

THE IRONY OF INTERNATIONAL BUSINESS LAW: U.S. PROGRESSIVISM, CHINA'S NEW LAISSEZ FAIRE, AND THEIR IMPACT IN THE DEVELOPING WORLD

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ABSTRACT

As the financial crisis draws U.S. business overseas and developing countries rise in influence, the regulation of international business has never figured so prominently in federal law. But the dominant paradigm through which academics and policymakers continue to view that law – the so-called “Washington Consensus” – proves deeply misleading. A more accurate account of the components, origins, and aims of U.S. international business law reveals two striking ironies.

First, in discrete but critical ways, the U.S. no longer represents the comparatively laissez-faire approach to federal business regulation. Rather, owing to its origins in the Progressive Era, U.S. federal law directs corporations toward non-economic social goals, particularly combating corruption (e.g. the Foreign Corrupt Practices Act) and promoting human rights (e.g. the Alien Tort Statute or economic sanctions). By contrast, the alternative legal regime to which the U.S. is frequently compared – China – largely allows companies to pursue profits internationally without regard to their impact on corruption and human rights. Though it remains true that the U.S. regime and its principal alternative are distinguished by the extent to which the state restricts business conduct to achieve social goals, the roles are now reversed.

Second, the rise of an alternative model now substantially thwarts the goals of U.S. progressive regulation. Empirical research in political science and economics demonstrates that because the U.S. regime increases the costs of doing business in emerging markets, U.S. companies tend to invest less. The resulting void in capital is filled by companies from countries – particularly China – that lack prohibitions on bribery and human rights violations. Ironically, enforcement of U.S. progressivism thus creates the very conditions in which corruption and human rights violations occur.

¹ Visiting Assistant Professor, the Chicago-Kent College of Law. This paper was made possible by a grant from the U.S.-India Educational Foundation that supported a year of lecturing and research across developing countries in Asia. I would like to thank the following law faculties for opportunities to present various iterations of this paper: George Washington University, Ohio State University, Brigham Young University, Chicago-Kent, the University of Cincinnati, the University of Nevada Las Vegas, and the University of Dayton. I would especially like to thank the following individuals for their helpful comments, with apologies to any whom I may have unwittingly omitted: Kim Bailey, Kathy Baker, Shima Baradaran-Robison, Bret Birdsong, Chris Buccafusco, David Gerber, Sarah Harding, Steve Johnson, Rob Knowles, Marty Malin, Tom Miles, Hank Perritt, Dean Jim Rasband, Chris Schmidt, Chris Seaman, Gordon Smith, Jeff Stempel, and Dean John Valery White. Special thanks to my excellent research assistant, Simon Joassin.

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I. INTRODUCTION

“This case is decided upon an economic theory which a large part of the country does not entertain.” -- Justice Oliver Wendell Holmes, dissenting in *Lochner v. New York*.²

“It doesn’t matter if a cat is black or white, so long as it catches mice.” -- Deng Xiaoping, former leader of the People’s Republic of China, on market reforms.³

As Justice Holmes crafted his famous *Lochner* dissent⁴, the U.S. was in the midst of an intellectual and political movement that would confirm his observation and refashion federal law. Academics and policymakers of the Progressive Era⁵ repudiated the laissez-faire doctrine of commercial regulation and expanded federal power to combat corruption, promote democracy and human rights, and mitigate economic inequalities.⁶ International business law was at first largely untouched by this movement, principally because U.S. business was then overwhelmingly domestic. But the U.S. and the world would soon be transformed by the rise in transnational business conduct, a process that continues to accelerate as the financial crisis draws U.S. companies even further into emerging markets.⁷ As U.S. business has expanded extraterritorially and engaged substantially with the developing world, U.S. business law has ineluctably followed, seeking to conform conduct in those countries to (some of) the same domestic standards.⁸ However, our understanding of the paradigm of U.S.

² *Lochner v. New York*, 198 U.S. 45, 75 (1905).

³ Johanna McGarry, *Deng Xiaoping Set Off Seismic Changes in China*, TIME Magazine, March 3, 1997, at 6, available at <http://www.time.com/time/magazine/article/0,9171,985990-6,00.html>.

⁴ For recent commentary on the enduring impact of Justice Holmes’ dissent on federal regulation, see, e.g., Victoria F. Nourse, *A Tale of Two Lochners: the Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751 (2009); Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463 (2009).

⁵ For the influence of the Progressive Era on contemporary law and academic commentary, see, e.g., Gregory S. Alexander, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Erwin Chemerinsky, *A Progressive Visionary: Stephen Reinhardt and the First Amendment*, 120 YALE L.J. 515 (2010); Edward J. McCaffrey, *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031 (2010).

⁶ See *infra* Part II.B.

⁷ See Neil Hodge, *Is the Sun Beginning to Shine on Emerging Markets?*, 63 NO. 1 INT’L B. NEWS 19, 22 (2009).

⁸ See, e.g., KURT MOORE, THE ORIGINS OF GLOBALIZATION (2009).

international business law – its components, origins, and aims – remains a blur of confusion and misperception among academics and enforcement officials alike.

We are therefore unable to grasp, and much less remedy, the adverse and ironic effects of U.S. business law enforcement in the developing world. While U.S. legal scholars have debated individual components of the U.S. international business law regime such as the Alien Tort Statute⁹ or the Foreign Corrupt Practices Act,¹⁰ we have not meaningfully engaged the questions of how these components combine to form a paradigm or how that paradigm operates in developing countries. Meanwhile, another legal literature rigorously compares the “legal origins” of various nations’ domestic legal regimes to understand whether they promote economic growth.¹¹ But while this literature is comparative, it is not international, and does not consider how the international business law regimes of powerful nations impact the legal and economic growth of developing nations. The legal academy has thus by default left that question to scholars from other disciplines;¹² we should not be surprised by the resulting omissions.

This paper seeks, for the first time in the legal academic literature, to identify and define the actual U.S. paradigm of international business law, and to then more accurately compare it to the alternative that China now

⁹ 28 U.S.C. § 1350 (2011). See, e.g., Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007); Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. (forthcoming 2011); Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 274 (2004); Julian Ku and John Yoo, *Beyond Formalism in Foreign Affairs: a Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004).

¹⁰ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd(1)-(3), 78ff (2006)), amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2006)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2006)).

¹¹ See, e.g., Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997). Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006).

¹² Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907 (2010); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489 (2011).

represents. I argue that while it certainly remains true, as the literature posits, that the U.S. and Chinese regimes of international business law are distinguishable by the extent to which the state limits economic freedom to advance social goals, the roles are in fact reversed. The U.S. regime, with roots traceable to the Progressive Era, uses the coercive power of the federal state to compel corporations toward social ends that are not narrowly related to market efficiency and economic growth. By contrast, following the death of Mao Zedong and the rise of Deng Xiaoping, China instituted a series of market reforms to promote growth and forestall social discontent,¹³ without imposing comparable obligations on corporations to promote progressive values in their extraterritorial conduct.¹⁴ Accordingly, in a dramatic and yet-unrecognized irony of international business law, the U.S. in discrete but important respects now represents the heavier hand of government regulation, while “communist” China has become comparatively laissez-faire. Indeed, the contrasting regimes, and their contest for influence in the developing world, regrettably resembles a peculiar sort of post-modern, turned-on-its-head cold war:¹⁵ China, communist in name but no longer in fact, increasingly represents value-free profit-seeking to the developing world, while the U.S., once the self-styled beacon of free market economics, in fact knowingly curtails corporate profit-seeking to promote greater public goods and increasingly asks other countries to do the same.

The contrast between the U.S. and China, properly understood, proves even more deeply ironic for its impact in developing countries. Drawing on empirical research in economics and political science, this Article shows that because U.S. progressivism significantly increases the costs of investing in developing countries, it tends to cause a decrease in such investment.¹⁶ This effect is at times by design (e.g., economic sanctions for human rights abuses), and yet at others by accident (e.g., the Foreign Corrupt Practices Act). In striking contrast, Chinese companies do not incur these added costs because their legal regime does not impose penalties on the methods of doing business that U.S. progressivism proscribes.¹⁷ As U.S. enforcement increases and companies invest less than they otherwise would and less than developing

¹³ See *infra* Part IV.A.

¹⁴ See *infra* Part IV.B.

¹⁵ While some literature analogizes contemporary U.S.-China relations to the Cold War, it generally presumes the conventional democracy/communism distinction. See, e.g., Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHIN. J. INT'L L. 321 (2010); Rein Mullerson, *Promoting Democracy without Starting a New Cold War?*, 7 CHIN. J. L. INT'L L. 1 (2008).

¹⁶ See *infra* Part V.B.

¹⁷ *Id.*

countries need, a void is created that Chinese companies fill. Those companies are able to conduct business without fear of violating laws concerning corruption and human rights. The U.S. enforcement of norms against corruption and human rights violations thus creates the very conditions in which those practices thrive. And the cost is born by the developing countries whose prospects for legal, social, and economic growth are otherwise highly promising.

Part II of this Article explains the dominant paradigm through which academics understand the U.S. model of regulating business conduct - the "Washington Consensus." This paradigm holds that federal law governing commercial activity is defined chiefly, if not exclusively, by the neo-liberal commitment to market deregulation.¹⁸ It includes such policy prescriptions as privatization through reducing government ownership and regulation, removing constraints on trade, allowing interest rates to respond more directly to market conditions, reducing government subsidies, and removing obstacles to foreign direct investment. The theme among these prescriptions, of course, is reducing the role of law and government in commerce; they suggest that the U.S. stands for less government regulation of business vis-à-vis other legal systems, and not more. Although the Washington Consensus paradigm is indeed accurate in describing principles of industrial and financial regulation, it does not incorporate the body of federal law that specifically applies to extraterritorial business conduct. Academics, even in the legal academy, nonetheless continue to view U.S. commercial regulation through the Washington Consensus lens, as through a glass, darkly.

Part III seeks to more accurately define the U.S. paradigm of extraterritorial business law. It will illustrate how the principles of the Progressive Era explain the areas of federal law with which U.S. companies principally contend: the U.S. Foreign Corrupt Practices Act¹⁹ seeks to reduce corporate corruption in international business; democracy and human rights are variously promoted through economic sanctions,²⁰ the Alien Tort Statute,²¹ and the extraterritorial application of employment discrimination

¹⁸ See, e.g., Ross P. Buckley, *The Economic Policies of China and India, and of the Washington Consensus: An Enlightening Comparison*, 27 WIS INT'L L.J. 707 (2010) (comparing the eastern policies of China and India with Washington Consensus policies); Brian Langille, *Imagining Post "Geneva Consensus" Labor Law for Post "Washington Consensus" Development*, 31 COMP. LAB. L. & POL'Y J. 523 (2010); John Williamson, *A Short History of the Washington Consensus*, 15 L. & BUS. REV. AM. 7 (2010) (giving a brief history of the term and its understanding today).

¹⁹ See *infra* Part III.A.

²⁰ See *infra* Part III.B.2.

²¹ See *infra* Part III.B.1.

laws, including but not limited to Title VII;²² and provisions of the U.S. Tax Code that apply to extraterritorial corporate profits obligate corporations to fund the federal government and its myriad programs.²³ These principles, and not the doctrine of laissez-faire capitalism, most accurately describe the legal regime that governs the overseas conduct of U.S. business.

Part IV explains how the misunderstanding concerning the impact of U.S. international business law in developing countries is only compounded by efforts to define the principal alternative to the U.S. model. That model is now represented by China, a country that is well-capitalized, aggressive in its foreign policy and international business conduct, and governed by a very different legal regime. That regime, sometimes called the “Beijing Consensus,”²⁴ but more often described as “state capitalism,”²⁵ or the “socialist market economy”²⁶ – is generally viewed in implicit or explicit contrast to the U.S. model. This scholarship suggests that owing both to its communist past and its present fear of social unrest, China imposes significantly greater restrictions on individual freedoms in the political and economic spheres alike.²⁷ The literature further details the appeal of China’s alternative legal model to developing countries across Asia, Latin America, and Africa, particularly those that lack political accountability.²⁸ This contrast between the neo-liberal Washington Consensus and socialist/authoritarian Beijing Consensus – which is becoming increasingly popular in academic and popular commentary alike²⁹ – is at best incomplete, and at worst misleading. In fact, although the Chinese government owns, controls, and/or subsidizes most of its major multinational corporations, the governing legal regime does

²² See *infra* Part III.B.3.

²³ See *infra* Part III.C.

²⁴ See, e.g., STEFAN HALPER, *THE BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE 21ST CENTURY* (2010).

²⁵ *Id.* at 10; see also IAN BREMMER, *THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS?* 134 (2010).

²⁶ Yuqing Xing, *Consumption, Income Distribution, and State Ownership in the People’s Republic of China*, *National Graduate Institute for Policy Studies* 11 (GRIPS Disc. Paper 10-18, Oct. 2010), available at <http://r-center.grips.ac.jp/gallery/docs/10-18.pdf>.

²⁷ See, e.g., HALPER, *supra* note 24; MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* (2009).

²⁸ See, e.g., HALPER, *supra* note 24, at 39; Raymond W. Copson, *US Response to China’s Rise in Africa: Policy and Policy Options*, in MARCEL KITISSOU, ED., *AFRICA IN CHINA’S GLOBAL STRATEGY* (2007); JACQUES, *supra* note 27, at 321.

²⁹ See, e.g., Thomas L. Friedman, *Power to the Blogging People*, *NY Times*, Sep. 14, 2010, available at http://www.nytimes.com/2010/09/15/opinion/15friedman.html?_r=1&scp=6&sq=%22beijing%20consensus%22&st=cse.

not have meaningful analogues to the FCPA, ATS, economic sanctions for human rights abuses, or Title VII.³⁰ More generally, it does not expect Chinese corporations to advance social goals in their overseas conduct other than the preservation of the Communist Party's hold on power. Ultimately, in comparison to the progressive norms that define the U.S. regime of international business law, China is more accurately understood as substantially laissez-faire.

Part V draws on theoretical and empirical research in economics and political science to understand the impact of these competing legal regimes in developing countries. It first illustrates that progressive capitalism is enforced almost exclusively against developing nations. It then draws on two theories – “constructive engagement” and the “black knight” – to show how the rise of China produces a perverse effect in international business whereby the enforcement of U.S. laws too often creates the very conditions in which corruption and human rights abuses proliferate. In conclusion, this Article lays the groundwork for future empirical and theoretical research on how the U.S. might promote progressive values more effectively in developing countries.

II. INTERNATIONAL BUSINESS LAW: RECONSIDERING THE DOMINANT PARADIGM

This section first describes the extant paradigm through which the U.S. legal regime of international business is widely understood – the “Washington Consensus” – and highlights its limitations. It then explores the tension – which I will call a jurisdictional oxymoron – inherent in the notion of a U.S. regime of international business law, and proposes parameters for choosing those federal statutes that rightly belong in an analysis of that regime. After selecting the laws for inclusion, the third section shows that these laws have a common origin in the Progressive Era of U.S. history and the intellectual movement that it spawned.

A. The Misleading “Washington Consensus”

The prevailing view of U.S. international business law emerged in the 1980s. After several decades in which the Keynes model of comparatively heavy economic regulation dominated post-WW II economic thinking, the world recession of the 1970s gave rise to a new model of economics generally

³⁰ See *infra* Part IV.B.

and to the theory of Western development economics known as the Washington Consensus.³¹

The new paradigm, promoted most famously by Milton Friedman, held that economic growth would increase only when markets were able to operate freely and efficiently, thus requiring deregulation, liberalization, and privatization.³² More specifically, this meant deregulating markets, removing controls on investment, allowing interest and exchange rates to float in response to world markets, reducing public spending and government ownership of industry, and reducing subsidies.³³ With the elections of Margaret Thatcher and Ronald Reagan, this became the guiding philosophy of the leading Western liberal nations. This paradigm also came to dominate the agendas of the two leading global financial institutions, both of which were headquartered in DC: the World Bank and the IMF. The term “Washington Consensus” emerged in 1989 and included a number of points: imposing fiscal discipline; reforming taxation; liberalizing interest rates; securing property rights; privatizing state-run subsidies; deregulating markets; adopting a competitive exchange rate; removing barriers to trade; and removing barriers to foreign direct investment.³⁴ These reforms, as imposed by western lending agencies, were collectively termed “structural adjustment programs” (“SAPs”), and were imposed universally regardless of the recipient country’s unique economic and legal conditions.³⁵ Between 1980 and 1995, SAPs were applied to approximately 80 percent of the world’s population.³⁶

³¹ HALPER, *supra* note 24, at 51; *see also* Ross P. Buckley, *The Economic Policies of China and India, and of the Washington Consensus: An Enlightening Comparison*, 27 WIS INT’L L.J. 707 (2010) (comparing the eastern policies of China and India with Washington Consensus policies as applied in the Americas and Africa); John Williamson, *A Short History of the Washington Consensus*, 15 L. & BUS. REV. AM. 7 (2010) (giving a brief history of the term and its understanding today).

³² HALPER, *supra* note 24, at 54. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (Fortieth Anniversary Ed., 2002) (1962); Milton Friedman, *The Hong Kong Experiment*, HOOVER DIGEST NO. 3 (1998) (Hong Kong has made great strides in the past fifty years because of its laissez-faire market).

³³ HALPER, *supra* note 24, at 57.

³⁴ *See* NIALL FERGUSSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 308-09 (2008).

³⁵ HALPER, *supra* note 24, at 57. *See generally* Kwaku Owusu Afriyie, *Do the Poor Develop the Rich? Taking a Second Look at Structural Adjustment Programmes* (Dec. 2, 2008), *available at* <http://ssrn.com/abstract=1284993> (discussing how SAPs were introduced, what countries must go through to receive funding and how SAPs, in general, have failed); Benzarour Choukri, *Macroeconomic Policies for Structural Adjustment Programs* (May 3, 2009), *available at* <http://ssrn.com/abstract=1398729> (analysis and explanation of the main provisions of structural adjustment programs); William Easterly, *What Did Structural Adjustment Adjust?: the Association of Policies*

Discussions about international economics, and about the role of the U.S. vis-à-vis developing countries, thus came to be predicated on a widely-held assumption that the U.S. was fundamentally promoting laissez-faire economics. Consider, however, the kinds of issues encompassed in this paradigm. They generally pertain to financial regulation and trade regulation, both of which are narrowly economic in their focus. The U.S. generally stood for reducing government regulation in both. Generally absent from this paradigm, however, is much discussion of the legal obligations that the U.S. government imposed directly on U.S. businesses in their overseas conduct. The Washington Consensus encompassed the regulation of finance and trade, but not of business more generally. And business law continued to be characterized to a very large extent by the federal laws that had emerged prior to the 1980s deregulation movement and that imposed substantial responsibilities on U.S. businesses to promote social and political goals at the expense of profit.³⁷ Although the recession of the 1970s and the deregulation movement of the 1980s would displace much of Keynesian economics, it would not displace the legacy of the Progressive Movement in international business.

