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A GAME THEORETIC ANALYSIS OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

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ABSTRACT

This paper uses game theory to understand why members of the Organization of American States adopted the Inter-American Convention against Corruption of 1996 (IACAC), and why this ambitious international convention has apparently failed to curb demand-side corruption in Latin America. The crux of the argument is that the IACAC has been ineffective, largely because the payoffs that drove its adoption are not aligned with the payoffs of the government officials whose conduct is subject to its substantive provisions. Domestic enforcement efforts have failed to reduce the demand for bribes. Latin American states should consider exogenous and multilateral enforcement strategies, such as leveraging the enforcement regime under the United States' Foreign Corrupt Practices Act, to create a credible threat of sanctions.

KEYWORDS: Anti-corruption treaties, game theory, collective action

I. INTRODUCTION

Recent corruption scandals across Latin America have put the fight against public corruption back on center stage in the region. In Guatemala, President Otto Pérez Molina resigned after facing charges of "corruption related to a customs fraud ring that gave discounts on import tariffs to companies in exchange for kickbacks."[1] Prosecutors are also investigating allegations he received $37.9 million in bribes "in return for construction contracts."[2] In Brazil, former President Luiz Inácio Lula da Silva faces charges for illicit enrichment in connec-

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* *The author wrote the original draft of this paper while studying at the University of California, Berkeley, School of Law.* *He thanks Professors Prasad Krishnamurthy and Andrew Guzman for their input and guidance.* *All views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, any of the institutions or persons mentioned herein.*

[1] David Luhnow, *Guatemala President Otto Pérez Molina Resigns*, WALL STREET JOURNAL (Sept. 3, 2015), http://www.wsj.com/articles/guatemala-judge-orders-detention-of-president-otto-perez-molina-1441253168.

[2] Andrew Pestano, *Ex-Guatemalan President Perez Molina facing $38M corruption investigation*, UPI (July 28, 2016), http://www.upi.com/Top_News/World-

tion with a "colossal graft scheme engulfing the national oil company, Petrobras."[3] United States authorities indicted Honduran Vice President Jaime Rosenthal on money laundering allegations "in the midst of widespread corruption scandals plaguing the Honduran government."[4] Argentina's president, Mauricio Macri, vowed to tackle this corrosive problem,[5] only to find himself embroiled in corruption allegations after the so-called Panama Papers exposed shady financial arrangements implicating prominent political figures across Latin America and around the world.[6] Indeed, corruption is an international problem that demands coordinated solutions.[7]

This essay analyzes efforts to fight transnational corruption through collective action in the Western Hemisphere, namely the Inter-American Convention against Corruption of 1996 (IACAC), S. Treaty Doc. No. 105-39, 35 I.L.M. 724 (entered into force on March 6, 1997). The first section sets the foundation for the economic analysis of transnational corruption, emphasizing the particular problems of public or demand-side corruption. The second section introduces game theory to analyze how the United States' Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1 *et seq.*, contributed to the development of the IACAC within the Organization of American States (OAS). The third section argues that the IACAC has failed to eradicate demand-side corruption, largely because the payoffs that motivated Latin American governments to ratify the convention are not aligned with the payoffs of the government officials whose conduct is subject to its substantive provisions. The final section proposes more robust exogenous and multilateral enforcement strategies, such as leveraging the FCPA's enforcement regime, to align payoffs and deter demand-side corruption.

News/2016/07/28/Ex-Guatemalan-President-Perez-Molina-facing-38M-corruption-investigation/5111469714708/.

[3] Simon Romero & Vinod Sreeharsha, *Federal Investigators in Brazil to Seek Graft Charges Against Ex-President Da Silva,* NEW YORK TIMES (Aug. 26, 2016), https://www.nytimes.com/2016/08/27/world/americas/luiz-incio-lula-da-silva-brazil-corruption-charges.html.

[4] Azam Ahmed, *U.S. Indicts Members of Powerful Honduran Family*, NEW YORK TIMES (Oct. 7, 2015), http://www.nytimes.com/2015/10/08/world/americas/us-indicts-members-of-powerful-honduran-family.html.

[5] Demian Bio, *What Are Macri's Proposals To Fight Corruption?* THE BUBBLE (Mar. 8, 2016), http://www.bubblear.com/macri-anti-corruption-bills/.

