution under extraterritorial laws forbidding payments of bribes. Generally, these laws

²²²17 ch. 7 § LAG OM ÄNDRING I BROTTSBALKEN (Svensk författningssamling [SFS] 2004:404) (Swed.).

²²³Liability similar to criminal liability may be imposed on legal persons through a variety of avenues; these mechanisms are not specifically aimed at bribery. See Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 327, 332 (2001).

²²⁴CODE PÉNAL SUISSE [CP] [CRIMINAL CODE], RS 311.0, art. 322*ter* (Switz.).

²²⁵CP, art.102 (Switz.).

²²⁶Anticorruption Statute art. 11 (Taiwan), <http://mojlaw.moj.gov.tw/LawContentE.aspx?id=FL001430>.

²²⁷Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict., c. 69, § 2 (Eng.). The United Kingdom has strengthened its laws controlling transnational corruption, see *infra* notes 266–75 and accompanying text, and may amend its regulations controlling domestic bribery.

²²⁸The United Kingdom recently circumscribed the criminal liability of legal persons; it is not clear whether this will affect corporate liability for bribery. See Beale, *supra* note 162, at 1495 (discussing the circumscription of criminal liability of legal persons in the United Kingdom).

²²⁹18 U.S.C. § 201(b) (2006).

²³⁰The United States distinguishes between bribes paid to induce a public official to engage in fraud or misconduct and bribes paid to induce a public official to commit a legal act. The maximum term of imprisonment for the latter is two years, although the fine continues to be three times the benefit obtained. *Id.* § 201(c).

²³¹See Robert Zachary Beasley, Note, *A Legislative Solution: Solving the Contemporary Challenge of Forced Waiver of Privilege*, 86 TEX. L. REV. 385, 385 (2007) (discussing criminal liability for bribery).

prohibit bribery of foreign officials, but in operation they could apply to a local firm or person who bribes a local official.²³²

For many years the United States' Foreign Corrupt Practices Act was the best known of these types of laws, and the Foreign Corrupt Practices Act still shapes the behaviors of many transnational businesses.²³³ Dozens of practice guides provide detailed discussion of the operation of the Foreign Corrupt Practices Act;²³⁴ this article leaves discussion of the intricacies of the Act to those guides and instead focuses on the risk of negative consequences for the act of paying a bribe. The Foreign Corrupt Practices Act prohibits firms or persons from directly or indirectly paying or offering to pay anything of value to foreign officials in order to obtain or retain business.²³⁵ Violations can result in fines of up to two million U.S. dollars for each violation and, for individual actors, imprisonment for up to five years.²³⁶ Additional penalties administered by the government include forfeiture of

²³²The law reaches, for example, bribe-paying local agents of firms connected to the United States. Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 657–58 (2010).

²³³See Joan T.A. Gabel et al., *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 AM. BUS. L.J. 453, 460–61 (2009) (suggesting that the Foreign Corrupt Practices Act effectuated a fundamental change in corporate culture); Philip M. Nichols, *Who Allows Facilitating Payments?*, 14 AGORA WITHOUT FRONTIERS 303, 315 (2009) (finding the policies of many companies located outside of the United States to be shaped by the Foreign Corrupt Practices Act).

²³⁴For examples of the literally hundreds of guidance pieces for practitioners, see DONALD ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT* (1995); Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755 (1989); John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009 (1990); James L. McCulloch & Christina Maria Abascal Deboben, *The Foreign Corrupt Practices Act and Other Legal Considerations Relevant to the Oil and Gas Industry in Latin America*, 77 TUL. L. REV. 1075 (2003); Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, 17 CURRENTS INT'L TRADE L.J. 3 (2008). For examples of scholarly analysis of the Foreign Corrupt Practices Act, see Earle, *supra* note 17; Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitude Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 511–12 (2000); Kathleen A. Lacey et al., *Assessing the Deterrent Effect of the Sarbanes-Oxley Act's Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 VAND. J. TRANSNAT'L L. 397 (2005); Salbu, *supra* note 20; Shaw, *supra* note 20.

²³⁵See 15 U.S.C. §§ 78dd-1(a), -3(a) (2006); see also Gabel et al., *supra* note 233, at 459–60 (discussing prohibitions).