B. International Business Law: a Jurisdictional Oxymoron

Despite its ever-increasing prominence in modern business practice, there is something faintly awkward in the U.S. context about the field of international business law. It proves a difficult concept to define. A casual perusal of a typical law school textbook in the field of International Business Transactions reveals somewhat of a hodge-podge – a bit of contract law, some import/export controls, a little bit on the extraterritorial application of anti-trust laws, and so forth.³⁸ I surely was not the first bright-eyed young business

and Growth with Repeated IMF and World Bank Adjustment Loans, J. OF ECON. DEV. 76 (2005) (examines top twenty recipients of repeated SAP lending and their growth); Sebastian Edwards, *Structural Adjustment Policies in Highly Indebted Countries* (NBER Working Paper No. W2502, Aug. 1989), available at <http://ssrn.com/abstract=425541> (analysis of highly indebted countries between 1982-1987 and the type of adjustment received); Jason Morgan-Foster, Note, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: the Argentine Case*, 24 MICH. J. INT'L L. 577, 578-83 (2003) (a short overview of SAPs and concluding that they do not improve growth). For a general look at conditions imposed under SAPs, see International Monetary Fund, *IMF Conditionality* (Sept. 27, 2010), <http://www.imf.org/external/np/exr/facts/conditio.htm>.

³⁶ HALPER, *supra* note 24, at 60.

³⁷ See *infra* Part III.

³⁸ See, e.g., RALPH H. FOLSOM, MICHAEL W. GORDON, JOHN A. SPANOGLE, JR., *INTERNATIONAL BUSINESS TRANSACTIONS, TRADE & ECONOMIC RELATIONS* (2005); DANIEL C.K. CHOW AND THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* (2010).

law student to open his IBT textbook for the first time and feel discombobulated. This awkwardness is due, in very large part, to the peculiar jurisdictional scheme of U.S. federalism. In ratifying the U.S. Constitution, the states sought to preserve their authority over domestic business, while creating a federal government with a more limited authority to regulate international conduct.³⁹ Business law has, with a few historic exceptions such as the Exchange Act of 1934⁴⁰ or Sarbanes-Oxley,⁴¹ generally remained with the states, while international matters are generally federal.⁴² International business law, then, awkwardly falls somewhere in between. It is not quite fully federal, yet not quite the province of the states. Where, then, does it come from, and what exactly is it?

This paper does not propose a comprehensive redefinition of the field of international business law. However, it does propose that we momentarily set aside the inherited definitions of international business law and start, from scratch, with a few criteria for selecting the areas of law to include in this study. First, laws in this study should be federal, and not state law. Only federal law reflects a national policy determination that a set of legal obligations are rightfully imposed on businesses in their international conduct. Second, I will focus on laws that we enforce unconditionally in international business, irrespective of their effects on the U.S. markets. These are laws that we enforce because we believe that business should conduct itself internationally in conformance to these principles, irrespective

³⁹ Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 555-56 (1994) (detailed examination of the evolution of U.S. business law starting after the Revolutionary War); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1124 (1986) (Framers of the constitution wanted to keep regulation of commerce with foreign nations in Congress to further national merchantist policy thus avoiding inconsistent state regulation).

⁴⁰ Securities and Exchange Act of 1934, 15 U.S.C. § 78(a) et seq. (2010); *see generally* Peter V. Letsou, *The Changing Face of Corporate Governance in the United States: The Evolving Roles of the Federal and State Governments*, 46 WILLAMETTE L. REV. 149, 171 (2009) (the Securities and Exchange Act of 1934 as one of the few federal laws governing business).

⁴¹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Letsou, *supra* note 60, at 185-86 (Sarbanes-Oxley, along with the Exchange Act of 1934, is one of the few federal laws governing business conduct).

⁴² *See, e.g.*, ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION 2 (2002) (“...it would be most descriptively accurate to say that federal securities law has occupied the securities field and that state law development has been marginal.”); Robert H. Jerry II. & Steven E. Roberts, *Regulating the Business of Insurance: Federalism in an Age of Difficult Risk*, 41 WAKE FOREST L. REV. 835, 837-40, 878 (2006) (insurance is regulated by the individual states, but advocates increased federal presence to deal with new insurance issues (e.g., loss via terrorism)).

of their impact on the U.S. economy; such are the truest examples of U.S. international business law. This excludes those areas of federal business law are governed by the effects test in their extraterritorial application, such as securities⁴³ and anti-trust.⁴⁴ Third, this paper will not look at treaties, such as the WTO⁴⁵ or NAFTA;⁴⁶ though unmistakably business-oriented and

⁴³ However, the Supreme Court has held that the anti-fraud provision of the Securities and Exchange Act of 1934 § 10(b) will no longer use a “conduct and effects” test. *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869, 2879-2880 (2010). Rather, the court had adopted a “transactional test” to determine whether jurisdiction is proper. *Id.* See also *Lapiner v. Camtek, Ltd.*, No. C 08-01327 MMC, 2011 WL 445849, at *2-3 (N.D. Cal Feb. 2, 2011) (applying *Morrison* and finding jurisdiction where plaintiff purchased stock on NASDAQ even though stock purchase was made in Israel) In *Re Royal Bank of Scotland Group PLC Securities Litigation*, No. 09 Civ. 300(DAB), 2011 WL 167749, at *6-8 (S.D.N.Y. Jan. 11, 2011) (applying *Morrison* and declining to exercise jurisdiction over claim involving an American plaintiff who purchased securities on a foreign exchange even though the securities were also available on the NYSE); *Cornwell v. Credit Suisse Group*, 729 F.Supp.2d 620, 627 (S.D.N.Y. 2010) (holding that there was no jurisdiction over a claim involving American investors who had purchased securities on the Swiss Exchange in light of *Morrison*). However, it is unclear whether *Morrison* will apply to cases brought by the SEC (instead of private individuals) or its impact on other sections of the Exchange Act. Steven M. Davidoff, *How Porsche May Outmaneuver a Securities Suit*, Oct. 22, 2010, <http://dealbook.nytimes.com/2010/10/22/how-porsche-may-outmaneuver-a-securities-suit/>. *Morrison* has been extended by some courts to apply to RICO cases, see Mayer Brown, *Extraterritorial Jurisdiction: Morrison’s Reasoning Limits RICO Claims as Well*, Nov. 10, 2010, <http://www.mayerbrown.com/publications/article.asp?id=9976&mid=6>.

⁴⁴ See, e.g., Jordan A. Dresnick, Kimberley A. Piro & Israel J. Encinosa, *The United States as Global Cop: Defining the ‘Substantial Effects’ Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. MIAMI INTER-AM L. REV. 453 (2009) (analyzing the evolution of effects test law through major Antitrust cases); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (holding that Sherman Antitrust Act applies where defendants intend for their conduct to be felt in the United States and such effect occurs); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 945-46 (7th Cir. 2003) (analyzing the effect of the Foreign Trade Antitrust Improvements Act on the Sherman Act’s effects test); *Dee-K Enterprises, Inc. v. Heveafil Sendirian Berhad*, 299 F.3d 281, 295-96 (4th Cir. 2002) (holding that the substantial effects test is used to determine jurisdiction when conduct is primarily foreign).

⁴⁵ For an explanation of the WTO, including history, see World Trade Organization, *What is the WTO?*, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 4, 2011). For an in depth analysis of WTO cases for the previous two years, see Raj Bhala and David Gants, *WTO Case Review 2009*, 27 ARIZ. J. INT’L & COMP. L. REV. 85 (2010); Raj Bhala and David Gants, *WTO Case Review 2008*, 26 ARIZ. J. INT’L & COMP. L. REV. 113 (2009).

⁴⁶ For an explanation of NAFTA, including history, see United States Department of Agriculture, *North American Free Trade Agreement (NAFTA)*, <http://www.fas.usda.gov/ftp/Policy/NAFTA/nafta.asp> (last visited Mar. 4, 2011). For recent NAFTA activity see Olivia Howe, *Recent Developments in NAFTA Law-Spring Update 2010*, 16 L. & BUS. REV. AM. 613 (2010); Olivia Howe, *Recent Developments in NAFTA Law-Winter Update 2009/2010*, 16 L. & BUS. REV. AM. 361 (2010).

international in focus, they are compromises among nations and, as such, do not reflect the U.S.'s independent policy determinations about the proper role of federal law in regulating extraterritorial business conduct. When focusing on international business law, thus defined, an unmistakable pattern emerges.

C. Repudiating Laissez-Faire: the Progressive Era

The various components of U.S. international business law, which I will detail below, reflect an approach to the federal regulation of business that is wholly unlike laissez-faire capitalism. Rather, it strikes one as a reaction against laissez-faire principles, and in fact, that is exactly what it was, and is. These laws find their origins in the Progressive Era, an historical period and an intellectual movement that began in the late nineteenth century in response to the laws and economic conditions of the Industrial Revolution.⁴⁷ Although the concept of progressivism is alive and well in the legal academy today and is invoked in a dizzying array of fields and literatures,⁴⁸ international business law has not traditionally been among them. This is somewhat ironic, given that the Progressive Movement emerged in part as a direct response to a most (in)famous legal case involving the federal regulation of business activity: *New York v. Lochner*.⁴⁹

The plaintiff in *Lochner* had been convicted of violating a New York statute that made allowing bakery employees to work more than sixty hours in a week or ten hours in one day a misdemeanor. Justice Rufus Peckham, writing for the majority, reversed New York's high court and held that the state legislature exceeded its police powers and violated a broad Fourteenth

⁴⁷ See, e.g., RONALD J. PESTRITTO AND WILLIAM J. ATTO, AMERICAN PROGRESSIVISM: A READER (2008) (a detailed history of American progressivism and its impact on America today); Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN L. REV. 993 (1990) (A history of the progressive era starting in the industrial age and its impact today).

⁴⁸ See, e.g., Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate Over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321, 323 (2009) (suggesting originality in copyright law has its roots in the progressive era); Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 733-36 (2004) (arguing that progressive era understanding of land-use regulation law, specifically zoning, does not adequately explain its use and importance today); Cass R. Sunstein, *A New Progressivism*, 17 STAN. L. & POLY REV. 197 (2006) (advocating a change in the government's role in markets using progressive era thinking); Brendan M. Brice, Comment, *Plyer v. Doe: Progressivism and Undocumented Aliens*, 4 WIDENER L. SYMP. J. 357, 400 (1999) (arguing a progressive approach towards undocumented aliens).

⁴⁹ *Lochner*, *supra* note 2, at 47.

Amendment liberty of contract.⁵⁰ Justice Holmes, in dissent, criticized the majority for deciding the case “upon an economic theory which a large part of the country does not entertain.”⁵¹ That theory, of course, was laissez-faire economics.⁵²

A chorus of scholars joined Justice Holmes in criticizing the Court’s decision and its underlying economic theory. Among the most prominent was Richard T. Ely, a political economist at the University of Wisconsin, Madison, who called the doctrine of laissez-faire economics a “complete fiasco”⁵³ in practice that was “unsafe in politics and unsound in morals.”⁵⁴ He rejected the older ideas of Adam Smith and his negative conception of freedom and the state in favor of a positive conception of liberty, associated with John Stuart Mill, in which the powers of government are utilized to advance individual liberties and temper the harmful effects of economic inequalities.⁵⁵ While the proponents of negative liberty sought to protect individual freedoms by limiting the power of the state, the new progressive, positive conception of freedom saw “positive state action as the key to reducing economic inequalities and thus to enhancing individual freedom.”⁵⁶ Other scholars of political economy who sounded similar themes and helped give rise to the movement were Henry Seagar at Columbia, Henry Carter Adams at the University of Michigan, and Edwin R.A. Seligman at Columbia.⁵⁷

The Progressive Movement became a multi-faceted push for reform, addressing a diverse array of social and economic issues at both the state and federal levels. But three themes unmistakably characterize both the

⁵⁰ *Id.* at 50.

⁵¹ *Id.* at 75.

⁵² Although the nine justices disagreed sharply on the scope of state power, “all nine justices understood individual liberty in negative terms and viewed social and economic legislation enacted under the police powers as an interference with and an infringement of that liberty.” Steven M. Ingram, *Taking Liberties with Lochner: the Supreme Court, Workmen’s Compensation, and the Struggle to Define Liberty in the Progressive Era*, 82 OR. L. REV. 779, 781 (2003).

⁵³ RICHARD T. ELY, THE PAST AND THE PRESENT OF POLITICAL ECONOMY 5 (Johns Hopkins U. Stud. In Hist. & Pol. Sci. 1884).

⁵⁴ RICHARD T. ELY, GROUND UNDER OUR FEET: AN AUTOBIOGRAPHY 132-44 (Ayer Co. Pub., 1977) (1938).

⁵⁵ Richard T. Ely, *Industrial Liberty*, PUBLICATIONS OF THE AM. ECON. ASS’N 59 (1902), reprinted in RICHARD T. ELY, STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY 398-425 (1903).

⁵⁶ Ingram, *supra* note 52, at 793.

⁵⁷ Henry Seagar, professor of political economy at Columbia University, Ernst Freund of the University of Chicago Law School. Ingram, *supra* note 52, at 795-97.

Progressive Era and the contemporary U.S. regulation of international business. First was a commitment to reducing corruption in business and government. The “muckrakers” – a term that Theodore Roosevelt coined to describe a new breed of journalists – exposed business and government corruption in the new national magazines, leading to a number of federal reforms.⁵⁸ One such series of articles criticized the monopoly of Rockefeller’s Standard Oil Company, and contributed meaningfully to the enforcement of anti-trust laws.⁵⁹ In the same vein, a series of articles entitled “The Treason of the Senate” exposed corruption in the U.S. Senate,⁶⁰ contributing significantly to the ratification of the Seventeenth Amendment instituting the direct election of U.S. senators.⁶¹ The Prohibition movement which resulted in the Eighteenth Amendment,⁶² similarly reflects the anti-corruption impulse.

A second theme was a commitment to promoting democracy and individual rights, particularly the rights of women and the poor. In establishing the direct election of U.S. senators, supporters of the Seventeenth Amendment sought to curb the abuses of state-appointed senators and make the office more democratically accountable.⁶³ The

⁵⁸ See ROBERT MIRALDI, ED., *THE MUCKRAKERS: EVANGELICAL CRUSADERS* (2000); Harry H. Stein, *American Muckrakers and Muckraking: the 50-Year Scholarship*, JOURNALISM QUARTERLY, Spring 1979, at 9-17.

⁵⁹ See IDA TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904) (giving a detailed explanation of the structure and creation of the Standard Oil Trust and the various illegal means it employed to control its monopoly).

⁶⁰ David Graham Phillips, *The Treason of the Senate: Aldrich, The Head of It All*, Cosmopolitan Magazine (Mar. 1906), available at <http://www.starkman.com/hippo/history/aldrich/phillips.html>.

⁶¹ U.S. Const. amend. XVII; see also Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 505-06 (1997) (evaluating the debates surrounding the passage of the amendment and discussing the impact of the direct election of senators today); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671 (1999) (analyzing how the amendment impacted the States and later, by Supreme Court interpretation); Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 168, 184 (1997) (characterizing election of state legislators as corrupted, examining the political climate leading up to the amendment’s passage, and offering explanations for its passage as well as its implications today).

⁶² U.S. Const. amend. XVIII; see also RUTH DUPRÉ, *THE PROHIBITION OF ALCOHOL REVISITED: THE US CASE IN INTERNATIONAL PERSPECTIVE* (2004), available at http://www.hec.ca/ica/cahiers/2004/ica0411_rd.pdf; Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1 (2006) (taking a detailed look at the Supreme Court cases regarding prohibition up until its repeal by the twenty-first amendment).

⁶³ See Bybee, *supra* note 61, at 544 (the Seventeenth Amendment was in enacted, in part,

Nineteenth Amendment granted women the right to vote in federal elections.⁶⁴ The concern with protecting the votes and political influence of the economically disadvantaged similarly motivated the push to establish the initiative, referendum, and recall at the state level.⁶⁵ The Progressive Era has been rightly criticized for failing to address issues of racial or ethnic inequality, or worse, reinforcing and exacerbating these inequalities.⁶⁶ But as with the Founding Era, the conflicts and hypocrisies that characterized certain of its leading figures have not displaced the legacy of their better ideas.

A third major development of the Progressive Era, one which applies most forcefully to corporations today in their extraterritorial activity and which reflects an intellectual repudiation of laissez-faire economics, is the establishment of the federal income tax with the ratification of the Sixteenth Amendment. Called “the quintessential progressive reform,”⁶⁷ the tax was not merely a means of increasing government revenue, but instead represented a revolt against the “classical nineteenth-century emphasis on negative individual liberties toward a more progressive and revitalized

so that senators would be responsible to the people); Zwicki, *supra* note 61, at 184 (viewing the passage of the Seventeenth Amendment as a response to the “perceived inability of state legislatures to perform their electoral function.”).

⁶⁴ U.S. Const. amend. XIX; *see also* Reva B. Siegel, *She the People: the Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1045 (2002) (analyzing the suffrage debates leading up to the amendment’s enactment and the history of the amendment since); Jennifer K. Brown, Note, *The Nineteenth Amendment and Woman’s Equality*, 102 YALE L.J. 2175, 2204 (1993) (detailing the suffrage movement and affirming the amendment’s purpose of recognizing women’s constitutional equality).

⁶⁵ *See* John Dinan, *The Original Intent and Current Operation of Direct Democratic Institutions*, 70 ALB. L. REV. 1035, 1043 (2007) (arguing that direct democracy has changed from the wants of the popular will to a vehicle for special interests); K.K. DuVivier, *Out of the Bottle: the Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007) (a brief history of direct democracy and a brief look at recent court decisions involving direct democracy); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH L. & POL’Y REV. 11, 40 (1997) (exploring the conditions that gave rise to direct democracy in the American west).

⁶⁶ *See, e.g.*, Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 45, 78 (1996) (progressive era as “the heyday of racism” with the author using failure to pass anti-lynching legislation as an example); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 945 (1998) (after analyzing four progressive era Supreme Court cases, Klarman concludes that the decisions had little impact on racial practices such as lynching, black disenfranchisement, etc).

⁶⁷ JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870 - 1920* 355 (1986).

conception that stressed an active role for the positive state.”⁶⁸ It supplanted the conception of the state as a passive protector of private property, and established “an active role for the positive state in the distribution of fiscal burdens.”⁶⁹ Through the Sixteenth Amendment, the U.S. system of public finance “underwent a dramatic, structural transformation” in which fiscal policy came to be “guided not simply by the functional and structural need for government revenue, but by concerns for equity and economic and social justice.”⁷⁰

The legacy of this movement, and not the doctrine of laissez-faire economics, best explains the corpus of U.S. federal business law that today governs extraterritorial business conduct. But the line between the Progressive Era and 21st century business law has one substantial connecting dot: the 1960s and 70s, when the paradigm that I now call Progressive Capitalism truly took shape.

III. REDEFINING THE U.S. PARADIGM: PROGRESSIVE CAPITALISM

In the 1960s, two major political movements would culminate in federal law that would eventually reshape the paradigm of U.S. international business law. Title VII of the Civil Rights Act of 1964 created prohibitions against employment discrimination that Congress would amend in 1991 to apply extraterritorially.⁷¹ The U.S. income tax code – which redistributed wealth through the financing of federal social programs – was amended by Subpart F to apply more vigorously to overseas corporate profits.⁷² But the biggest, and greatly underappreciated, era of international business law reforms was the late 1970s under the presidency of Jimmy Carter. Between 1976 and 1980, the paradigm of U.S. international business law that we can now call Progressive Capitalism truly took shape in three distinct ways. First, the Carter Administration pushed for the enactment of new legislation: the U.S. Foreign Corrupt Practices Act of 1977 was the first law anywhere in the world that specifically prohibited the bribing of overseas government officials

⁶⁸ Ajay K. Mehotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 U.C.L.A. L. REV. 1793, 1799 (2005).

⁶⁹ *Id.* at 1798-99.

⁷⁰ *Id.* at 1795.

⁷¹ Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000(e) et seq. (2010)), *amended by* Civil Rights Act of 1991, Pub. L. No. 102-66, § 109, 105 Stat. 1071 (1991).

⁷² 26 U.S.C. §§ 951-964 (2007).

for business purposes.⁷³ Second, an existing legal regime was fundamentally redefined to pursue a new set of social goals. Economic sanctions, previously a component of military strategy that was framed by the two world wars and the Cold War, was transformed by Jimmy Carter into an instrument for promoting human rights in developing countries.⁷⁴ In the wake of these paradigm-changing events, human rights attorneys prevailed upon the judicial branch to effect the third major change. The Alien Tort Statute, a once-obscure provision of the Judiciary Act of 1789 that had laid largely dormant for nearly two centuries,⁷⁵ was suddenly and dramatically refashioned into a means of holding persons liable for overseas human rights abuses.⁷⁶ These three planks - anti-corruption, democracy and individual rights, and the progressive redistribution of wealth through the federal income tax - best explain the federal laws that today constitute U.S. international business law. Each area of law involves the knowing restraint on economic freedom to advance social and political goals. They are examples not of laissez-faire, but of the Progressive Era's deliberate rejection of that doctrine.

A. Combating Corruption: The Foreign Corrupt Practices Act

The U.S. Foreign Corrupt Practices Act prohibits the bribing of overseas government officials for business purposes.⁷⁷ Congress originally enacted the prohibition in 1977, and it became an important component of the Carter Administration's push toward using business conduct to promote liberal-democratic values. It was at first just a symbolic component, and was scarcely enforced for the first twenty years of its existence. Then approximately ten years ago, owing to a combination of factors that scholars still only partially understand, the U.S. Department of Justice and the Securities and Exchange Commission initiated an extraordinarily dramatic surge in enforcement.⁷⁸ Today, it is widely regarded as among the most important and fearsome statutes in international business, with fines routinely reaching in the tens or hundreds of millions of dollars.⁷⁹ Some have heralded

⁷³ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd(1), et seq. (2006).

⁷⁴ GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & BARBARA OEGG, *ECONOMIC SANCTIONS RECONSIDERED* (3d ed. 2007).

⁷⁵ Alien Tort Statute (codified at 28 U.S.C. § 1350 (2011)).

⁷⁶ *See infra* Part III.B.1.

⁷⁷ Foreign Corrupt Practices Act, *supra* note 73.

⁷⁸ Winston & Strawn, *FCPA Enforcement and Compliance Strategies Overview*, Nov. 17, 2009, <http://www.acc.com/chapters/social/upload/11-17-09-fcpa.pdf>.

⁷⁹ Google, http://www.google.com/search?q=FCPA+finer+history&hl=en&prmd=ivns&%20tbs=tl:1&tbo=u&ei=fe6MTf_yC4Sutwfv4v3LDQ&sa=X&oi=timeline_result&ct=title&resnum=11&ved=0CFoQ5wIwCg#q=FCPA+finer+history&hl=en&sa=X&prmd=ivns&tbs=t

the FCPA as helping to effectuate a worldwide sea change in attitudes toward bribery.⁸⁰ Others have decried its supposed cultural imperialism.⁸¹ However, none has characterized it as an instrument of laissez-faire economics.

The statute emerged from two distinct corruption scandals of the 1970s, both of which were replete with symbolic implications for international business and western capitalism more generally. In 1971, Congress provided the Lockheed Corporation, then a major manufacturer of civilian and military aircraft, with a \$250 million federal loan guarantee to prevent bankruptcy. Soon afterwards, regulators discovered that Lockheed had bribed several foreign governments to obtain contracts. Lockheed ultimately disclosed several multi-million dollar bribes to various countries, particularly the Netherlands, Japan, and Italy, the revelation of which caused scandals that were embarrassing both to those countries and to the United States.⁸² The second was the Watergate scandal, which exposed the illegal payments of various U.S. companies to domestic political campaigns.⁸³ The SEC responded in 1974 by conducting an investigation, which found that U.S. corporations had made covert payments not only to U.S. political campaigns, but also to overseas government officials, and were typically accounted for through “slush funds.” As part of the post-Watergate reforms, Congress sought to supplement existing domestic anti-bribery legislation with comparable legislation that would prohibit payments to overseas officials and require more accurate accounting.⁸⁴

l:1&tbo=u&ci=geMTdSkD4yWtwfq0JHLDQ&oi=timeline_result&ct=title&resnum=11&ved=0CFoQ5wIwCg&bav=on.2,or.r_gc.r_pw.&fp=48e89ff3ea888421 (last visited Mar. 25, 2011).

⁸⁰ See, e.g., Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1988 OECD Convention: An Impetus for Worldwide Changes in attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485 (2000).

⁸¹ See, e.g., Steven R. Salbu, *Bribery in the Global Market: A critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997).

⁸² See *Lockheed's Defiance: A Right to Bribe?*, Time, Aug. 18, 1975, available at <http://www.time.com/time/magazine/article/0,9171,917751-1,00.html>.

⁸³ Spalding, *supra* note 12, at 359.

⁸⁴ See, e.g., Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOBAL STUD. L. REV. 1, 5 (2006); Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. SUPP. 593, 595-96 (2002); Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW.J. INT'L L. & BUS. 269, 271-75 (1998); Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2902-03 (2005).

Despite its salience at the level of practice, the FCPA⁸⁵ remains somewhat obscure in the academy and requires an introduction. Most fundamentally, the statute prohibits bribing overseas government officials for business purposes. A payment is defined quite broadly, as the “furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value,”⁸⁶ so as to include gifts of any kind. The parties to whom such payments are prohibited is similarly broad, and can include any “foreign official;”⁸⁷ any foreign political party or party official;⁸⁸ and third parties such as agents, distributors, or joint venture partners.⁸⁹ The payment must be done to assist in “obtaining or retaining business for or with, or directing business to, any person,”⁹⁰ commonly referred to as the business purpose test.⁹¹

⁸⁵ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd(1)-(3), 78ff (2006)), *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2006)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2006)).

⁸⁶ 15 U.S.C. § 78dd-1(a).

⁸⁷ 15 U.S.C. § 78dd-1(a)(1) (2006); *id.* § 78dd-2(a)(1); *id.* § 78dd-3(a)(1). Foreign official is defined as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.” 15 U.S.C. § 78dd-1(f)(1)(A) (2006); *id.* § 78dd-2(h)(2)(A); *id.* § 78dd-3(f)(2)(A). A 1977 House Report suggests that this definition should not include an employee “whose duties are essentially ministerial or clerical.” H. REP. NO. 95-640, at 8 (1977). After the 1998 amendments, language was added to provide that a foreign official may also include an officer or employee of a “public international organization” or any person acting in an official capacity for or on behalf of such an organization. 15 U.S.C. § 78dd-1(f)(1)(A) (2006); *id.* § 78dd-2(h)(2)(A); *id.* § 78dd-3(f)(2)(A). The purpose of this language is to comply with the OECD Convention. S. REP. NO. 105-277, at 3 (1998). Nonetheless, The DOJ interprets this section to hold that the prohibition applies to payments to “*any* public official, regardless of rank or position,” and that it is meant to focus on the “*purpose* of the payment instead of the particular duties of the official receiving” the bribe. DEP’T OF JUSTICE, LAY PERSON’S GUIDE TO FCPA § D, *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [hereinafter DOJ GUIDE].

⁸⁸ 15 U.S.C. § 78dd-1(a)(2) (2006); *id.* § 78dd-2(a)(2); *id.* § 78dd-3(a)(2). This term is not defined in the statute.

⁸⁹ DOJ GUIDE, *supra* note 87, at “Third Party Payments.” The third party may include any person to whom something of value is given while “knowing” that it will be given to members of the previous two groups. 15 U.S.C. § 78dd-1(a)(3) (2006); *id.* § 78dd-2(a)(3); *id.* § 78dd-3(a)(3). In 1988, The statute expanded the definition of knowledge to include “deliberate ignorance,” which under the statutory language is satisfied when a person is “aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. § 78dd-1(f)(2) (2006); *id.* § 78dd-2(h)(3); *id.* § 78dd-3(f)(3).

⁹⁰ 15 U.S.C. § 78dd-1(a)(1) (2006); *id.* § 78dd-2(a)(1); *id.* § 78dd-3(a)(1).

The jurisdictional scope of the FCPA is surprising, and reflects a very broad commitment to reducing corruption in international business. The anti-bribery provisions apply to publicly-listed companies and other issuers of securities,⁹² “domestic concerns,”⁹³ defined as “any individual who is a citizen, national, or resident of the United States,”⁹⁴ and includes corporations, partnerships, and other entities that have their principal place of business in the United States, or which are organized under the laws of a U.S. state,⁹⁵ and “persons other than issuers or domestic concerns,”⁹⁶ which includes a “person,” other than an issuer or domestic concern, who is in the territory of the United States at the time of the conduct in question,⁹⁷ and who is not a national of the United States or a commercial entity legally organized in the United States.⁹⁸

The legislative history from 1977 reflects a wide-spread willingness to forego economic advantages for the sake of promoting an anti-corruption agenda that was understood fundamentally in social or moral, rather than economic, terms. Indeed, the record reflects the substantial concern that the statute would put U.S. at an economic disadvantage in international business, but was nonetheless enacted. Robert S. Ingersoll, Deputy Secretary of State, stated, “It is tempting to try to deal with the situation unilaterally, but there are serious risks for the United States in such an approach. There is

⁹¹ See DOJ GUIDE, *supra* note 87, at § E. The 1977 House Report makes clear that the corrupt requirement is satisfied even where the act is not “fully consummated,” or does not “succeed in producing the desired outcome.” H.R. REP. NO. 95-640, at 8 (1977).

⁹² 15 U.S.C. § 78dd-1 (2006).

⁹³ *Id.* § 78dd-2 (2006).

⁹⁴ 15 U.S.C. § 78dd-2(h)(1)(A) (2006).

⁹⁵ *Id.* § 78dd-2(h)(1)(B) (2006). The 1977 Senate Report stipulates that this latter section should apply to entities which are “owned or controlled by individuals who are citizens or nationals of the United States” and have their principal place of business in the United States or a territory, possession, or commonwealth. S. REP. NO. 95-114, at 17 (1977). For more recent comments by the U.S. Department of Justice, see DOJ GUIDE, *supra* note 87, at § A (“U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question.”).

⁹⁶ *Id.* § 78dd-3 (2006). The third category of person subject to the anti-bribery sections was established by the FCPA’s 1998 amendments to satisfy the OECD convention’s requirement that statutes cover “any person.” S. REP. NO. 105-277, at 2 (1998).

⁹⁷ 15 U.S.C. § 78dd-3(a) (2006).

⁹⁸ *Id.* § 78dd-3(f)(1) (2006). As a result of this amendment, foreign corporations, even if subsidiaries of a U.S. corporation, as well as the employees of such corporations, may now be independently liable under the FCPA. See DON ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT* § 13:2 (2000); see also Mike Koehler, *Why Compliance with the U.S. Foreign Corrupt Practices Act Matters in China*, CHINA L. & PRAC. (2008), available at <http://ssrn.com/abstract=1396267>.

widespread recognition in the Congress that such unilateral action would put U.S. companies at a serious disadvantage in the export trade.”⁹⁹ This fear was shared by the International Chamber of Commerce, which testified that unless prohibitions on overseas bribery were internationalized, it “could, and in some cases would, mitigate severely against U.S. business and prevent it from being able to compete effectively in quite substantial markets of the world.”¹⁰⁰ One senator stated:

What disturbed me as I traveled around the world was the realization that American business was being internationally blamed for activities which are very obvious to me were a very common practice throughout the entire world. Not only the countries of the West—Western Europe, Japan, and the United States—but certainly through Africa, the Middle East, and Asia.¹⁰¹

Similarly, Senator Frank Church, a Democrat from Idaho, concluded: “There is no doubt that these practices are common, and that they are used by foreign and American firms alike.”¹⁰² Senator Ribicoff predicted that under unilateral legislation, “the American companies, who should be making payoffs then would be barred from making payoffs, the business that they should be getting would be going to foreign competitors who were undertaking the same practices.”¹⁰³

Despite these reservations, Congress enacted the legislation. The legislative history further reflects that its passage was driven by a combination of promoting values and building alliances through the active, deliberate exportation of anti-corruption norms.

President Carter ultimately explained in his signing statement that:

[d]uring my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. [The FCPA] provides that necessary sanction. I share Congress belief

⁹⁹ *Abuses of Corporate Power: Hearing Before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm.*, 94th Cong. 153, 154 (1976).

¹⁰⁰ *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 94th Cong. 39, 49 (1976) [hereinafter *1976 Senate Banking Hearings*].

¹⁰¹ *Protecting the Ability of the United States to Trade Abroad: Hearing Before the Subcomm. on International Trade of the S. Comm. on Finance*, 94th Cong. 1 (1975) [hereinafter *1975 Senate Hearing*] (statement of Sen. Abraham Ribicoff).

¹⁰² *Id.* at 8 (statement of Sen. Frank Church).

¹⁰³ *1975 Senate Hearing*, *supra* note 101, at 1 (statement of Sen. Abraham Ribicoff).

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that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.¹⁰⁴

Again, this view was expressed most forcefully and eloquently by the Democrat George Ball:

The vast volume of speeches, pamphlets, and advertising copy and propaganda leaflets extolling the virtues of free enterprise are cancelled every night when managements demonstrate by their conduct that a sector of multinational business activity is not free; it is bought and paid for. This is a problem that, like so many others, has relevance in the struggle of antagonistic ideologies; for, when our enterprises stoop to bribery and kickbacks, they give substance to the communist myth—already widely believed in Third World countries—that capitalism is fundamentally corrupt.¹⁰⁵

Another representative further explained, “[p]erhaps most serious” was the “delicate situation” with Italy, which was “one of the keys to the southern flank of NATO.”¹⁰⁶ He noted that “[a]llegations of payments by Lockheed served to advance the Communist cause in Italy where the Communist bloc was strengthened by the sight of corrupt capitalism.”¹⁰⁷

Accordingly, the FCPA was originally conceived as a symbol of the notion that the U.S. did not stand for naked profit-seeking. Rather, its version of capitalism embraced the power of the federal government to restrict corporate profits in the name of advancing other social goals.

¹⁰⁴ Foreign Corrupt Practices and Investment Disclosure Bill: Statement on Signing S. 305 into Law, 13 WEEKLY COMP. PRES. DOC. 1909, 1909 (Dec. 20, 1977).

¹⁰⁵ *1976 Senate Banking Hearings*, *supra* note 100, at 41-42 (statement of George Ball, Lehman Bros.).

¹⁰⁶ *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 126, 141 (1976).

¹⁰⁷ *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 172, 173 (1977) (statement of Rep. Stephen S. Solarz).

B. Promoting Democracy and Human Rights

U.S. corporations doing extraterritorial business are subject to a substantial and multi-faceted legal obligation to promote individual rights, without regard to their impact on profit-seeking. These include: the Alien Tort Statute; economic sanctions for human rights abuses; and laws prohibiting discrimination in employment, particularly but not limited to Title VII.

1. The Alien Tort Statute

The ATS, a once-obscure provision of the Judiciary Act of 1789, provides simply that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁰⁸ From its enactment until 1980, the law was invoked only 21 times,¹⁰⁹ and only two courts had ever upheld jurisdiction under the statute.¹¹⁰ With the watershed case of *Filartiga v. Pena-Irala* in 1980, the statute found new life, and perhaps even assumed a new identity: an instrument for holding persons liable for overseas human rights abuses. But the statute would not be used against corporate defendants until 1997,¹¹¹ at which point it became, quite suddenly, among the most controversial and high-profile statutes in international business law. Since 1997, approximately 150 cases have been filed against corporations. They have been filed in 25 different federal districts, with many in New York and California. Plaintiff’s judgments have ranged from \$1.5 million to \$80 million, and settlements from \$15.5 million to, reportedly, \$30 million. Roughly one-third of these cases are presently pending in federal court.¹¹² Under the ATS, conduct construed to violate the “law of nations” has included arbitrary detention, the right to peaceful assembly, forced labor, racial discrimination, environmental harms, and breach of a duty to treat with dignity.¹¹³ They generally involve acts by foreign security forces, labor-related issues, issues related to the

¹⁰⁸ 28 U.S.C. § 1350 (2011).

¹⁰⁹ Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int’l L. & Pol. 1, 4 n.15 (1985).

¹¹⁰ See *Adra v. Clift*, 195 F.Supp. 857 (D. Md. 1961); *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1067).

¹¹¹ *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2005).

¹¹² Jonathan Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, June 2010, at 5, available at http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/think_globallysuelocally.pdf.

¹¹³ Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT’L ECON 245, 249 (2004).

provision of support to repressive political regimes, or environmental damage.¹¹⁴

The statute is today celebrated by a chorus of scholars for its impact on promoting human rights, while claims of its adverse impact on corporate profits are largely unheeded. Though the U.S. Chamber of Commerce and scholars sympathetic to the business community's concerns have called for amending or even abolishing the ATS,¹¹⁵ Congress has declined to stem the tide of human rights litigation against corporations. Indeed, academics have praised ATS litigation for its impact on promoting social or political values that are not closely connected to preserving or promoting the free market – namely, its influence in shaping the domestic legal regimes of developing countries. One writes that the ATS has played an “important role in the recent overall global development of enforceable human rights norms;”¹¹⁶ that it has “been heralded by foreign governments, international organizations, and U.N. agencies as a significant mechanism for enforcing international human rights norms;”¹¹⁷ and continued the work of the Nuremberg Trials to “define and clarify the appropriate standard for corporate complicity in fundamental human rights violations.”¹¹⁸ Dean Harold Koh locates the ATS as part of a broader movement of corporate social responsibility, and reform efforts “undermine meaningful efforts to promote corporate responsibility abroad.”¹¹⁹ Others find that corporate liability under the ATS for human rights violations is a key component of the “constructive engagement” agenda, which holds that investment can be an effective means of promoting reforms in developing countries.¹²⁰ By this position, liability “furthers rather than undermines constructive engagement” by creating the legal conditions in

¹¹⁴ Drimmer, *supra* note 112.

¹¹⁵ See, e.g., GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 55-56 (2003) [hereinafter HUFBAUER & MITROKOSTAS] (concluding that the solution to the various threats the ATS poses to U.S. commercial and foreign policy interests is to amend the statute to define the causes of action, grant federal courts exclusive jurisdiction, clarify the aiding and abetting and color of law standards to require intent and substantial assistance, create a ten-year statute of limitations, and require the exhaustion of local remedies in the country of origin); BARRY E. CARTER ET AL., INTERNATIONAL LAW 639-43 (4th ed. 2003) (summarizing various arguments and proposed amendments).

¹¹⁶ Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971 (2004).

¹¹⁷ *Id.* at 975.

¹¹⁸ *Id.* at 979.

¹¹⁹ Koh, *supra* note 9, at 274.