²³⁶15 U.S.C. §§ 78dd-2(g), -3(e); see also Kyle P. Sheahen, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT'L L.J. 464, 468 (2010) (discussing penalties and noting that the “stakes [are] high”).

government licenses, debarment from government contracts, and disgorgement of profits connected to the bribes.²³⁷ The United States Department of Justice and the SEC, administrators of the Act, do not easily succumb to ruses intended to shield a firm from liability; bribes paid through third parties or payments made with a purposeful lack of knowledge of purpose expose a firm to liability.²³⁸

Jurisdiction under the Act extends to U.S. firms, citizens, and residents; to firms with securities listed on a U.S. exchange or registered with the SEC, as well as firms required to file reports with the SEC; to employees and agents of firms subject to jurisdiction; and to persons involved in the payment of bribes, any part of which includes conduct that is connected to the territory of the United States—including, for example, an e-mail sent to a party in the United States or a payment that includes routing through a bank in the United States.²³⁹ Amy Westbrook even suggests that the United States may extend jurisdiction if the payment of a bribe affects markets in the United States.²⁴⁰ Any person or firm evaluating the potential consequences of paying a bribe must take into account the broad reach of the United States' jurisdiction, which includes persons and firms outside of the United States.²⁴¹ As

²³⁷See Baker, *supra* note 232, at 669; Taylor, *supra* note 234, at 7; David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 474–75, 484–87 (2009).

²³⁸See Marceau, *supra* note 143, at 296–97; Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L.J. 691, 720–21 (2007).

²³⁹The U.S. Department of Justice explicitly makes this sweeping claim of jurisdiction. See *Foreign Corrupt Practices Act: An Overview*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Oct. 13, 2011). Scholars have also commented on the broad jurisdiction afforded the Foreign Corrupt Practices Act. See H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 291–358 (2001); Westbrook, *supra* note 146, at 552–53.

²⁴⁰Westbrook, *supra* note 146, at 553–54.

²⁴¹See Brown, *supra* note 239, at 291–92 (discussing jurisdictional amendments to the Foreign Corrupt Practices Act); Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 14–16 (1999) (discussing SEC enforcement over foreign corporations and top executives); Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 418 & n.87 (2007)

Mike Koehler notes, “the undeniable fact [is] that FCPA risk is omnipresent.”²⁴²

A person evaluating the potential consequences of paying a bribe must also understand that many countries have enacted laws similar to the Foreign Corrupt Practices Act. More than fifty countries criminalize bribery of foreign officials. These countries are listed in Table 2.²⁴³

More countries will join this list. Several international organizations require members to criminalize transnational bribery. The African Union, for example, has promulgated the African Convention on Preventing and Combating Corruption,²⁴⁴ which requires members to prohibit bribery of

Table 2: Countries that Criminalize Bribery of Foreign Officials

Argentina	France	Panama
Australia	Germany	Peru
Austria	Greece	Poland
Belgium	Guatemala	Portugal
Brazil	Hungary	Romania
Bulgaria	Iceland	Russia
Canada	Ireland	Slovak Republic
Chile	Israel	Slovenia
China	Italy	South Africa
Colombia	Jamaica	South Korea
Costa Rica	Japan	Spain
Czech Republic	Luxemburg	Sweden
Denmark	Mexico	Switzerland
Dominican Republic	Netherlands	Turkey
El Salvador	New Zealand	United Kingdom
Estonia	Nicaragua	United States
Finland	Norway	Uruguay

(discussing a Foreign Corrupt Practices Act enforcement action against an international oil company).

²⁴²Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 396 (2010).

²⁴³This table uses information from the Organization of American States, the OECD, Transparency International, and sources cited *infra* notes 246–47.