¹²⁰ Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 209 (2008).

which U.S. companies will “promote democracy and human rights in their interactions with foreign governments and citizens by conveying democratic values and pushing for respect for the rule of law.”¹²¹

Just as the original purpose of the ATS is largely unknown and shrouded in mystery,¹²² the statute’s current significance is the result of unlikely and partially unknown events. The statute remained largely dormant until the late 1970s, when the daughter of a Paraguayan physician named Joel Filartiga, who had been an outspoken critic of the government of President Alfredo Stroessner and whose son had been tortured and murdered by a high-ranking officer of Stroessner’s regime, sought the legal advice of a New York City NGO called the Center for Constitutional Rights.¹²³ Filartiga brought a criminal suit against Pena, which proved futile due to the severe harassment of his attorney and unexplained judicial delays. Later in the 1970s, the plaintiff’s daughter, Dolly Filartiga discovered that Pena was living in Brooklyn, and through her contacts at Amnesty International, she was directed to CCR, who suggested an “experimental” approach – using a long-dormant and obscure provision of the 1789 Judiciary Act, now referred to as the Alien Tort Statute, to seek civil damages.¹²⁴ Interestingly, no one at CCR remembers who originally suggested that the ATS might be used to bring an

¹²¹ *Id.*

¹²² Judge Friendly once called the ATS a “legal Lohengrin” because “no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1015 (2d Cir. 1975). The very limited historical record suggests that the two incidents of assault of foreign ambassadors on U.S. soil originally precipitated its passage in 1789. HUFBAUER & MITROKOSTAS, *supra* note 115, at 3 (citing CARTER ET AL., *INTERNATIONAL LAW*, 229, 251 (4th ed. 2003)). *See* *Respublica v. De Longchamps*, 1 U.S. 111 (1784). Congress was “evidently anxious to display American leadership in defending international standards of good behavior,” and wanted to signal that it “would not tolerate flagrant violations of the ‘law of nations,’” thereby avoiding international conflict given the “fragile peace that followed the end of the American Revolution.” *Id.* at 113-14. Others have argued that it meant to enforce those norms that were widely recognized as among the law of nations in 1789, which included the rights of ambassadors, the right of safe conduct, and prohibitions on piracy. *See* Kevin R. Carter, Note, *Amending the Alien Tort Claims Act: Protecting Human Rights or Closing Off Corporate Accountability*, 38 CASE W. RES. J. INT’L L. 629, 632 (2007) (citing Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U.L. REV. 881, 891 (1999)); Yasmine A. Rassam, *Contemporary Forms of Slavery and the Evolution of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT’L L. 330 (1999) (explaining that the law of nations expanded in the late 1800s to include prohibitions in slave trading).

¹²³ *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

¹²⁴ JEFFREY DAVIS, *JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS* 18 (2008).

action in tort by a foreign national against a foreign national, and one CCR attorney joked, “it was probably an intern.”¹²⁵

CCR accordingly filed suit in the Southern District of New York under wrongful death statutes, the U.N. Charter, the Universal Declaration on Human Rights, the U.N. Declaration Against Torture, the American Declaration of the Rights and Duties of Man, and “other pertinent declarations documents, and practices constituting the customary international law of human rights and the law of nations,” as well as the Alien Tort Statute.¹²⁶ Filartiga alleged that the court had jurisdiction over Pena under the general federal question provision, 28 U.S.C. 1331, and the Alien Tort Statute. The district court granted the defendant’s motion to dismiss on jurisdictional grounds, holding that the “law of nations” excludes law that governs a state’s treatment of its own citizens.¹²⁷ On appeal, the court held that “official torture is now prohibited by the law of nations” and that the distinction between official torture of nationals and foreigners – suggested in dicta from Second Circuit precedent¹²⁸ – is “out of tune with the current usage and practice of international law.”¹²⁹ Addressing the jurisdictional question, the court concluded that the law of nations “has always been part of the federal common law,”¹³⁰ and that although the statute did not grant new rights to aliens, it opened “the federal courts for adjudication of the rights already recognized by international law.”¹³¹

Despite the power of this precedent, plaintiffs seeking relief from state actors faced a number of hurdles, including the U.S. Foreign Sovereign Immunities Act of 1976, which creates a presumption of sovereign immunity from U.S. lawsuits unless a specific exception (such as the sponsorship of terrorism or commercial activities) applies. State actor defendants have also invoked various prudential court doctrines, especially the act of state and political question doctrines, to bar suits against them.¹³² Plaintiffs accordingly began seeking relief under the ATS from private parties, including both natural persons and corporations, thus transforming this statute yet again into a de facto law of U.S. international business.

¹²⁵ *Id.* at 19.

¹²⁶ Filartiga, 630 F.2d at 879.

¹²⁷ *Id.*

¹²⁸ Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976).

¹²⁹ Filartiga, 630 F.2d at 884.

¹³⁰ *Id.* at 885.

¹³¹ *Id.* at 887.

¹³² HUFBAUER ET AL., *supra* note 74, at 5.

The first ATS case against a corporation would come about twenty years later, when citizens of Burma (Myanmar), again with the support of the Center for Constitutional Rights, filed a case against the Unocal Corporation alleging, *inter alia*, that it had aided and abetted the murder, rape, torture, and forced labor of villagers by the government in construction of a gas pipeline.¹³³ The Central District of California granted summary judgment in favor of Unocal, and on appeal, the Ninth Circuit affirmed Filartiga's holding that customary international law is part of the federal common law.¹³⁴ It further assumed, without argument, that if the ATS establishes federal jurisdiction over private parties, that jurisdiction would extend to corporations as well.¹³⁵ As the case law concerning private defendants developed, two categories of cases emerged. Corporations may be sued for their own conduct, or they may be sued for acts committed principally by foreign states. In the latter cases, plaintiffs will allege that the corporations were acting "under color of law" or were "joint actors" with the foreign government.¹³⁶

Recent litigation has raised, or failed to resolve, two significant legal issues. The first is the U.S. Supreme Court's first and only opinion on the ATS, *Sosa v. Alvarez-Machain*,¹³⁷ which addressed what some have called "the most contested issue in U.S. foreign relations law during the last decade:"¹³⁸ the status of customary international law (CIL) in U.S. courts. Some scholars had argued what would later be called the "modern position" that CIL had the status of self-executing federal common law, which the

¹³³ *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

¹³⁴ *Doe I v. Unocal Corp.*, 395 F.3d 932, 933 (9th Cir. 2002).

¹³⁵ *Id.* at 945-56. More recently, the Second Circuit specifically addressed, as a matter of first impression, the question of whether the ATS confers jurisdiction over claims against corporate defendants. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). The court held that customary international law provides not only the underlying causes of action under the ATS, but also whether the scope of liability extends to the defendant. *Id.* at 128. It held that corporate liability for violations of international law is not itself a rule of customary international law because it is not a "specific, universal, and obligatory norm" and has not attained acceptance among the nations of the world. *Id.* at 145. Although the opinion at first glance may seem to sound the death knell for corporate liability under the ATS, two factors suggest otherwise: 1) the opinion may be reversed by an en banc panel or by the U.S. Supreme Court; and 2) much ATS litigation is filed outside the Second Circuit, and even if *Kiobel* were to withstand review, that portion would certainly rise quite dramatically.

¹³⁶ HUFBAUER ET AL., *supra* note 74, at 5; *see also* Doug Cassell, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U.J. INT'L HUM. RTS. 304, 317-26 (2008).

¹³⁷ *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

¹³⁸ Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 871 (2007).

courts could apply without any express authorization from Congress.¹³⁹ “Revisionists,” on the other hand, argued that CIL had the status of federal common law only when the courts had express authorization from Constitution or the political branches.¹⁴⁰ *Sosa*, undertaking to address this precise question, resolved it in such a manner that both sides claimed victory,¹⁴¹ holding that the ATS authorized federal courts to recognize federal common law causes of action for only for a “limited number of CIL violations,”¹⁴² particularly those that have no “less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”¹⁴³ Thus despite the Supreme Court weighing in, the status of CIL in federal courts remains very much unresolved.

The second issue concerns whether liability under the ATS extends to corporate defendants. The Second Circuit recently addressed this issue as a matter of first impression, and found that customary international law provides not only the underlying causes of action under the ATS, but also the scope of liability.¹⁴⁴ It found that corporate liability for violations of international law is not itself a rule of customary international law because it is not a “specific, universal, and obligatory norm” and has not attained acceptance among the nations of the world.¹⁴⁵ The impact of this holding will be limited by the fact that much ATS litigation is filed outside the Second Circuit, and if *Kiobel* were to withstand en banc review, that portion would certainly increase quite dramatically. Accordingly, the ATS remains a viable instrument for holding corporations liable for human rights abuses, irrespective of any alleged competitive disadvantage.

¹³⁹ See Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 303-04 (1994); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1846-47 (1998).

¹⁴⁰ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: a Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995); see also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665 (1986).

¹⁴¹ See Bradley et al., *supra* note 160, at 872.

¹⁴² Bradley et al., *supra* note 160, at 893.

¹⁴³ *Sosa*, 124 S.Ct. at 732.

¹⁴⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 128 (2d Cir. 2010).

¹⁴⁵ *Id.* at 145.

Economic sanctions, though generally not thought of in the context of business law, are fundamentally a restraint on business activity to achieve social and political goals. Despite their long history, not until the presidency of Jimmy Carter did sanctions become an instrument of promoting human rights and, by extension, the kinds of social values that are the subject of this paper.

Ample commentary attests to the nature of economic sanctions as a restraint on profit-seeking to achieve social goals unrelated to the market. As one scholar observed, “the basic purpose of economic sanctions throughout history has always been restricting foreign trade and finance or withholding economic benefits such as state aid from targeted states . . . to accomplish broader security or foreign policy objectives.”¹⁴⁶ They are a form of “economic statecraft” that involves the withdrawal of economic resources to achieve a policy change in the target country.¹⁴⁷ Sanctions “institute a deliberate programme of action to disrupt or terminate an ongoing economic relationship between the sender and target countries. Since this ongoing relationship is mutually beneficial . . . its interruption will be costly to both parties.”¹⁴⁸ In fact, the threat of sanctions, or the sanctions themselves, would have no teeth but for the volume of business activity between the sender and the target. By curtailing that activity and withdrawing financial support, we aim to “hamper the target country’s economy and redistribute income, status, and influence among its domestic constituents.”¹⁴⁹

Sanctions for human rights thus represent the policy determination that the sender country cares, for example more about “human rights or racial equality in China and South Africa respectively than commercial sales to and corporate investments in those countries.”¹⁵⁰ They represent the determination that sender nations “obviously care about matters other than trade and investment. If this were not the case, none would have bothered to threaten or actually undertake sanctions which are precisely intended to use economic leverage to obtain political concessions.”¹⁵¹ Indeed, the frequency and intensity of sanctions represents the sender’s “willingness to suffer

¹⁴⁶ SAMUEL KERN ALEXANDER III, ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY 10 (2009).

¹⁴⁷ STEVE CHAN & A. COOPER DRURY, SANCTIONS AS ECONOMIC STATECRAFT: THEORY AND PRACTICE 1 (2000).

¹⁴⁸ *Id.* at 9.

¹⁴⁹ *Id.* at 5.

¹⁵⁰ *Id.* at 9.

¹⁵¹ *Id.* at 10.

substantial economic and political costs to itself for the sake of achieving its declared objective . . . Accordingly, a sender’s self-inflicted costs provide an indicator of its seriousness and determination.”¹⁵²

Economic sanctions have an ancient history, though their use for protesting human rights abuses is quite modern. Democratic governments have restricted commercial activity to promote social values in foreign regimes from the first known example of economic sanctions. In Pericles’ Megarian Decree of 432 B.C., the city-state of Athens imposed sanctions on Megara in retaliation against what we would today deem a human rights violation – the kidnapping of three Aspasian women.¹⁵³ The Greek playwright Aristophanes would later suggest that these sanctions ultimately triggered among the greatest regime clashes in ancient history: the Peloponnesian War between Athens and Sparta.¹⁵⁴ Sanctions would not become a regular tool of modern history until after World War I, and through the first couple decades following World War II, particularly with the onset of the Cold War, sanctions generally preceded or accompanied major military efforts.¹⁵⁵ Examples from the U.S. would include the sanctions against Iran in 1951, North Vietnam in 1954, Laos in 1956, Cuba in 1960, or South Vietnam in 1963.¹⁵⁶ The social value thrust of sanctions would develop in the 1960s and then fully mature in the 1970s, under the leadership of President Carter, as economic increasingly focused on the promotion of human rights.¹⁵⁷

The most comprehensive analysis of economic sanctions is the collaborative work of Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, and Barbara Oegg (HSEO), *Economic Sanctions Reconsidered*.¹⁵⁸ Originally published in 1985 and updated in 1990 and then again in 2007, they analyze 174 examples of economic sanctions. HSEO define sanctions as the “deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations.”¹⁵⁹ In sanctions jargon, the country

¹⁵² *Id.* at 13.

¹⁵³ HUFBAUER ET AL., *supra* note 74, at 9.

¹⁵⁴ “Then Pericles the Olympian in his wrath/Thundered, lightened, threw Hellas into confusion/Passed laws that were written like drinking songs/ [decreeing] the Megarians shall not be on our land, in our market, on the sea or on the continent . . . Someone will say it was not right . . . Come, if a Lacedaemonian sailed out in a boat and denounced and confiscated a Seriphian puppy, would you have sat still?” Aristophanes, *The Acharnians*, *quoted at* HUFBAUER ET AL., *supra* note 74, at 9.

¹⁵⁵ HUFBAUER ET AL., *supra* note 74, at 10.

¹⁵⁶ HUFBAUER ET AL., *supra* note 74, at 30.

¹⁵⁷ HUFBAUER ET AL., *supra* note 74, at 13.

¹⁵⁸ HUFBAUER ET AL., *supra* note 74.

¹⁵⁹ HUFBAUER ET AL., *supra* note 74, at 3. An alternative definition holds that any

applying the sanctions is often called the “sender” and the sanctioned country is the “target.” With respect to the senders, sanctions can be unilateral or multilateral, although the latter usually involve major powers persuading their smaller allies to join.¹⁶⁰ Sanctions can involve any or all of three types of customary trade or financial relations: limitations on imports, limitations on exports, and restricting the flow of finance.¹⁶¹ The target country need not be the adversary of the sender, and indeed, many of the most successful documented instances of sanctions have involved a friendly target who promptly acquiesced to the sender’s demands.¹⁶²

Sanctions may serve either of two purposes. While the most obvious purpose of economic sanctions would be to “coerc[e] target governments into particular avenues of response,”¹⁶³ economists and political scientists have explained that economic sanctions might also be designed to accomplish an entirely different, non-instrumental goal. Under this alternative theory, sanctions are not necessarily designed to effect reforms in the target countries, and their success thus should not necessarily be measured by the extent of any resulting reforms. William H. Kaempfer and Anton D. Lowenberg have contrasted the “instrumental” theory of sanctions with the “expressive” purpose.¹⁶⁴ According to this theory, the value of sanctions lies in “taking a moral stance against some other nation’s objectionable behavior.”¹⁶⁵ Where a target country offends the sender state, but the sender’s leaders may deem more severe intervention such as military action inappropriate, the

conduct intentionally depriving a people of its “means to an effective economic life” counts as sanctions. GEOFF SIMONS, *IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL?* 11 (1999). This definition would even treat military conduct that adversely impacted a target’s economy as sanctions, and is thus significantly broader than any generally accepted usage. Another available definition is “coercive economic measures taken against one or more countries to force a change in politics, or at least to demonstrate a country’s opinion about the other’s policies.” DIANNE E. RENNACK & ROBERT D. SHUEY, *ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW* 2 (1998), *cited in* HOSSEIN G. ASKARI, JOHN FERRER, HILDY TEEGEN & JIAWEN YANG, *ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY* 14 (2003). This definition is not preferred because it excludes the possibility that sanctions may be expressive tools, and not necessarily designed to “bring about a change in behavior or policies.”

¹⁶⁰ HUFBAUER ET AL., *supra* note 74, at 5.

¹⁶¹ HUFBAUER ET AL., *supra* note 74, at 44–45.

¹⁶² *See* HUFBAUER ET AL., *supra* note 74, at 60.

¹⁶³ HUFBAUER ET AL., *supra* note 74, at 5.

¹⁶⁴ William H. Kaempfer & Anton D. Lowenberg, *The Theory of International Economic Sanctions: A Public Choice Approach*, 78 AM. ECON. REV. 786, 786 (1988).

¹⁶⁵ *Id.*; *see also* PER LUNDBORG, *THE ECONOMICS OF EXPORT EMBARGOES: THE CASE OF THE US-SOVIET GRAIN SUSPENSION* (1987).

sender's leaders may nonetheless feel compelled to "do something."¹⁶⁶ While the costs of military action may be too high, the political costs of doing nothing may be considerable to the extent that it projects weakness.¹⁶⁷ Such domestic political pressure can "persuade the government in the sanctioning nation to respond by imposing sanctions to meet goals other than target compliance."¹⁶⁸ Indeed, the expressive purpose of sanctions sometimes occurs despite its instrumental ineffectiveness, but often the sanctions are "designed deliberately to be ineffectual."¹⁶⁹

The expressive purpose of sanctions is even further testament to the non-economic feature of so-called economic sanctions. While these sanctions curtail economic activity, they by and large do so not to effectuate changes in economic conditions, but rather, to promote social and political goals. Their inherent curtailment of business activity – express moral outrage, or outrage at the social and political conditions that may exist in a country that we may be powerless to change.

But even economic sanctions that are instrumental in design are fundamentally non-economic when imposed in protest of human rights abuses. The term "economic" in "economic sanctions" refers to the means, not the ends. We employ economic means to achieve social and political ends. We curtail business activity to achieve goals that have little to do with market conditions or profit.

3. The Extraterritorial Application of Employment Discrimination Laws

Title VII of the Civil Rights Act of 1964 is of course the bedrock U.S. statute addressing discrimination in employment¹⁷⁰ Though its role in domestic anti-discrimination efforts is familiar,¹⁷¹ few appreciate the scope of

¹⁶⁶ Ivan Eland, *Economic Sanctions as Tools of Foreign Policy*, in *ECONOMIC SANCTIONS: PANACEA OR PEACEBUILDING IN A POST-COLD WAR WORLD?* 29 (David Cortright & George Lopez eds., 1995).

¹⁶⁷ See generally DANIEL W. DREZNER, *THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS* (1999) (discussing political costs).

¹⁶⁸ Eland, *supra* note 166, at 29.

¹⁶⁹ *Id.* Scholars have debated the expressive function in law generally. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2035 (1996).

¹⁷⁰ 42 U.S.C. § 2000e-2(a)(1).

¹⁷¹ See e.g., Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. MEM. L. REV. 25 (2005) (examination of Title VII's impact on sex and race in employment); Charity Williams, Note, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357 (2008) (providing background on

its application to extraterritorial conduct, and its prominence in the basket of legal obligations that businesses bring with them when conducting business overseas.

Title VII originally contained no language expressly extending coverage to individuals working overseas for corporations owned or controlled by American persons. When faced with the question in 1991, the Supreme Court invoked the nineteenth-century presumption against extraterritorial application of U.S. statutes absent express statutory direction, and thus limited Title VII's coverage to practices arising in connection with work performed in the U.S.¹⁷² In direct response to this case, Congress inserted a provision into the Civil Rights Act of 1991 that overturned the decision by extending coverage to include U.S. citizens employed in a foreign country.¹⁷³ Corporations now falling within the act's statute include not only U.S. corporations but foreign corporations controlled by American employers.¹⁷⁴

Moreover, two federal courts have held that the bona fide occupational qualification ("BFOQ") must operate in foreign countries just as they do domestically, regardless of the legal or cultural practices of that country. A U.S. oil company that worked in Latin American countries declined to promote a female employee to vice-president of international operations because "Latin American clients would react negatively to a woman vice-president."¹⁷⁵ The Ninth Circuit reversed the district court's holding that gender was a BFOQ in this context, and held that just as customer preference cannot be the basis of a BFOQ in a domestic setting, it cannot be the basis in an international setting.¹⁷⁶ It added, "Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country."¹⁷⁷ Similarly, where the Baylor University medical school excluded Jewish physicians from participating in a rotation program that sent doctors to Saudi Arabia due to that country's "apparent hostility to Jews," the Southern District of Texas held

religious discrimination challenges in today's workplaces).

¹⁷² EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

¹⁷³ Section 701(f), 42 U.S.C. § 2000e(f).

¹⁷⁴ Section 702(c)(2), 42 U.S.C. § 2000e-1(c)(2). Title VII exempts conduct that would cause any U.S. employer to violate the law of the foreign workplace. Section 702(b), 42 U.S.C. § 2000e-1(b).

¹⁷⁵ Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1274 (9th Cir. 1981).

¹⁷⁶ *Id.* at 1277.

¹⁷⁷ *Id.*

that “patronizing, paternalistic ‘concerns’ of Baylor for the safety of Jews in Saudi Arabia” do not constitute a BFOQ.¹⁷⁸ Interestingly, these cases predate the 1991 extraterritorial amendment, and illustrate the inherent force of Title VII to push across national boundaries.

Though Title VII is the predominant employment discrimination statute, it does not stand alone, and is accompanied by others that also apply extraterritorially. The Americans with Disabilities Act prohibits discrimination based on disabilities in the employment context.¹⁷⁹ The 1991 amendments to the Civil Rights Act that amended Title VII to apply extraterritorially similarly amended the ADA.¹⁸⁰ Similarly, the Age Discrimination in Employment Act forbids age discrimination against persons over 40 years old in hiring, firing, promotions, applications, and other “terms, conditions, or privileges of employment.”¹⁸¹ Though a statute of lesser impact, the ADEA actually set the precedent that Congress evidently followed in amending Title VII. In 1984, the Third Circuit decided that the ADEA did not apply extraterritorially,¹⁸² and Congress immediately responded by amending the ADEA.¹⁸³ The extraterritorial application of Title VII is now coextensive with the ADEA.

Accordingly, Title VII, the ADA, and the ADEA combine to create a significant set of anti-discrimination laws with which all business must comply when working overseas. Though many have argued that the extraterritorial application does not go far enough, and specifically that their coverage should not be limited to U.S. employees,¹⁸⁴ these laws nonetheless figure

¹⁷⁸ *Abrams v. Baylor College of Medicine*, 581 F. Supp. 1570 (S.D. Tex. 1984).

¹⁷⁹ Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., (2009), *as amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(b)(2)(B), 105 Stat. 1071 (1991) [hereinafter ADA].

¹⁸⁰ 42 U.S.C. § 12112(c)(2)(B).

¹⁸¹ Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (2010) [hereinafter ADEA]. One Circuit has held that it also prohibits the creation of an “age-hostile” environment. *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996).

¹⁸² *Cleary v. U.S.*, 728 F.2d 607, 610 (3d Cir. 1984).

¹⁸³ 29 U.S.C. § 623(h). *See also* *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998) (ADEA extends to U.S. branches of foreign employers).

¹⁸⁴ *See, e.g.*, Paul Frantz, *International Employment: Antidiscrimination Law Should Follow Employees Abroad*, 14 MINN J. GLOBAL TRADE 227, 229 (2005) (Title VII, ADA and the ADEA should apply to lawful permanent residents working for overseas U.S. corporations); Kathy Roberts, *Correcting Culture: Extraterritoriality and U.S. Employment Discrimination Law*, 24 HOFSTRA LAB. & EMP. L.J. 295, 331 (2007) (concluding Title VII, ADA and the ADEA should be extended to non-U.S. employees of U.S. companies working both domestically and abroad); Carson Spott, Note, *Competitive and Fair: The Case for Exporting Stronger Extraterritorial Labor and*

prominently in understanding the practical and symbolic significance of the U.S. regime of international business law.

C. Income Taxation: the Anti-Deferral Regime for Extraterritorial Corporate Profits

As discussed above, the federal income tax represented a significant shift in the role of government in commercial activity. Today, the U.S. government has developed a complex scheme to ensure that U.S. corporations, even in their extraterritorial conduct, finance federal programs through the taxation of corporate profits.

As a general rule, the profits of U.S. corporations from their ownership interests in foreign corporations are not taxed until the earnings are repatriated to U.S. shareholders in the form of a dividend or realized by U.S. shareholders from the sale of shares.¹⁸⁵ This practice of postponing taxation of profits until repatriation is known as deferral, and reflects the long-standing U.S. tax policies that the foreign profits of foreign entities should not be taxed, and foreign-chartered corporations are distinct legal entities.¹⁸⁶ When a foreign-chartered corporation is owned by a U.S. corporation, the result is that profits attributable to U.S. shareholders escape U.S. tax as long as they are reinvested in foreign tax jurisdictions; hence the frequent establishment of subsidiaries in low-tax foreign jurisdictions. Such has been the tax policy of the U.S. since the original enactment of the federal income tax with the Sixteenth Amendment in 1913. From that date through the 1950s, U.S. multinational corporations could operate in complete freedom from current U.S. income taxation as long as they conducted their business through foreign subsidiaries.¹⁸⁷ These policies were essentially abused through manipulating income by shifting mobile forms of income to foreign low-tax jurisdictions, especially through establishing foreign holding companies (companies formed to earn mobile passive income) or base companies (companies in low-tax jurisdictions that serve as conduits for the overseas sales of U.S.-manufactured goods).¹⁸⁸ As early as 1937 Congress

Employment Protection, 33 HASTINGS INT'L & COMP. L. REV. 479, 500 (2010) (U.S. labor law should be applied universally to all employees including non-U.S. employees working for U.S. corporations overseas).

¹⁸⁵ MICHAEL J. GRAETZ, FOUNDATIONS OF INTERNATIONAL INCOME TAXATION 217 (2003).

¹⁸⁶ *Id.* at 217.

¹⁸⁷ Keith Engel, *Tax Neutrality to the Left, International Competitiveness to the Right, Stuck in the Middle with Subpart F*, 79 TEX. L. REV. 1525, 1526 (2001).

¹⁸⁸ GRAETZ, *supra* note 185, at 217-18.

recognized the need to impose limits on the privilege of deferral to preserve the U.S. tax base, but business interests successfully resisted.

The movement to subject extraterritorial profits to an income tax regime would gain sufficient momentum in the 1960s as the U.S. was running a large budget deficit and the ease with which U.S. corporations could defer income taxation was increasingly perceived as a contributing factor. The Kennedy administration thus introduced radical new international taxation legislation that was based upon a policy of global tax neutrality – that the business activity of foreign subsidiaries would be taxed at the same rate as wholly domestic U.S. corporations.¹⁸⁹ The business community gave significant pushback, on the grounds that global tax neutrality would put U.S. corporations at a competitive disadvantage.¹⁹⁰ The two sides achieved a compromise in 1962 with enactment of the first significant constraint on deferral – Subpart F of the Code’s subchapter on foreign income. Subpart F currently taxes – that is, does not permit tax deferral – of certain types of income, labeled “disfavored income,”¹⁹¹ and only by a “controlled foreign corporation” (CFC). A CFC is generally a foreign corporation that is majority owned by U.S. persons (counting only the shareholders who own at least 10% of the stock).¹⁹² Subpart F identifies several types of CFC income that are subject to current taxation based on the ease with which they can be shifted to low-tax jurisdictions.¹⁹³ Disfavored income generally includes income from passive investments, especially the income generated by stocks and bonds.¹⁹⁴

Since the original enactment of Subpart F, the U.S. has further enacted a “series of extremely complex and somewhat overlapping anti-deferral regimes” to complement, or complicate, Subpart F.¹⁹⁵ Many scholars argue that the provisions that apply to extraterritorial corporate profit are not as progressive as they should be.¹⁹⁶ Nonetheless, it remains true that the U.S. anti-deferral rules of Subpart F are “harsher” than the rules of other developed countries, indicating, in the words of one scholar, not that the U.S. should join a “race to the bottom,” but to the contrary, that “the rest of the

¹⁸⁹ Engel, *supra* note 187.

¹⁹⁰ Engel, *supra* note 187.

¹⁹¹ Engel, *supra* note 187.

¹⁹² GRAETZ, *supra* note 185, at 218.

¹⁹³ GRAETZ, *supra* note 185, at 218.

¹⁹⁴ Engel, *supra* note 187.

¹⁹⁵ Robert J. Peroni, *Back to the Future: a Path to Progressive Reform of the U.S. International Income Tax Rules*, 51 U. MIAMI L. REV. 975, 986 (1997).

¹⁹⁶ *Id.* at 1011.

developed world has not joined the United States in a ‘race to the top.’”¹⁹⁷ “The United States has tried to lead and, while many have followed, none has followed quite as far as the United States has gone.”¹⁹⁸ The U.S. system, while not the most severe in every single instance, is generally “almost always the harshest, sometimes by a wide margin.”¹⁹⁹

The anti-deferral regime thus rounds out the model of Progressive Capitalism that the U.S. imposes on corporations in their extraterritorial conduct. The following section will contrast this model with its Chinese counterpart. It will show that China does not impose any of the legal constraints on business conduct included in this study: it has deliberately refused to enact anti-corruption laws, despite substantial worldwide lobbying; it does not hold its corporations liable for complicity in human rights abuses; it very rarely imposes economic sanctions, and never for human rights abuses; and it does not have effective laws prohibiting discrimination in employment. As such, with respect to the kinds of social values that these laws are designed to promote and despite its practice of owning or subsidizing corporations, China’s legal regime is substantially laissez-faire.

IV. CHINA’S NEW LAISSEZ FAIRE

The existing scholarship on Chinese international business law draws on two unvarying themes. The first is the relative heaviness of the Chinese state vis-à-vis western liberalism. This literature has developed terms such as “state capitalism,”²⁰⁰ or “socialist market economy”²⁰¹ to capture China’s supposedly heavy-handed curtailment of individual freedoms, particularly in the area of human rights, while only reluctantly and incrementally implementing liberal market reforms. Scholarship focusing specifically on China’s international business regime develops a second theme, emphasizing the increasingly aggressive role of Chinese business, encouraged and subsidized by the state, in investing in developing countries. This literature focuses, accurately, on the Chinese government’s recognized need to obtain natural resources, create markets for its products, and build political alliances to increase its international influence. However, scarcely understood is the legal regime that directs this extraterritorial conduct. Terms such as “state capitalism” accurately capture the Chinese government’s approaches to areas

¹⁹⁷ National Foreign Trade Council, Inc., *the NFTC Foreign Income Project: International Tax Policy for the 21st Century, Report and Analysis* 67 (2001), available at [http://www.nftc.org/default/tax/fip/NFTC1a%20Volume2\(1\).pdf](http://www.nftc.org/default/tax/fip/NFTC1a%20Volume2(1).pdf).

¹⁹⁸ *Id.* at 68.

¹⁹⁹ *Id.*

²⁰⁰ HALPER, *supra* note 24, at 60.

²⁰¹ Xing, *supra* note 26, at 11.

such as industrial policy or financial regulation, where the state's hand is indeed heavier than most western counterparts. However, they do not capture China's distinctive approach with respect to the values that are the subject of this paper. Focusing on such areas as combating corruption and promoting human rights, the Chinese regime of international business is striking not for the heaviness of the state, but for its lightness – the absence of laws curtailing profit-seeking to achieve other goals unrelated to the profit. Rather, profit-seeking, or economic development, is itself the predominant political goal – by seeking profits, Chinese businesses are thought to advance the economic growth that will secure allegiance to the state and preclude widespread social resistance. In this sense, the Chinese regime is more accurately understood as substantially laissez-faire.

A. The Political Purposes of Chinese Business

Shortly after the founding of the People's Republic of China in 1949, the Communist government under Mao Zedong confiscated the pre-existing private companies and converted them into state-owned enterprises (“SOEs”).²⁰² In the ensuing years, initially under the first Five Year Plan of 1953-57, the government further nationalized industry by placing SOEs under the control of local government bodies for the purpose of developing a Soviet-style command economy.²⁰³ The government took control over such fundamental SOE operations as labor recruitment, finance, materials, production, supply, and marketing.²⁰⁴

After Mao's death in 1978, new coalition of conservative leadership, led by Deng Xiaoping, took control of the government. These leaders' principal focus was lifting China out of poverty, and believed that doing so required reformation of China's economic structure.²⁰⁵ Accordingly, Deng implemented a series of liberalizing reforms to make SOEs more productive. These early reforms set in motion a process whereby business would continue to serve the political purpose of preserving the communist party's power, and its role as exclusive custodian of the common good. But the means of achieving this objective would change fundamentally. Rather than collectivization, the means of promoting the common good became profit.

²⁰² Neal Stevens, Comment, *Confronting the Crisis of Insolvency in China's State-Owned Enterprises: Can the Proposed Bankruptcy Law Erase the Red Ink?*, 16 WIS. INT'L L.J. 551, n.13 (1998) (citing JIANFU CHEN, FROM ADMINISTRATIVE AUTHORISATION TO PRIVATE LAW, A COMPARATIVE PERSPECTIVE OF THE DEVELOPING CIVIL LAW IN THE PEOPLE'S REPUBLIC OF CHINA 75 (1995)).

²⁰³ *Id.* at n.15.

²⁰⁴ *Id.* at 554. See also CHEN, *supra* note 202.

²⁰⁵ Stevens, *supra* note 202, at 556.

Deng's vision was that economic prosperity would stabilize society and preserve the state's power. Economic growth, then, became the political purpose of business.

In the early 1990s, the party accelerated its reforms to the ownership structure of SOEs and instituted more standardized corporate governance, passing the Company Law in 1993.²⁰⁶ Radical reforms continued through the late 1990s as the government formulated a new strategy: "grasping the large and letting the small go."²⁰⁷ This referred to cultivating large SOEs that were strong and competitive, and eventually developing them into multinational companies, while giving up control of smaller and less strategic enterprises. The ultimate goal of these reforms was to allow the state to retreat from select sectors through privatization, while continuing to dominate a few strategic industries.²⁰⁸ The government implemented recapitalization reforms to make the large, strategic SOEs more efficient, by converting state loans to equities, authorizing state banks to write off bad loans, selectively listing firms in stock markets, and allowing the firms to form joint ventures with foreign investors.²⁰⁹ Today, SOEs do not own monopolies; rather, they are subjected to competition both domestically and with foreign firms.²¹⁰ They also are allowed to raise large amounts of private capital; all of the twelve biggest IPOs on the Shanghai Stock Exchange in 2007 were state enterprises.²¹¹ State-owned enterprises have access to banks as well as the stock market, and some scholars estimate that up to 99 percent of bank loans to Chinese companies go to state-owned enterprises.²¹² The cost of capital is low and the banks are lenient in enforcing the terms of repayment for SOEs, while the private sector struggles comparatively to raise capital.²¹³ Privatization has ultimately meant subjecting state-owned companies to private competition and private markets. The firms are thus hybrids that have characteristics of both public and private companies.²¹⁴ Unlike other transitional economies, such as the Russian

²⁰⁶ *Id.* at 557.

²⁰⁷ Xing, *supra* note 26, at 11.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ JACQUES, *supra* note 24, at 184.

²¹¹ *Id.*

²¹² Gordon Redding and Michael A. Witt, *Post-Transition China* 8 (Faculty Research Working Paper 2010/25/EPs/EFE, Apr. 14, 2010), forthcoming in PETER SHELDON, SUNGHOON KIM, YIQIONG LI, AND MALCOLM WARNER (EDS.), *CHINA'S CHANGING WORKPLACE* (Mar. 31, 2011), available at <http://ssrn.com/abstract=1590267> (citing K.S. TSAI, *CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA* (2007)).

²¹³ *Id.*

²¹⁴ JACQUES, *supra* note 24.

Federation, China has never aspired to complete privatization of business.²¹⁵ In the course of these business reforms, redundant workers were laid off, and all social welfare functions such as provision of housing, schools, hospitals, and pensions were removed from the SOEs to the government.²¹⁶

The statistics confirm that as a result of these reforms, SOEs became smaller in number but larger in assets and in profitability. From 1998 to 2007, the number of state-owned firms shrank from 64,737 to 20,680, and the percentage of the labor force from 60.5 to 22.1. However, total assets more than doubled, from 7.5 trillion Yuan to 15.8 trillion, and profits from 52 billion to 1.1 trillion.²¹⁷

These reforms were imbued with a profound political purpose: to promote economic growth and social harmony and preserve the power of the Communist Party. The large SOEs represent “state tools toward driving economic development and a Chinese presence in [strategic] industries.”²¹⁸ Business therefore is directed to meet the “state’s development goals,” not just serve the financial interests of the business sector.²¹⁹ Sectors such as retail, agriculture, and service industries (other than banking) are now substantially private, while large strategic sectors like steel, aluminum, energy, transportation, communications, and banking remain government-owned.²²⁰ Government policy is to retain state control in these strategic industries as a means of maintaining socialist characteristics within a market economy—the so-called “socialist market economy.”²²¹ The state “acts as the dominant economic player and uses markets primarily for political gain.”²²² The ultimate motive is “maximizing the state’s power and the leadership’s chances of survival.”²²³

Given the political imperative of maximizing economic growth, the Chinese legal regime encourages profit-seeking in extraterritorial business without much regard for the externalities that progressive capitalism addresses. Indeed, in discrete respects, China’s system resembles the *laissez faire* against which progressivism reacted.

²¹⁵ Xing, *supra* note 26, at 12.

²¹⁶ Xing, *supra* note 26, at 11.

²¹⁷ Xing, *supra* note 26, at 12.

²¹⁸ Redding et al., *supra* note 212.

²¹⁹ BREMMER, *supra* note 25, at 134.

²²⁰ Redding et al., *supra* note 212, at 10.

²²¹ Xing, *supra* note 26, at 5. *See also* BREMMER, *supra* note 25, at 135.

²²² BREMMER, *supra* note 25, at 5.

²²³ BREMMER, *supra* note 25, at 4.

B. China's Alternative to Progressive Capitalism

The political regime that governs China's business activity – both domestic and international – stands in stark contrast to the Progressive Capitalism regime of U.S. international business law. Given the narrow focus of Chinese business regulation on promoting economic growth, China's legal regime generally includes a “proclivity for corruption . . . and human rights violations.”²²⁴ Accordingly, in the areas of this study, particularly corruption and human rights, Chinese business law is substantially silent.