²⁴⁴African Union Convention on Preventing and Combating Corruption, *opened for signature* July 11, 2003, 43 I.L.M. 5.

foreign officials;²⁴⁵ forty-five members have signed the convention and thirty-one have ratified it.²⁴⁶ The Organization of American States also requires members to criminalize transnational bribery.²⁴⁷

The laws enacted by these countries share with the Foreign Corrupt Practices Act the characteristic of criminalizing transnational bribery. The Russian law, signed into effect in the spring of 2011, criminalizes bribery of foreign officials in connection with international business; the law applies to both legal and natural persons and imposes large fines for violations.²⁴⁸ Also enacted as of the spring of 2011, the anti-bribery legislation of the People's Republic of China includes a provision imposing criminal liability for bribes paid or offered to foreign officials in order to seek an unjust commercial benefit.²⁴⁹ The law applies to natural and legal persons, including joint ventures. Penalties for violations of this law include imprisonment for up to ten years as well as fines.²⁵⁰ China has not yet had time to demonstrate the vigor with which it will enforce this law; the central government of China, however, has in general demonstrated a commitment to prosecuting corruption cases.²⁵¹

Many of the laws criminalizing bribery of foreign officials have broader jurisdictional application than even that of the Foreign Corrupt

²⁴⁵See James Forole Jarso, *The Media and the Anti-Corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects*, 26 AM. U. INT'L L. REV. 33, 42 (2011) (discussing provisions of the African Union Convention).

²⁴⁶See *List of Countries Which Have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption*, AFRICAN UNION (June 8, 2010), <http://www.africa-union.org/root/au/documents/treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf>.

²⁴⁷See Amanda Boote & Anne H. Dechter, *Slipped Up: Model Rule 2.1 and Counseling Clients on the "Grease Payments" Exception to the Foreign Corrupt Practices Act*, 23 GEO. J. LEGAL ETHICS 471, 485 (2010) (discussing the Organization of American States and other conventions requiring the criminalization of transnational bribery).

²⁴⁸Andrew E. Kramer, *Russia Is Invited to Join O.E.C.D. Anti-Bribery Pact*, N.Y. TIMES, May 26, 2011, at B4.

²⁴⁹Zhongguo Renmin Gongheguo Xingfa [Criminal Law] (promulgated by the Standing Committee of the National People's Congress, Feb. 25, 2011, effective May 1, 2011), art. 164 (China).

²⁵⁰*Id.*

²⁵¹See *China Demonstrates Intent to Clean up Corruption Through Law Change*, TRUSTLAW (Mar. 23, 2011, 12:18PM), <http://www.trust.org/trustlaw/news/china-demonstrates-intent-to-clean-up-corruption-through-law-change/> (discussing the new foreign bribery law and the Chinese commitment to prosecuting corruption cases).

Practices Act. Hungary, for example, not only extends jurisdiction to bribes paid within Hungary's territory or by Hungarian citizens and companies abroad,²⁵² but it also may prosecute nonnationals for the payment (or receipt) of bribes if the conduct is a crime in the place where it occurred.²⁵³ In other words, Hungary's courts may extend jurisdiction over a person who pays a bribe to a foreign official almost any place in the world, regardless of any substantial connection to Hungary.²⁵⁴ Iceland extends jurisdiction to acts that have a substantial connection to the territory of Iceland, but will also prosecute a person apprehended on the territory of Iceland even if the bribe had no connection to Iceland.²⁵⁵ At the discretion of the King, the antibribery law of Norway can be extended to non-Norwegian nationals for acts committed entirely outside of Norway.²⁵⁶

The breadth of behaviors prohibited by many of these laws also exceeds that of the Foreign Corrupt Practices Act. The Act, for example, famously exempts "facilitating payments" (bribes paid to secure nondiscretionary government actions).²⁵⁷ The same is not true of myriad other laws that criminalize bribes paid to foreign officials.²⁵⁸ Mexico, for example, does not provide an exception for facilitating payments,²⁵⁹ nor does Luxembourg²⁶⁰ or Japan.²⁶¹ The Foreign Corrupt Practices Act applies only to bribes paid to obtain or retain business; many countries

²⁵²See Büntető Törvénykönyv [BTK] [Criminal Code] tit. VIII, § 258B, para. 3(1) (Hung.).

²⁵³*Id.* § 258B, para. 4(1)(a).

²⁵⁴See Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery*, 32 VAND. J. TRANSNAT'L L. 1249, 1314 n.448 (1999) (stating that Hungary's jurisdictional reach is "of particular interest").

²⁵⁵See ICELANDIC GENERAL PENAL CODE, Law. No. 147/1998, §§ 5–6 (Ice.).