1. Corruption

Ample scholarship exists on nature and magnitude of corruption in Chinese society. Scholars have identified various causes of Chinese corruption: one holds that the development of a market economy after 1978 lead to an increase in corruption, as foreign investors arrived who were willing and able to pay higher prices to obtain favorable treatment;²²⁵ another study finds a link between the relative stagnation of the salaries of public officials' incomes in relation to the managers of state-owned and private enterprises;²²⁶ yet another study looks at the lack of control and centralization in China's vast bureaucracy which lead to factional conflict at the top and at the bottom, an increase in autonomy and decrease in accountability;²²⁷ others include the lack of effective checks and balances in the national government and specifically, a lack of independence in anti-corruption agencies,²²⁸ and the deeply-rooted Chinese cultural norms of gift giving and sustaining personal relationships.²²⁹

²²⁴ Halper, *supra* note 24, at 170.

²²⁵ Kin-men Chan, *Corruption in China: a Principle-Agent Perspective*, HANDBOOK OF COMPARATIVE ADMINISTRATION IN THE ASIA-PACIFIC BASIN 308 (1999). *See also* Zengke He, *Corruption and Anti-Corruption in Reform China*, 33 COMMUNIST AND POST-COMMUNIST STUDIES, June 2000, at 248-51; XIAOBO LU, CADRES AND CORRUPTION, THE ORGANIZATIONAL INVOLUTION OF THE CHINESE COMMUNIST PARTY 18 (2000).

²²⁶ He, *supra* note 225, at 251; LU, *supra* note 225, at 190.

²²⁷ He, *supra* note 225, at 251-53; Chan, *supra* note 225, at 311-14. As one scholar famously put it, “corruption = monopoly + discretion - accountability.” ROBERT KLITGAARD, CONTROLLING CORRUPTION 75 (1988). For a broader discussion of bureaucratic and legal reforms to prevent corruption, see Sahr K. Kpundeh & Irene Hors, *Overview, in Corruption & Integrity Improvement Initiatives in Developing Countries* 11-12 (United Nations Development Programme & OECD Development Centre eds.) (1998), *available at* http://www.undp.org/oslocentre/PAR_Bergen_2002/corruption.htm#Overview.

²²⁸ He, *supra* note 225, at 253-54; LU, *supra* note 225, at 156-57.

²²⁹ He, *supra* note 225, at 175-88, 255-56.

Like virtually every country, China has domestic anti-corruption laws on the books. And on its face, the law would appear to have some teeth. The key sections of the revised criminal law dealing with political corruption are graft and bribery offenses;²³⁰ dereliction of duty;²³¹ and offenses against company and enterprise management.²³² Bribery is defined in careful detail.²³³ The offense is defined broadly: it may be committed by anyone who is a state functionary regardless of rank or position. It covers anyone performing public duties, not just government officials.²³⁴ It covers either active demand or passive receipt of illegal consideration.²³⁵ It encompasses grease payments for routine or ministerial government action.²³⁶ The receipt of gifts of substantial value from foreign interests is specifically prohibited.²³⁷ While China has organized multiple political campaigns to implement this law and otherwise fight corruption in the last several decades, and Chinese government officials have periodically suggested enacting further laws,²³⁸ these have involved only the prosecution of high-profile cases involving high-profile

²³⁰ See People's Republic of China Criminal Law Art. 382-396 (1997) [hereinafter PRC Criminal Law], available at www.colaw.cn/findlaw/crime/criminallaw3.html.

²³¹ PRC Criminal Law Art. 397-419.

²³² PRC Criminal Law Art. 158-169 passim (which apply *inter alia* to management of state-owned enterprises).

²³³ PRC Criminal Law Art. 385, 387 (solicitation and/or receipt of bribes by state functionaries); PRC Criminal Law Art. 391 (offering of bribes to seek illegitimate gain)

²³⁴ PRC Criminal Law Art. 382; see also *Official Reply of Supreme People's Procuratorate Regarding Criminal Responsibility of Civilian Employees at Prison Facilities*, in FALŪ QUANSHU ZENGBIANBEN 71 (1994).

²³⁵ Jia Yu & You Wei eds., *Chinese Criminal Law* 650, 652-653 (1997).

²³⁶ See Hilary K. Josephs, *The Upright and the Low-Down: An Examination of Official Corruption in the United States and the People's Republic of China*, 27 SYRACUSE J. INT'L L. & COM. 269, 297 n.191 (2000).

²³⁷ PRC Criminal Law Art. 394.

²³⁸ In 2007, a senior court official suggested specifically criminalizing the bribing foreign officials to help fulfill the country's obligations under UNCAC. China Daily, Oct. 20, 2007, cited in UN Report at n.308. Similarly, in 2008 a member of the National People's Congress proposed enacting a more comprehensive anti-corruption law that strengthened the whistleblower and witness protection mechanisms, clarified anti-corruption powers of investigative and judicial bodies, specify punishments, and establish an effective oversight system. Discipline Inspection and Supervision Newspaper, Mar. 14, 2008, www.mos.gov.cn/Template/article/csr_display.jsp?mid=20080226027174, cited at UN Report n.309. In 2009, China issued a specific regulation to prohibit the leaders of its state-owned enterprises from abusing their power for personal gain at the expense of the state or other investors. Furthermore, on January 18, 2010, the Chinese Communist Party promulgated a revised code of conduct addressing corruption by high-ranking officials. In addition, in May 2010, the Supreme People's Procuratorate issued a circular on further strengthening the battle against serious bribery crimes. UN Report at 67.

officials.²³⁹ While various Chinese companies have been prosecuted for overseas business bribery under the laws of other jurisdictions, particularly the U.S.,²⁴⁰ and has selectively prosecuted Chinese officials for receiving bribes from foreign companies,²⁴¹ and has even prosecuted foreign companies or officers for paying bribes,²⁴² studies show that these scattered enforcement actions have not led to a decrease in perceived corruption in China.²⁴³

²³⁹ For an in-depth study of the modern history of China's corruption prosecutions and public relations efforts, and their failure to effect widespread corruption reduction, see Benjamin van Rooij, *China's War on Graft: Politico-Legal Campaigns against Corruption in China and their Similarities to the Legal Reactions to Crisis in the U.S.*, 14 PAC. RIM. L. & POL'Y J. 289, 298-308 (2005).

²⁴⁰ For example, in 2009 the U.S. Department of Justice alleged that in 2005, a subsidiary of China Communication Construction paid bribes amounting to US \$1.76 million to the son of a former Bangladesh prime minister in connection with a Bangladesh port project. U.S. Dep't of Justice, Press Release, Jan. 9, 2009, www.justice.gov/opa/pr/2009/January/09-crm-020.html. In November 2009, the accused Bangladeshi party in that case was charged with money laundering in connection with the alleged bribes. The Daily Star, Nov. 13, 2009, www.thedailystar.net/newDesign/news-details.php?nid=113862. See Fritz Heimann and Gillian Dell, *Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention* 66 (2010), available at <http://albinowhale.wordpress.com/2010/07/28/progress-report-2010-enforcement-of-the-oecd-convention-on-combating-bribery-of-foreign-public-officials/>.

²⁴¹ For example, the former general manager of the China National Nuclear Corporation is under investigation for accepting bribes from a foreign nuclear power company. Sina, Jan. 15, 2010, news.sina.com.cn/c/2010-01-15/162019477102.shtml, cited at UN Report n.300. Similarly, a former employee of Sinopec (China's petroleum and chemical SOE) was convicted of accepting bribes from the German company Daimler and was sentenced to 7 years in prison in 2006. Sohu, Mar. 25 2010, news.sohu.com/20100325/n271106990.shtml, cited at UN Report n.301. The companies IBM, NCR and Hitachi were named in a 2006 court verdict against the former president of the China Construction Bank, who was sentenced to 15 years in jail for receiving over U.S. \$500,000 in bribes. The New York Times, Oct. 30, 2006, www.nytimes.com/2006/11/30/business/worldbusiness/30iht-bank.3731302.html. A former employee of Mitsui & Co., Ltd. was also named in a 2001 court verdict in which the former vice minister of China's Ministry of Electric Power Industry was sentenced to 13 years in jail for receiving approximately US \$61,000 in bribes and offering to help win a bid. Panjueshu, Sept. 28, 2001, www.Panjueshu.com/beijing/gaoyuan/chakeming.html, cited at UN Report n.303. In 2009, Politburo member Bo Xilai led an extensive and far-reaching crack-down on corrupt public officials and gangsters in China's largest city, Chongqing, resulting in trials involving over 9,000 suspects and 50 public officials. China also made efforts to centralise its enforcement system, establishing in 2006 a working group to coordinate the relevant governmental authorities in combating commercial bribery. UN Report at 67.

²⁴² In the Rio Tinto case, four employees of that British-Australian mining firm were convicted of taking bribes of RMB 92,180,000 and stealing commercial secrets. Their sentences ranged from 7 to 14 years in prison, substantial personal fines and confiscation of personal assets. Economic Observer, May 18, 2010, www.eeo.com.cn/industry/energy_chem_materials/2010/05/18/170289.shtml. Similarly, the Foshan Bureau of

Similarly, China now has on the books two laws prohibiting overseas commercial bribery. First, China has ratified the UN Convention Against Corruption (UNCAC).²⁴⁴ While UNCAC is an important symbolic gesture, the U.N. has not enforced it to any degree and the convention has virtually no impact on international corporate conduct.²⁴⁵ Secondly, China has very recently adopted its own FCPA-type law. On February 25, 2011, China amended the above-mentioned criminal statutes to specifically prohibit the bribing of overseas government officials for business purposes.²⁴⁶ The most important amendment prohibits the giving of “property” to “any foreign public official or official of an international public organization” for “the purpose of seeking illegitimate commercial benefit.”²⁴⁷ Its jurisdiction, much like the FCPA, extends to all citizens wherever located, all natural persons within the territory of China, and all companies organized under Chinese law.²⁴⁸ However, the list of countries with such laws on the books, but without meaningful enforcement, is quite long.²⁴⁹ Moreover, as noted above, China has conspicuously failed to systematically enforce its domestic anti-corruption laws.²⁵⁰ There is no reason to think that China’s enforcement of its foreign bribery provisions will be any more rigorous than its domestic provisions. Indeed, there is much reason to think the contrary: China has an interest in

Administration Industry and Commerce forced a soft drink company to disgorge profits of RMB 650,000, and fined Pepsi RMB 50,000, for paying commercial bribes. Fujian News Network, Oct. 14, 2009, www.fjcn.com/news/2009/2009-10-14/62478.shtml, cited at UN Report n. 306.

²⁴³ Rooij, *supra* note 239, at 289.

²⁴⁴ Convention Against Corruption, G.A. Res. 58/4, arts. 15-16, U.N. Doc. A/58/4 (Oct. 31, 2003), *reprinted in* 43 I.L.M. 37 (2004) [hereinafter UNCAC]. For a complete list of countries that have ratified the UNCAC, see United Nations Office on Drugs and Crime, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Mar. 7, 2011). For background information on the UNCAC, see United Nations Office on Drugs and Crime, Background of the United Nations Convention Against Corruption, <http://www.unodc.org/unodc/en/treaties/CAC/index.html> (last visited Mar. 7, 2011).

²⁴⁵ Philippa Webb, *The United Nations Convention Against Corruption*, 8 J. INT’L ECON. L. 191, 224, 229 (2005) (lack of robust monitoring for the UNCAC means enforcement will be low and it remains to be seen whether the UNCAC is anymore than rhetoric).

²⁴⁶ Covington and Burling LLP, China Amends Criminal Law to Cover Foreign Bribery <http://www.cov.com/files/Publication/42670cdc-69c5-449f-8cca-de977578b090/Presentation/PublicationAttachment/ccc56508-172d-445a-9a57-e5552dedb517/China%20Amends%20Criminal%20Law%20to%20Cover%20Foreign%20Bribery.pdf> (last visited Mar. 5, 2011).

²⁴⁷ PRC Criminal Law Art. 164.

²⁴⁸ Covington and Burling LLP, *supra* note 246.

²⁴⁹ Find OECD report indicating that almost no one enforces the convention other than the U.S.

²⁵⁰ See UN report at 65-67.

enforcing domestic prohibitions to project a more favorable image and attract FDI, while China's lack of meaningful overseas bribery prohibitions gives it a great competitive advantage. Accordingly, despite its symbolic efforts, we have virtually no reason to doubt that Chinese companies will continue to pay bribes in developing countries without fear of penalty.

2. Human Rights

China's stance on human rights is of course well-documented and widely recognized.²⁵¹ It is no surprise, then, that China does not obligate its corporations to promote human rights norms in their extraterritorial conduct. That China has no analogue to the Alien Tort Statute is an unremarkable observation; the ATS is unique to the U.S. Less unique to the U.S. is the practice of imposing economic sanctions; there, China has a history, but it is brief and devoid of a human rights theme. Although China has imposed economic sanctions a few times since 1949, they have been few and far between, and none were related to human rights. Indeed, since the 1970s China has unilaterally imposed sanctions three times: in 1978, against Albania, in retaliation for anti-Chinese rhetoric; again in 1978, against Vietnam, to coerce that country to withdraw its troops from Kampuchea; and in 1992, against France, to protest its arm sales to Taiwan.²⁵² None were for human rights causes or any other social norms unrelated to national security.

As with Chinese corruption law, various Chinese statutes and constitutional provisions purport to prohibit employment discrimination.²⁵³ Very recently, in 2007, China passed its most rigorous and employee-friendly statute, the China Employment Promotion Law, which prohibits discrimination on the basis of ethnicity, race, gender, or religious beliefs (although not age).²⁵⁴ It specifically grants victims of discrimination access to courts, thus theoretically overcoming the principal obstacle of all previous anti-discrimination provisions in China - the lack of enforceability.²⁵⁵

²⁵¹ See Gun Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1 (1996); Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 84-142 (2005).

²⁵² HUFBAUER ET AL., *supra* note 74, at 25-30.

²⁵³ Jiefeng Lu, *Employment Discrimination in China: the Current Situation and Principle Challenges*, 32 HAMLINE L. REV. 133, 174-78 (2009). See also Kenneth A. Cutshaw, Michael E. Burke, and Christopher A. Wagner, *Corporate Counsel's Guide to Doing business in China*, 1 CORP. COUNS. GD. TO DOING BUS. IN CHINA § 15:11 (3d ed. 2010).

²⁵⁴ Jian Hang, *China to Allow Employees to Bring Discrimination Suits Against Employers*, 1681 PLI/CORP. 93 (2008).

²⁵⁵ Timothy Webster, *Ambivalence and Activism: Employment Discrimination in China* (Yale Law School Legal Scholarship Repository, Aug. 1, 2010), available at

Although a handful of lawsuits have resulted,²⁵⁶ it is not widely regarded as a meaningful deterrent to discrimination.²⁵⁷

China's income tax regime is one area where the differences with the U.S. may be merely of degree, and not of kind. In 1983 the government implemented an income taxation scheme to replace the old profit-delivery system which had allowed an SOE to keep all profits once it met a government set delivery level based on profit, output, quality, variety, and costs. This system levies an income tax on SOEs and divides after-tax profits into funds that SOEs can retain and funds that are remitted to the state.²⁵⁸

But despite glimpses of progress, China's legal regime remains substantially indifferent to these the values at the core of the U.S. regime. Meanwhile, China has gradually mounted a highly aggressive campaign of outbound foreign direct investment. The "Go Global" campaign of the late 1990s, also sometimes translated as the "Go Out" campaign, has encouraged enterprises to invest abroad.²⁵⁹ Chinese SOEs are the major players in China's increasing outbound investment activities.²⁶⁰ Since the launching of the "Go Global" Strategy, Chinese companies' interest in overseas investing has increased substantially, especially among state-owned enterprises. Statistics indicate that Chinese direct foreign investments rose from \$3 billion in 1991 to \$35 billion in 2003.²⁶¹ In the context of the 2008 financial crisis, Chinese companies significantly accelerated their outbound investment. SOEs are deployed in a coordinated manner to maximize the benefits to the domestic and foreign affairs policies of the state.²⁶² To guide and assist these companies' investment activities, the Chinese government has been actively providing regulatory, enterprise, and diplomatic support.²⁶³ The Chinese Ministry of Commerce implemented this strategy by issuing, among others,

<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1000&context=ylas>.

²⁵⁶ *Id.* at 57-62.

²⁵⁷ *Id.* at 62.

²⁵⁸ Stevens, *supra* note 202, at 556; see also WORLD BANK, CHINA AND MONG. DEP'T., REFORM AND STATE OWNED ENTERPRISES 6-13 (1996).

²⁵⁹ Larry Cata Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3, 32 (2010). See also Philip C. Saunders, *China's Global Activism: Strategy, Drivers, and Tools*, OCCASIONAL PAPER NO. 4, 12 (2006), available at <http://www.ndu.edu/inss/symposia/pacific2006/saunders.pdf>.

²⁶⁰ Catherine (Xiaoying) Zhang, BUSINESS NEGOTIATION BETWEEN WESTERNERS AND CHINESE STATE-OWNED ENTERPRISES, 42 INT'L LAW. 1303, 1305 (2008).

²⁶¹ Backer, *supra* note 259, at n.457.

²⁶² Backer, *supra* note 259, at 32.

²⁶³ Backer, *supra* note 259, at n.458.

the Procedures for the Administration of Overseas Investment, which delicately defines the relationship between the government and companies seeking outbound investments.²⁶⁴ The government's push for the development of national industry "champions" is a component of its broader political agenda of economic nationalism focused on issues of energy security, geopolitical positioning and national competitiveness.²⁶⁵ Investment is calculated to translate into long-term political influence.²⁶⁶ Nations in which China shows interest have two things in common: natural resources, and potential for new markets.²⁶⁷

China is thus investing aggressively in developing countries, and its increasing presence will lead to increasing influence over the formation of those countries' legal regimes. As the above analysis shows, Chinese companies are bound by a set of laws that are profoundly different from, if not opposed to, the laws of Progressive Capitalism. The following sections begin to explore the impact of these respective regimes on developing countries.

V. THE IMPACT OF PROGRESSIVE CAPITALISM IN DEVELOPING COUNTRIES

This section attempts to develop an understanding of the significance of the U.S.- China contrast for developing countries. The first section identifies the countries in which U.S. international business law has taken principal effect - for example, where the FCPA is enforced, where conduct giving rise to ATS litigation has occurred, or which have been the target of economic sanctions. It concludes that these laws take effect overwhelmingly in developing countries. U.S. international business law is thus, in effect, U.S. policy toward developing countries. It then details the known economic impact of these laws on such countries. Drawing on available empirical research, it demonstrates that each area of law tends, whether by design or by accident, to decrease FDI in developing countries. For economic sanctions, such an outcome is specifically intended and consistent with the law's clear objectives. For the FCPA, by contrast, whether a decrease in FDI is indeed consistent with the statute's purpose and likely to achieve its aims is a more

²⁶⁴ Backer, *supra* note 259, at 33.

²⁶⁵ Backer, *supra* note 259, at 34.

²⁶⁶ HALPER, *supra* note 24, at 105.

²⁶⁷ HALPER, *supra* note 24, at 106. "For centuries, [China] has pursued a highly extractive approach towards a natural environment which, compared with that of most nations, is extremely poorly endowed with resources, most obviously arable land and water, as measured by population density. China, for example, has only one-fifth as much water per capita as the U.S." JACQUES, *supra* note 27, at 170.

disputed question. Regardless, the U.S. model of progressive capitalism clearly leads to a reduction in FDI in countries whose laws or practices are inconsistent with specific U.S. political and social values. The question is not whether FDI reduction in developing countries occurs; the question, rather, concerns its impact.

The second section lays a theoretical foundation for addressing this question. Drawing on constructive engagement theory, it lays out the ways in which foreign direct investment from more developed nations is understood to effectuate reforms in developing countries. This theory, however, fails to account for the phenomenon described in this paper - the existence of a well-capitalized country that seeks to systematically build economic and political alliances with developing countries, but is not itself governed by liberal values. To fill this gap in the constructive engagement theory, this paper draws on political science and economics literature concerning economic sanctions, and introduces the concept of the "black knight" - a country that is not participating in the sanctions and instead moves in to supply the capital that the sanctioning countries have withdrawn. It argues that the phenomenon of the black knight is not limited to economic sanctions, but rather is now pronounced in international business law generally in ways that threaten the success of the constructive engagement aims.

A. Empirical Data: the Enforcement Concentration in Developing Countries

The areas of law included in this study fall naturally into two groups. The first category consists of laws that are principally extraterritorial in focus. These are laws that Congress designed, at their inception, to apply primarily if not exclusively to international conduct. They address very specific political conditions in particular countries, and thus apply to countries only to the extent that those countries exhibit the conditions that the law is designed to address. They include the FCPA, economic sanctions, and the ATS. Such laws would naturally take effect in particular kinds of countries - for examples, countries that egregiously violate human rights or exhibit high levels of corruption - and not in countries that do not exhibit these characteristics. The second category includes laws that were originally domestic in application but that Congress later amended to apply extraterritorially; these include employment discrimination laws and the income tax. Because they are not designed to address particular political conditions overseas, they ultimately apply to conduct in all countries equally. For example, the income tax provisions apply to business conduct in Germany in exactly the same fashion and to the same extent that they apply

to conduct in the Congo, and there is no reason to believe that taxation laws would be enforced any more aggressively or frequently in either country.

A quantitative analysis of the countries in which income tax or employment law violations have occurred would therefore yield little fruit. Accordingly, the following section focuses on the first category of laws – those that are principally extraterritorial in focus, that apply only to particular kinds of regimes, and whose enforcement will tend to concentrate in particular kinds of countries. As the following analysis shows, these laws focus almost exclusively on developing countries.

This analysis uses the World Bank’s classifications of countries based on levels of economic development, which divides all 187 member nations into three groups – low, middle, and high income . The World Bank will sometimes refer to low- and middle-income countries collectively as “developing countries,” and this paper follows that example.²⁶⁸ Each of the areas of law that are principally extraterritorial exhibits an overwhelming enforcement focus on developing countries.

The easiest of these to quantify is the Alien Tort Statute, owing to its comparatively recent resurrection. This paper looks only at cases filed against corporations; it disregards cases filed against public officials and private individuals. Plaintiffs have filed against corporations for conduct in the following countries: Argentina,²⁶⁹ Bangladesh,²⁷⁰ Burma,²⁷¹ China,²⁷² Colombia,²⁷³ Egypt,²⁷⁴ Guatemala,²⁷⁵ India,²⁷⁶ Indonesia,²⁷⁷ Liberia,²⁷⁸ Mali,²⁷⁹

²⁶⁸ For a list of these countries and a discussion of the World Bank’s methodology, see World Bank, *Country and Lending groups* (visited at Mar. 4, 2011), at <http://data.worldbank.org/about/country-classifications/country-and-lending-groups>.

²⁶⁹ *Bauman v. DaimlerChrysler AG*, No. 04-CV-00194 (N.D. Cal. filed Jan. 1, 2004).

²⁷⁰ *Doe v. Wal-Mart Stores, Inc.*, No. 05-CV-07307 (C.D. Cal. filed Oct. 11, 2005).

²⁷¹ *Doe v. Unocal Corp.*, No. 96-CV-06959 (C.D. Cal. filed Oct. 3, 1996).

²⁷² *Doe v. Wal-Mart Stores, Inc.*, No. 05-CV-07307 (C.D. Cal. filed Oct. 11, 2005); *Kasky v. Nike, Inc., et al*, S087859, 27 Cal. 4th 939 (Cal. filed April 20, 1998); *Zheng et al v. Yahoo! Inc., et al*, 08-CV-01068 (N.D. Cal. filed February 22, 2008); *Xiaoning v. Yahoo! Inc.*, No. 07-CV-02151-CW (N.D. Cal. filed Apr. 18, 2007).

²⁷³ *In re Chiquita Brands Int’l Inc.*, 08-MD-01916 (S.D. Fla. filed February 20, 2008); *Estate of Rodriguez v. Drummond Co., Inc.*, No. 02-CV-0665 (N.D. Ala. filed Mar. 14, 2002); *Romero v. Drummond Co., Inc.*, No. 03-CV-00575 (N.D. Ala. filed 2006), appealed filed No. 07-14090 (11th Cir. 2007); *Suaraz v. Drummond Co., Inc.*, No. 03-CV-1788 (N.D. Ala. filed July 11, 2003); *Baloco et al. v. Drummond Co., Inc. et al.*, No. 09-CV-00557 (N.D. Ala. filed March 20, 2009); *Mujica v. Occidental Petroleum Corp.*, No. 03-CV-02860 (C.D. Cal. filed Apr. 24, 2003); *Shiguago v. Occidental Petroleum Corp.*, No. 06-04982 (C.D. Cal. filed Aug. 10, 2006); *Carijano v. Occidental Corp.*, No. BC370828 (Cal. App. Dep’t Super. Ct. filed May 10, 2007); *Sinaltrainal v. Coca-Cola*

Nicaragua,²⁸⁰ Nigeria,²⁸¹ the Pacific Island of Saipan,²⁸² Papua New Guinea,²⁸³ Peru,²⁸⁴ South Africa,²⁸⁵ Swaziland,²⁸⁶ Turkey,²⁸⁷ and Vietnam.²⁸⁸ Each of these countries is low- or middle-income. That is, 100% of the cases alleging corporate violations of the ATS have occurred in developing countries.

The calculation of the impact of economic sanctions requires some minor methodological distinctions, but yields the same result. As discussed above, the use of sanctions by the U.S. dates back to 1917 but began to focus on human rights in the 1970s. This study will include only those sanctions whose declared purpose, as identified by Hufbauer et al,²⁸⁹ was to protest human rights abuses. The U.S. has imposed such sanctions against the following countries: Argentina (1977), Belarus (2006), Bolivia (1979), Brazil (1977), Burma (1988), Cameroon (1992), Chile (1975), China (1989), Colombia (1996), Ecuador (2000), El Salvador (1977, 1990), Ethiopia (1977), Fiji (2006), Guatemala (1977), Guinea (2002), Haiti (1987, 1991, 2001), Ivory

Co., No. 01-CV-3208 (S.D. Fla. filed July 20, 2001).

²⁷⁴ Bigio v. Coca-Cola Co., No. 97-CV-02858 (S.D.N.Y. filed Apr. 21, 1997).

²⁷⁵ Villeda Aldana v. Fresh Del Monte Produce, Inc., No. 01-CV-3399 (S.D. Fla. filed Aug. 2, 2001).

²⁷⁶ Bano v. UnionCarbide Corp., No. 99-CV-11329 (S.D.N.Y. filed Nov. 15, 1999).

²⁷⁷ Doe I v. Exxon Mobil Corp., No. 01-CV-01357 (D.D.C. filed June 19, 2001); Doe v. Wal-Mart Stores, Inc., No. 05-CV-07307 (C.D. Cal. filed Oct. 11, 2005); Kasky v. Nike, Inc., et al., S087859, 27 Cal. 4th 939 (Cal. filed April 20, 1998).

²⁷⁸ Flomo et al. v. Bridgestone Americas Holding, Inc., No. 05-CV-08168 (C.D. Cal. filed Nov. 17, 2005), transferred to No. 06-CV-00627 (S.D. Ind. Mar. 28, 2006).

²⁷⁹ John Doe I v. Nestle, S.A., No. 05-05133 (C.D. Cal. filed July 14, 2005).

²⁸⁰ Doe v. Wal-Mart Stores, Inc., No. 05-CV-07307 (C.D. Cal. filed Oct. 11, 2005).

²⁸¹ Adamu v. Pfizer, Inc., No. 04-CV-01351 (S.D.N.Y. filed Feb. 18, 2004); Bowoto v. Chevron Corp., No. 99-CV-02506-SI (N.D. Cal. filed May 27, 1999); Wiwa v. Royal Dutch Petroleum Co., No. 96-CV-08386 (S.D.N.Y. filed Nov. 8, 1996).

²⁸² Doe v. Target Corp., No. 02-CV-80049 (9th Cir.); Does v. Levi Strauss & Co., No. 03-CV-15252 (9th Cir.); Does v. Advanced Textile, No. 99-CV-16713 (9th Cir.); Doe v. Gap Inc., No. 99-CV-00329 (C.D. Cal. filed Jan. 13, 1999); Doe v. Brylane, L.P., No. 00-CV-00229 (D. Haw. filed Mar. 28, 2000); Doe v. Gap., Inc., No. 99-CV-00717 (D. Haw. filed Oct. 15, 1999).

²⁸³ Sarei v. Rio Tinto, PLC., No. 00-11695 (C.D. Cal. filed Nov. 2, 2000).

²⁸⁴ Flores v. S. Peru Copper Corp., No. 00-CV-9812 (S.D.N.Y. filed Dec. 28, 2000).

²⁸⁵ In re South African Apartheid Litig., No. 02-MD-1499 (S.D.N.Y. filed Dec. 20, 2002).

²⁸⁶ Doe v. Wal-Mart Stores, Inc., No. 05-CV-07307 (C.D. Cal. filed Oct. 11, 2005).

²⁸⁷ Turedi v. The Coca-Cola Company., No. 05-CV-09635 (S.D.N.Y. filed Nov. 15, 2005).

²⁸⁸ Kasky v. Nike, Inc., et al., S087859, 27 Cal. 4th 939 (Cal. filed April 20, 1998).

²⁸⁹ This paper relies on the characterizations of the purposes of each set of sanctions as summarized by HUFBAUER ET AL., *supra* note 74, at 24-33.

Coast (1999), Kenya (1990), Malawi (1992), Nicaragua (1977, 1992), Niger (1996), Nigeria (1993), Pakistan (1999), Paraguay (1977), Peru (1991), Poland (1981), Romania (1983), Somalia (1988), South Africa (1962, 1985), South Korea (1973), South Vietnam (1963), Sudan (1989, 2010), Thailand (1991), Uganda (1972), Uruguay (1976), Uzbekistan (2005), Zaire (1990), Zambia (1996), Zimbabwe (2002).²⁹⁰

Each of these countries is of course low- or middle-income. As with the ATS, this list does not include a single high-income country. This is hardly surprising; we all understand that the U.S. tends not to sanction countries such as the U.K. and France. Still, it bears mention in this context that quite literally all of the countries with whom the U.S. has ever ceased business relations to promote social or political goals in modern history have been developing countries.

Finally, calculating the number of FCPA violations that relate to conduct in developing countries is substantially more difficult, and requires the following analysis. In previous work, I compiled a list of countries in which alleged acts of bribery formed the basis of either a finding of liability in a civil action, a conviction in a criminal action, or a settlement of either.²⁹¹ Because these actions are frequently resolved through pleas, deferred prosecution agreements, or civil settlements,²⁹² these instances of alleged bribery are not proven. Because the defendant will sometimes settle without admitting guilt, they are not even admitted violations.²⁹³ Rather, they are allegations of bribery that ultimately formed the basis of the resolution of a legal action that was unfavorable to the defendant. I will refer to them here as “alleged violations.”

²⁹⁰ See HUFBAUER ET AL., *supra* note 74, at 24-33 for sanctions through 1999, and accompanying CD-Rom for 2002-2007. For 2007 to the present, see U.S. Dep’t. of the Treasury, Sanctions Programs, <http://www.treasury.gov/resourcecenter/sanctions/Programs/Pages/Programs.aspx> (last visited Mar. 5, 2011). This index does not include cases from the last several years in which only certain individuals and organizations of a given country are sanctioned, such as Burma or Somalia.

²⁹¹ Spalding, *supra* note 12, at 410.

²⁹² See STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 6 (2005); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1-3 (2006).

²⁹³ See Shearman & Sterling LLP, *FCPA Digest: Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, at 11-201 (2009), available at http://www.shearman.com/files/upload/FCPA_Digest.pdf, for a breakdown of bribery-related FCPA cases by criminal action, civil action brought by the DOJ, and civil action brought by the SEC. Bribery-related charges might ultimately be settled either under the bribery provisions or the books and records provisions of the FCPA. *See id.*

Each country in which an alleged violation occurred over this thirty-year period was categorized in that work as developing (low- and middle-income) or developed (high income).²⁹⁴ In total, 125 alleged violations occurred—that is, 125 separate instances in which a defendant (or group of related defendants) became liable for one or more illicit payments in a particular country related to a single commercial transaction or a set of closely related transactions. Of these 125 instances, only nine, or 7% of the total, occurred in developed countries. Of those nine, only five have occurred since ratification of the OECD convention in 1997. Not surprisingly, very little FCPA enforcement activity occurs in developed countries. However, 93% have occurred in developing countries. FCPA enforcement has concentrated in developing countries only marginally less than the ATS and economic sanctions. These areas of international business law have an exclusive, or near-exclusive, focus on developing countries.

It is of course intuitive that laws which attach severe penalties to participating in certain proscribed practices would lead to a reduction in investment in countries where those practices are relatively common. Empirical research has since confirmed this result for most much of the Progressive Capitalism paradigm. Most obvious, and foreseeable, is the impact of economic sanctions. Perhaps less dramatic, but still foreseeable and indeed confirmed by empirical studies, is the impact of the FCPA on investment in countries where corruption is more prevalent. The ATS has yet to provide sufficient data for such studies, though its impact has been the subject of some scholarly predictions.

The impact that economic sanctions have had to date on target countries is perhaps the most obvious, most easily quantified, and least contested. These numbers do not differentiate between sanctions for human rights abuses and sanctions for other purposes, but nonetheless give a general sense of the economic effects of sanctions. After years of sporadic sanctioning, the net costs increased dramatically starting in 1975. That year, the total annual costs of sanctions to all target countries was \$2.4 billion. Five years later, as the Carter Administration escalated the use of sanctions, particularly for human rights abuses, total annual costs became \$6.8 billion. The costs of sanctions reached a zenith in the 1990s, when annual costs in 1990 were \$28.9 billion, in 1995 were \$30.8 billion, and in 2000 were \$27

²⁹⁴ The categorizations of various countries, and the number of alleged violations that occurred in each, are provided in the appendix.

billion.²⁹⁵ This data is unsurprising: an economic sanction, by design, is a substantial withdrawal of investment from a targeted country.

Not so with the FCPA, where the potentially negative impact on FDI is not self-evident, but has been the subject of two principal empirical studies. In 1995, not quite twenty years after enactment of the FCPA and three years prior to the OECD treaty ratification, James Hines of the John F. Kennedy School of Government offered the first major contribution to the theory that anti-bribery legislation deterred investment in countries where bribery is perceived to be relatively prevalent.²⁹⁶ Hines analyzed the impact of the FCPA on U.S. investment by looking at four indicators of U.S. business activity: foreign direct investment,²⁹⁷ capital-to-labor ratios,²⁹⁸ and levels of joint-venture activity post-1977.²⁹⁹ Although prior studies had suggested that the FCPA had no measurable impact on foreign investment,³⁰⁰ Hines moved beyond prior scholarship by distinguishing the impact of the FCPA from other unrelated factors.³⁰¹ He found that by each of these measures, U.S. business activity in corrupt countries showed “unusual declines” after 1977.³⁰² Foreign direct investment (FDI) grew substantially more rapidly after 1977 in less-corrupt countries than in more corrupt countries, after controlling for GDP growth and total FDI.³⁰³ Similarly, the median capital-to-labor ratio for corrupt high-growth countries fell slightly in the years after the FCPA, whereas it rose in less-corrupt countries.³⁰⁴ With respect to aircraft exports, while the U.S. share of the world’s exports declined in the years following the

²⁹⁵ HUFBAUER ET AL., *supra* note 74, at 18.

²⁹⁶ James R. Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977* (Nat’l Bureau of Econ. Research, Working Paper No. 5266, 1995), available at <http://www.nber.org/papers/w5266.pdf>.

²⁹⁷ *Id.* at 6. Because the threatened penalties of the FCPA raise the costs of doing business in higher risk countries, Hines reasoned that one possible impact of the FCPA would be a reduction in such business.

²⁹⁸ *Id.* at 11. Which could be reduced as a result of the FCPA if firms conclude that an equally effective alternative to bribing local politicians would be to hire larger numbers of their constituents.

²⁹⁹ *Id.* at 14.

³⁰⁰ See, e.g., Paul J. Beck, Michael W. Maher & Adrian E. Tschoegl, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL & DECISION ECON. 295, 301 (1991); John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. INT’L BUS. STUD. 107-11 (1984). For Hines’ critique of the previous methodologies, see Hines, *supra* note 296, at 19 n.23.

³⁰¹ Hines, *supra* note 296, at 2.

³⁰² Hines, *supra* note 296, at 1.

³⁰³ Hines, *supra* note 296, at 10.

³⁰⁴ Hines, *supra* note 296, at 12.

FCPA, it declined much more significantly, almost four times as much, in corrupt countries relative to less-corrupt countries.³⁰⁵

Hines' analysis of the impact of anti-bribery legislation on investor countries was limited to the United States for the obvious reason that it was the only country with such legislation at the time of his study. Once that changed with ratification of the OECD convention, a new data set became available, and this data was analyzed for similar trends by Alvaro Cuervo-Cazurra, an M.I.T.-trained economist at the Darla Moore School of Business at the University of South Carolina. In his first article on the subject, Cuervo-Cazurra essentially confirmed and expanded upon Hines' thesis.³⁰⁶ Cuervo-Cazurra's study was narrower than Hines' in that he focused exclusively on FDI, but broader in that Cuervo-Cazurra used data on bilateral FDI inflows from 183 home economies to 106 host economies with varying quantified corruption levels.³⁰⁷

Cuervo-Cazurra found that the phenomenon of businesses from countries with anti-bribery legislation investing less in highly corrupt countries was not limited to the United States. Rather, high levels of corruption in a host country generally resulted in less FDI from signatories to the OECD convention.³⁰⁸ The same phenomenon that Hines identified with respect to the United States thus became more widespread as a result of the OECD convention. The underside of the phenomenon that Hines first identified—countries that are not bound by anti-bribery legislation continue to invest in corrupt countries—was likewise confirmed by Cuervo-Cazurra. Post-OECD, as signatory countries invested less in corrupt countries, countries with higher levels of corruption received relatively more FDI from countries with similarly higher corruption levels.³⁰⁹ The result of these trends is that as anti-bribery legislation became more widespread, corrupt countries received less

³⁰⁵ Hines, *supra* note 296, at 17.

³⁰⁶ Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. Int'l Bus. Stud. 807, 814 (2006). Cuervo-Cazurra further noted that Hines' study had become subject to various methodological disputes, as noted in Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1 (2000). Cuervo-Cazurra believed that he had improved upon Hines' methodology and yet confirmed the results. See Cuervo-Cazurra, *supra* at 808-09. Again, evaluating these methodologies is not the purpose of this article.

³⁰⁷ *Id.* at 811.

³⁰⁸ *Id.* at 807-08.