²⁵⁶See PENAL CODE §§ 12.4, 13 (Nor.). This provision applies to all criminal acts; the provisions criminalizing bribery of foreign officials can be found at § 276a.

²⁵⁷See Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments*, 25 PENN ST. INT'L L. REV. 251, 263–69 (2006) (discussing the exemption).

²⁵⁸See Nichols, *supra* note 233, at 310.

²⁵⁹See Código Penal Federal [CFP] [Federal Criminal Code], as amended Diario Oficial de la Federación [DO], Oct. 24, 2011, art. 222 *bis* (Mex.).

²⁶⁰See CRIMINAL CODE arts. 247–51 (Lux.).

²⁶¹See KEIHŌ [KEIHŌ] [PEN. C.] art. 10 *bis* (2) (Japan).

criminalize any bribe paid to a foreign official. The Czech Republic,²⁶² Denmark,²⁶³ Germany,²⁶⁴ and Poland,²⁶⁵ to name but a few, extend jurisdiction to all forms of bribery committed abroad and do not limit application of their laws to bribes paid in furtherance of business.

The laws of the United Kingdom merit special mention. The United Kingdom suffered a great deal of embarrassment for its failure to pursue bribes paid abroad by the British defense company BAE.²⁶⁶ In response, the United Kingdom enacted the ambitious Bribery Act of 2010, which entered into force in the summer of 2011.²⁶⁷ The Bribery Act, as is true of many countries' laws, "reaches more conduct" than the Foreign Corrupt Practices Act.²⁶⁸ The Bribery Act, for example, not only prohibits the payment of bribes to foreign officials, but it also imposes *strict liability* for failure to prevent bribes.²⁶⁹ It extends jurisdiction not only to British nationals and businesses, but also to acts of bribery that have a "close connection" to the United Kingdom, which might include market effect.²⁷⁰ Joseph Warin, Charles Falconer, and Michael S. Diamant note that the jurisdictional reach combined with the strict liability provisions "could have a profound impact on multinational corporations."²⁷¹

²⁶²See TRESTNÍ ZÁKON [Criminal Code] no. 140/1961 Sb., § 161 (Czech).

²⁶³See CRIM. CODE § 122 (Den.).

²⁶⁴See STRAFGESETZBUCH [StGB] [PENAL CODE], NOV. 13, 1998, BUNDESGESETZBLATT, TEIL I [BGBl. I] 945, as amended, § 334 (Ger.). Germany applies the same criminal provision to both domestic and transnational bribery. See Gesetz zur Bekämpfung Internationaler Bestechung [IntBestG] [Act on Combating Bribery of Foreign Public Officials in International Business Transactions], Sept. 10, 1998, BGBl. 1998 S. 2327, art. 2, § 1 (Ger.), translation available at <http://www.oecd.org/dataoecd/62/3/2377209.pdf>.

²⁶⁵See PENAL CODE art. 229.5 (Pol.).

²⁶⁶See Jacqueline L. Bonneau, Note, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 374–75 (2011) (describing failed investigation and international condemnation).

²⁶⁷Bribery Act, 2010, c. 23 (U.K.).

²⁶⁸Bonneau, *supra* note 266, at 389.

²⁶⁹See Bribery Act § 7.

²⁷⁰*Id.* § 12.

²⁷¹F. Joseph Warin et al., *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 16 (2010).

Most importantly, however, the United Kingdom has committed itself to pursuing bribe payers and prosecuting them with this law.²⁷² The United States has demonstrated a similar commitment. Law enforcement officials in the United States have described prosecution of transnational bribery laws as “a national-security imperative” second only to antiterrorism laws as an enforcement priority.²⁷³ Prosecutions under the Foreign Corrupt Practices Act have increased exponentially, and many predict an even greater increase in prosecution of nonnationals.²⁷⁴ The United Kingdom and United States are not alone. “By any calculation, international anti-bribery enforcement is increasing worldwide, as more countries move slowly from enacting anti-bribery laws to initiating actions to identify and prosecute the individuals and companies who break them.”²⁷⁵