³⁰⁹ *Id.* at 808.

of their FDI from less-corrupt countries and more of their FDI from more-corrupt countries.³¹⁰

Cuervo-Cazurra further expanded this analysis in a follow-up article published in 2008,³¹¹ which had two major conclusions concerning the impact of anti-bribery legislation on levels of FDI in relatively corrupt markets. First, he was able to verify and restate the conclusion of his previous article—that countries that implemented the OECD convention had become “more sensitive” to corruption and had reduced their FDI in more-corrupt countries.³¹² Second, he proposed a modification of Hines’ original thesis. He concluded that prior to the OECD convention, U.S. investors were not in fact investing less in corrupt countries, but that they began investing less after the ratification of the OECD.³¹³ In other words, the FCPA standing alone did not induce U.S. investors to invest less in corrupt countries, but rather the OECD induced both U.S. and other OECD signatories to invest less.

This article need not consider whether Cuervo-Cazurra’s methodology is more reliable than Hines’ in evaluating the impact of the FCPA prior to the OECD convention. The relevant conclusion from these studies is that the latest empirical studies suggest that anti-bribery legislation has a deterrent effect on investment in countries where bribery is perceived to be more prevalent. Moreover, countries that are more tolerant of corruption fill the FDI void. As the following section will show, the patterns of FCPA enforcement to date suggest that emerging markets are the countries where investment will be most deterred as a result of continued enforcement.

The impact of the ATS is perhaps the least certain, as no empirical data exists on the impact it may have had since its relatively recent rebirth. However, its likely impact has been estimated in one study. It found that more than 180,000 export-related jobs are at risk, reflecting the possible loss of U.S. exports. Looking at the impact on U.S. trade and foreign direct investment, it estimated a loss of as much as \$23 billion in U.S. exports. As much as 25% of all U.S. oil and mineral imports, amounting to \$37 billion, could be disrupted, and U.S. foreign direct investment stocks could decline by over \$50 billion. The countries in which ATF cases have occurred or are likely to occur could lose \$270 billion of FDI, putting nearly 2 million jobs at risk, reducing commerce by \$20 billion, and reducing GDP by more than

³¹⁰ *Id.*

³¹¹ Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT’L BUS. STUD. 634 (2008).

³¹² *Id.* at 644.

³¹³ *Id.* at 645.

\$50 billion.³¹⁴ These numbers are of course disputed; Harold Koh recommends a much more conservative attitude (although proposing no alternative methodology) for estimating ATS impact.³¹⁵

Regardless of the exact quantity, there can be no dispute that rigorous enforcement of the ATS will tend to diminish U.S. FDI in developing countries, much like economic sanctions always have and the FCPA has more recently. The impact that the withdrawal of FDI will have in developing countries today can be understood by drawing on two literatures from economics and political science: constructive engagement theory and, from economic sanctions, the concept of the “black knight.”

B. Constructive Engagement Theory and the Problem of the “Black Knight”

The “constructive engagement” theory, also known as the “developmental model,” holds that foreign direct investment in developing countries can and does stimulate reform.³¹⁶ Such reforms can occur in any or all of several ways. The first is educative; as western companies interact with foreign government officials, private companies, and even their own foreign employees, they impart democratic values and in reverse, help to integrate those regimes into the global community.³¹⁷ Companies will also push more forcefully for reforms that at very least create a more favorable business environment, and these tend to also promote other related social values.³¹⁸ The second is reputational; as companies find that their economic development hinges on FDI which in turn hinges on their reputations as a reliable and profitable investment destination, they will implement

³¹⁴ HUFBAUER ET AL., *supra* note 74, at 38-39.

³¹⁵ See Koh, *supra* note 9, at 263-74 (arguing that the detrimental economic effect of ATS litigation is overstated).

³¹⁶ Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 209 (2008).

³¹⁷ *Id.* at 219-20. See also Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS. & DEV. L.J. 1, 5-6 (2002); Mark B. Baker, *Flying Over the Judicial Hump: a Human Rights Drama Featuring Burma, the Commonwealth of Massachusetts, the WTP, and the Federal Courts*, 32 LAW & POL'Y INT'L BUS. 51, 81 (2000) (both contain good summary of constructive engagement with citations); KARL SCHOENBERGER, *LEVI'S CHILDREN: COMING TO TERMS WITH HUMAN RIGHTS IN THE GLOBAL MARKETPLACE* 112 (2001).

³¹⁸ Herz, *supra* note 316, at 221; see also David L. Richards et al., *Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries*, 45 INT'L STUD. Q. 219, 222, 235 (2001).

appropriate reforms that generally include political liberalization.³¹⁹ Third, foreign investment can stimulate the growth of a middle class that will agitate for political freedoms.³²⁰

The literature is founded on two critical, and now uncertain, premises. The first is that capital-exporting nations have more progressive legal regimes than the developing countries in which they operate – that the capital-rich countries can help to liberalize the countries whose legal systems are still transitional. The second is that the companies from these countries have a powerful tool at their disposal: the threat of withdrawing FDI. Companies can demand reforms in developing countries for the very reason that the developing country wants and needs the capital. The supply of capital is the incentive that these companies can offer; the withdrawal of capital is the threat that they can leverage to achieve the needed reforms.

While these two premises may have been largely true in times past, among the most basic claims of this paper is that they cease to be true now. Today, China is the best, but not the only, example of a capital-rich country with an aggressive foreign policy but with an alternative legal regime. If a company bound by the legal obligations of progressive capitalism withdraws its FDI, Chinese companies can move in and fill the void. The leverage that U.S. companies historically held is undermined by the rise of China. While the legal literature has yet to acknowledge and come to terms with this fact, literature from the fields of political science and economics can fill in our understanding significantly.

Economic sanctions, a subject of abundant political science and economics scholarship, have historically often failed due to the phenomenon of the “black knight.”³²¹ These are powerful wealthy allies of the target country that move in to fill the void that the sanctions create. This dynamic plays out most powerfully where large powers are engaged in ideological struggles and are competing for influence in transitional countries, such as US sanctions against Cuba and Nicaragua in which the Soviet Union played the black knight, or Soviet sanctions against Yugoslavia and Albania, in which the roles were reversed.³²² In the post-Cold War world, black knights – principally China – have opposed U.S. sanctions efforts with significant effect

³¹⁹ Herz, *supra* note 316, at 220-21; *see also* WESLEY T. MILNER, ECONOMIC GLOBALIZATION AND RIGHTS: AN EMPIRICAL ANALYSIS, IN GLOBALIZATION AND HUMAN RIGHTS 77, 80, 88 (Alison Brysk ed. 2002).

³²⁰ Herz, *supra* note 316, at 221; *see also* Forcese, *supra* note 317, at 10-17.

³²¹ *See* HUFBAUER, ET AL., *supra* note 74, at 8.

³²² HUFBAUER, ET AL., *supra* note 74, at 8.

in Iran and Burma.³²³ An example with very different ideological fault lines is the Arab boycott of Israel, in which the U.S. was the black knight.³²⁴ For the target of sanctions, accepting the support of a black knight is frequently the relatively easier and more economical way to avoid the harmful effects of the sanctions.³²⁵ The black knight effect has proven historically to be less effective where the sanctioning countries already have something of a political alliance, while the effect is especially pronounced where the sender lacks a strong relationship with the target.³²⁶ The duration of a sanctions episode also correlates with the presence of black knights. When such countries intervene, the sanctions are of course less effective and the sender country will therefore extend the sanctions far longer than if no black knights existed. Historically, sanctions with black knights last roughly twice as long as sanctions without them.³²⁷ The assistance of black knights “erodes the chances of success and, given the reluctance of most senders to admit failure and lift sanctions, contributes to episodes that drag on indefinitely.”³²⁸ Put another way, “too many cooks opposing sanctions can spoil the sender’s broth.”³²⁹ Moreover, the presence of black knights tends to “bolster the target government’s standing at home and abroad.”³³⁰

This black knight phenomenon is likewise visible, with alarming intensity, in the anti-corruption context. Hines noted that while U.S. commercial engagement in corrupt countries dropped significantly as a result of the FCPA, no evidence exists to suggest that total foreign business activity in such countries dropped; rather, other firms that were not constrained by anti-bribery legislation apparently took the place once occupied by U.S. companies.³³¹ He noted that the principal effect of the statute was to divert U.S. investments to less-corrupt countries, and in more-corrupt countries to effectively “encourag[e] ownership substitution between [U.S.] and foreign investors.”³³² Cuervo-Cazurra predicted that corruption-prone countries would increasingly turn to companies from countries without effective anti-corruption measures for the capital that the U.S. and its allies become uncomfortable providing.

³²³ HUFBAUER, ET AL., *supra* note 74, at 175.

³²⁴ HUFBAUER, ET AL., *supra* note 74, at 8.

³²⁵ HUFBAUER, ET AL., *supra* note 74, at 47.

³²⁶ HUFBAUER, ET AL., *supra* note 74, at 163.

³²⁷ HUFBAUER, ET AL., *supra* note 74, at 172.

³²⁸ HUFBAUER, ET AL., *supra* note 74, at 172.

³²⁹ HUFBAUER, ET AL., *supra* note 74, at 175.

³³⁰ HUFBAUER, ET AL., *supra* note 74, at 175.

³³¹ Hines, *supra* note 296, at 19-20.

³³² Hines, *supra* note 296, at 20.

The Organization for Economic Cooperation and Development³³³ has adopted a convention³³⁴ that calls on member nations to enact legislation that very closely resembles the FCPA.³³⁵ All OECD members, and several other nations, have indeed enacted such legislation. While supporters of the convention hail it as the solution to global corruption,³³⁶ two reasons counsel caution, one of which is temporary and the other potentially permanent. The temporary reason is that no other OECD nation has come even remotely close to enforcing its statute to the extent that the U.S. enforces the FCPA. Statistics on the volume of anti-corruption enforcement actions from other countries remain astonishingly low.³³⁷ To be optimistic, though, countries such as Germany and the U.K. are beginning to follow the U.S. lead, and will likely continue to do so; it may well be simply a matter of time before most of the major capital exporters in the OECD meaningfully enforce their FCPA-type statutes.

But the second problem will prove trickier. When the OECD adopted its convention in 1997, its ranks included virtually all significant exporters of capital in the world. Since 1997, however, the world has changed in dramatic and irreversible ways. Most notable has been the emergence of the BRICs, an acronym coined by Goldman Sachs to describe the four biggest emerging markets - Brazil, Russia, India, and China. In 1997 these four countries were not yet described as BRICs and exported little capital; they were instead regarded as promising investment destinations, as

³³³ For a brief overview of the OECD, see the Organization For Economic Cooperation and Development, About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html (last visited Mar. 7, 2010); see also Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 485-86 (2000); James Salzman, *Decentralized Administrative Law in the Organization for Cooperation and Development*, 68-AUT LAW & CONTEMP. PROBS. 189, 190-217 (2005) (detailing the history and structure of the OECD while also providing several case studies).

³³⁴ OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, reprinted in 37 I.L.M. 1 (1998), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

³³⁵ The OECD convention resembles the FCPA. See Crutchfield et al., *supra* note 333, at 501-12. In 1998 the FCPA was amended to more closely resemble the OECD convention, see FCPA Enforcement, http://www.fcpaenforcement.com/documents/document_detail.asp?ID=713&PAGE=4 (last visited Mar. 7, 2011).

³³⁶ See e.g., Crutchfield et al., *supra* note 333, at 523-24; Anne Janet DeAses, Note, *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process*, 34 PUB. CONT. L.J. 553, 570-71 (2005).

³³⁷ Transparency International, OECD Progress Report, http://www.transparency.org/news_room/latest_news/press_releases/2010/2010_07_28_oecd_progress_report (last visited Mar. 7, 2011).

importers of capital but not exporters. This has changed, as these countries increasingly export capital and otherwise command increasing influence in the major global financial institutions.

None of the BRICs is a member of the OECD. The organization has nonetheless actively lobbied each of these countries to enact FCPA-type legislation. Russia and India have notably declined.³³⁸ While Brazil³³⁹ and China³⁴⁰ have enacted such laws, the list of countries that have done the same but taken absolutely no enforcement action is quite lengthy. China thus stands to remain a black knight in international business for the foreseeable future. The following section begins to wrestle with this difficult fact.

VI. CONCLUSION: AVOIDING A RACE TO THE BOTTOM

On the broad spectrum of economic ideology - a radical commitment to small government and economic liberty lying at one pole, and the dominant state presence of 20th century communism lying at the other - the U.S. and China originally occupied either extreme. At their respective revolutions, the U.S. embodied the principles of natural rights and limited government,³⁴¹ while China sought to build a Soviet-style planned economy.³⁴² But for each country, a series of political and economic crises would draw it away from the extremes and toward the center. In the U.S., the Civil War, Great Depression, civil rights movement, Watergate, and the accounting scandals of the 1990s would successively enlarge the power of the federal government and expand the federal regulation of commercial affairs. On the opposite side of the spectrum, and the globe, China would experience economic stagnation, the failed economic reforms of the Great Leap Forward, the atrocities of the Cultural Revolution, and finally, the death of Mao.³⁴³ China

³³⁸ For OECD activity with these and other countries, see OECD, OECD Enlargement, http://www.oecd.org/document/35/0,3343,en_2649_34487_38598698_1_1_1_1,00.html (last visited Mar. 7, 2011).

³³⁹ C.C. Law No. 10.467 (Br); C.P. Law No. 9.613 (Br). For more information on the Anti-Bribery legislation in Brazil, see OECD, Brazil - OECD Anti-Bribery Convention, http://www.oecd.org/document/26/0,3746,en_2649_37447_44571034_1_1_1_1_37447,00.html (last visited Mar. 7, 2011).

³⁴⁰ PRC Criminal Law, *supra* note 247.

³⁴¹ See, e.g., Charles J. Cooper, *Limited Government and Individual Liberty: the Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63 (1987); Patrick M. Garry, *Liberty Through Limits: the Bill of Rights as Limited Government*, 62 SMU L. REV. 1745 (2009); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005).

³⁴² ARIF DIRLIK, *MARXISM IN THE CHINESE REVOLUTION* (2005); FRANK N. TRAGER, *COMMUNIST CHINA, 1949-1969* (1970).

³⁴³ See, e.g., RODERICK MACFARQUHAR AND JOHN K. FAIRBANK, *THE CAMBRIDGE HISTORY OF CHINA: REVOLUTIONS WITHIN THE CHINESE REVOLUTION* (1992);

would then undertake to promote economic development by limiting the government's role in economic regulation, while the role of the U.S. federal government was expanding.

Today, in the sphere of international business, these two nations have not merely met in the middle of that ideological spectrum; rather, they have passed each other. With respect to the areas of business law described in this Article, the U.S. now stands for the aggressive use of the state's coercive power to direct corporate conduct toward social goals that are not narrowly related to the market. Meanwhile, China has sought to reduce such restraints in the name of maximizing economic growth to forestall social unrest and preserve the Communist Party's power. In the U.S., the liberal ideals of Adam Smith and Thomas Jefferson³⁴⁴ would be supplanted by administrations of two Roosevelts³⁴⁵ and Jimmy Carter;³⁴⁶ while the revolutionary communalism of Marx, Lenin, and Mao would be displaced in China by the pragmatic reforms of Deng Xiaoping³⁴⁷ and his successors. Hence the irony of international business law: while U.S. law now obligates corporations to pursue the social goals of combating corruption and promoting human rights, the Chinese legal regime permits and even encourages profit-seeking with scant regard for social impact.

But the irony of international business law has an additional dimension. The above section demonstrates³⁴⁸ that as the U.S. enforces progressive capitalism with threat of severe penalty, U.S. companies inevitably invest less in countries whose practices are most inconsistent with progressive values. Sometimes, these companies will consciously accept the risk, move forward with business plans, potentially aspire to push for reforms, and certainly hope to avoid entanglement in prohibited business practices. But as

MAURICE MEISNER, *MAO'S CHINA AND AFTER: A HISTORY OF THE PEOPLE'S REPUBLIC* (3rd ed.) (1999).

³⁴⁴ See, e.g., DUMAS MALONE, *THOMAS JEFFERSON AND THE RIGHTS OF MAN* (1974); JERRY Z. MULLER, *ADAM SMITH IN HIS TIME AND OURS* (1995).

³⁴⁵ See, e.g., WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* (1963); EDMUND MORRIS, *THEODORE REX* (2001); GEORGE E. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* (2001); ERIC RAUCHWAY, *THE GREAT DEPRESSION AND THE NEW DEAL* (2008).

³⁴⁶ GARY M. FINK AND HUGH DAVIS GRAHAM (eds.), *THE CARTER PRESIDENCY: POLICY CHOICES IN THE POST-NEW DEAL ERA* (1998); David F. Schmitz and Vanessa Walker, *Jimmy Carter and the Foreign Policy of Human Rights: the Development of a Post-Cold War Foreign Policy*, *Diplomatic History* (2004) at 113-143.

³⁴⁷ See, e.g., RICHARD EVANS, *DENG XIAOPING AND THE MAKING OF MODERN CHINA* (1993); BELTON M. FLEISHER, ET AL., *POLICY REFORM AND CHINESE MARKETS: PROGRESS AND CHALLENGES* (2008); ROSS GARNAUT, *CHINA'S THIRD ECONOMIC TRANSFORMATION* (2004); XIAOHUI LIU, *CHINA'S THREE DECADES OF ECONOMIC REFORMS* (2010).

³⁴⁸ See *supra* Part V.B.

both the empirical literature and common sense would confirm, some companies will deem the risk too great, and decline to invest. This FDI void is then filled by companies from countries that lack such prohibitions. Drawing on the theoretical resources of the economics and political science literature discussed above,³⁴⁹ the emergence of a powerful black knight thus thwarts the constructive engagement enterprise. Accordingly, the over-aggressive enforcement of prohibitions on corruption and human rights violations can create the very conditions in which these practices thrive.

Imagine, then, another spectrum, representing the range of approaches to the enforcement of U.S. international business law. At one end lies the most severe enforcement regime, designed to incentivize maximum compliance with progressive values. At the other end of this spectrum lies an utterly lax enforcement regime with minimal deterrent value. From the perspective of the U.S., these extremes are of course significantly different in practice: they make the difference between socially responsible, and irresponsible, conduct. However, from the perspective of the developing countries in which these businesses operate, the two extremes of the enforcement spectrum actually produce substantially similar results. When U.S. enforcement becomes so severe that U.S. companies can no longer afford the risk of doing business in developing countries, their withdrawal creates a void that Chinese companies can exploit. Because these companies are not bound by such laws, they behave just as U.S. companies would behave if the laws of U.S. progressivism were not enforced at all. On either side of the spectrum, the developing country is left to be ravaged by socially irresponsible business conduct.

The solution to the problem outlined in this paper lies in striking the delicate balance between enforcing progressive norms and enabling constructive engagement. The cynic may immediately retort that any talk of “balance” merely speeds the race to the bottom. Not so. The law must continue to punish bribery and complicity in human rights abuses, but it must do so in a manner that further encourages, rather than deters, investment in developing countries. Conversely, the law can neither let egregious corporate misconduct go unpunished, nor leave developing countries vulnerable to the predatory practices of companies that lie outside U.S. jurisdiction. How this might be achieved is a question that is extraordinarily rich in theoretical, doctrinal, and empirical future research.

³⁴⁹ *Id.*