The global trend toward vigorous enforcement of antibribery laws brings with it the possibility of overlapping jurisdiction.²⁷⁶ A hypothetical U.S. national working for a manufacturing branch located in China of a Singaporean and German joint venture with a significant market presence in Britain who paid a bribe to an Indonesian government official while at a meeting in South Korea would be subject to liability under each of the criminal laws of Germany, Indonesia, the People’s Republic of China, Singapore, South Korea, the United Kingdom, and the United States. If she tried to flee on Icelandic Airlines she would be subject to arrest and prosecution during the layover in Reykjavik. Wherever she went in the world, she would be subject to prosecution by Hungary. This hypothetical is designed to illustrate the potential for extensive overlap, but it is far from fanciful. Stephen Kobrin, among others, writes of the post-Westphalian business reality, in which businesses form multiple chains of

²⁷²Bonneau, *supra* note 266, at 392; Koehler, *supra* note 241, at 415–16.

²⁷³Grimm, *supra* note 141, at 249.

²⁷⁴E.g., Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1149–52 (2008); Koehler, *supra* note 241, at 416–17.

²⁷⁵TRACE INT’L, GLOBAL ENFORCEMENT REPORT 2010, 2 (2010), available at <https://secure.traceinternational.org/data/public/documents/GlobalEnforcementReport9.2010-64572-1.pdf>.

²⁷⁶Neal Katyal suggests that this type of overlapping jurisdiction makes it more difficult for a wealthy corrupt actor to subvert justice through bribery. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1379 n.266 (2003).

relationships with little regard for political borders.²⁷⁷ A firm that pays a bribe is subject to punishment by each of the states that can claim jurisdiction over that act, and those claims may be plentiful. When considering the consequences of paying a bribe, a firm must include the possibility of multiple criminal prosecutions.

CONCLUSION

The rules regarding bribery are clear at both the macro and the micro levels: individuals and firms may not pay bribes. Scholars have also examined the consequences of bribery at the macro level, and that research has been marshaled together in a comprehensive manner: the consequences can be devastating. However, although empirical and theoretical research has been conducted at the micro level, that research has not been marshaled together in the same way. The lack of a comprehensive overview of the firm- and individual-level consequences of paying bribes perhaps contributes to the continued payment of bribes by firms even though the rules clearly prohibit those bribes. The failure of scholarship to discuss the consequences at the micro level could also be interpreted as the failure to state a business case for not paying bribes.

This article provides a comprehensive overview of the likely or potential outcomes that flow from paying bribes. The payment of bribes initiates a dynamic relationship between the bribe payer and a bureaucracy. That relationship, as well as the bribe itself, engenders consequences. In general, the payment of bribes increases the costs borne by a firm and increases the amount of time that firm will spend interacting with bureaucracies. The firm is likely to experience lower rates of growth and lower productivity than firms that do not pay bribes. The firm that pays bribes will be debarred from participating in a number of lucrative projects and will not be able to enter into beneficial relationships with transnational actors. Individuals in the firm, as well as the firm itself, expose themselves

²⁷⁷See Stephen J. Kobrin, *Globalization, Transnational Corporations and the Future of Global Governance*, in *HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP* 249, 253–64 (Andreas Georg Scherer & Guido Palazzo eds., 2008) (describing a transition to a transnational rather than international economy and the dissonance caused by the lack of transnational governance mechanisms); see also William Twining, *Essay, A Post-Westphalian Conception of Law*, 37 *LAW & SOC'Y REV.* 199, 199 (2003) (describing the complex interplay of legal systems not captured by a Westphalian orientation).

to criminal prosecution, fines, and imprisonment. The expansive international legal regime increases the likelihood that the bribe-payer has violated multiple laws and bears potential liability in multiple jurisdictions.

From a scholarly perspective, the research on consequences at the micro level complements the research on consequences at the macro level. Bribery imposes costs on the firm or the individual and degrades relationships in which that firm or individual is involved. From the perspective of an actual business or businessperson, the research as a whole presents a strong business case for complying with rules that prohibit the payment of bribes and for developing programs and policies that ensure compliance with laws prohibiting the payment of bribes. Firms that develop and implement such programs and thereby avoid paying bribes should also avoid the costs imposed by the payment of bribes and enjoy an advantage over firms that continue to pay bribes.