[6] AFP, *Officials in Latin America linked to 'Panama Papers,'* THE GUARDIAN (Apr. 4, 2016), http://guardian.ng/news/officials-in-latin-america-linked-to-panama-papers/.

[7] *See* Patrick Glynn, Stephen J. Kobrin & Moises Naim, *The Globalization of Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY 7 (Kimberly A. Elliott ed., 1997).

II. Demand-side Corruption and Its Economic Consequences

Corruption operates as a barrier to economic growth, distorts open markets and undermines democratic accountability and the rule of law.[8] The most pernicious form of transnational corruption is international bribery, which typically involves unauthorized payments by multinational companies to foreign government officials, including employees of state-owned companies, in exchange for commercial contracts, access to valuable resources, entry into profitable markets or exemption from costly regulations.[9] The World Bank estimates that about five percent of the world's exports – $50-80 billion a year – is siphoned off by corrupt officials in developing countries.[10]

On the demand side, the takers of bribes are usually bureaucrats who act as agents of their respective governments.[11] The principal is the citizenry, represented by democratically elected officials who are responsible for supervising the agents. An imperfection of this principal/supervisor/agent relationship is that elected officials may shirk their duty to monitor and disclose acts of corruption and collude with corrupt bureaucrats instead.[12] In an ideal world, bureaucrats would seek to maximize social welfare "so that their objectives would be perfectly matched with those of society."[13] In practice, however, "bureaucrats have, like most other economic actors, an agenda of their own, and monetary income is certainly one of the arguments of their objective function."[14]

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[8] Roger Bowles, *Corruption, in* Encyclopedia of Law and Economics 460, 475 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), http://encyclo.findlaw.com/8500book.pdf (surveying the economic consequences of corruption); *see also* Susan Rose-Ackerman, *The Political Economy of Corruption, in* Corruption and the Global Economy 31, 32 (Kimberly A. Elliott ed., 1997) (hereinafter "Rose-Ackerman, *Political Economy of Corruption*").

[9] Organisation for Economic Co-operation and Development, *OECD Foreign Bribery Report* 5 (2016), http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-foreign-bribery-report_9789264226616-en#page5.

[10] *Id.*

[11] Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 Ann. Rev. of L. & Soc. Sci. 217, 218 (2010) [hereinafter "Rose-Ackerman, *Law and Economics of Bribery*"]; *see also* Susan Rose-Ackerman, *The Economics of Corruption*, 4(2) J. of Pub. Econ. 187 (1975) [hereinafter "Rose-Ackerman, *Economics of Corruption*"] (assuming only one principal agent relationship in a corrupt transaction, the relation between the corrupt official and his superior).

[12] *See* Jean Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*, 2(2) J. L. Econ. & Org. 181, 184-87, 192-97 (1986); Bowles, *supra* note 8, at 460-61.

[13] Alberto Ades & Rafael Di Tella, *The New Economics of Corruption: a Survey and Some New Results*, 45 Political Studies 496, 503 (1997).

[14] *Id.*

Not all economic views of corruption are negative. The traditional debate compares corruption either to throwing sand into the gears of a country's economic engine or adding grease to its otherwise truncated bureaucratic machinery.[15] On one hand, where corruption is allowed, officials may generate bureaucratic hurdles to demand bribes.[16] On the other hand, where delays and obstacles are a result of "hyperactive social planners," corrupt bureaucrats may improve social welfare because they help companies avoid cumbersome regulations and because the bribe serves as a reward for underpaid yet efficient bureaucrats.[17] The latter is a "minority view,"[18] but some bureaucrats may nonetheless espouse it. The growing consensus is that corruption hampers economic growth and is a second-best solution for conducting business in a free and open market.[19]

Empirical research supports the claim that corruption adversely affects investment, productivity and socio-economic growth.[20] Corruption reduces incentives for investment because it increases the costs of entering a market. One study using the Business International indices of corruption found that "a one-standard-deviation improvement in the corruption index causes investment to rise by 5 percent of GDP and the annual rate of growth of GDP per capita to rise by half a percentage point."[21] In another study, corruption was negatively correlated with levels of development, as measured by the level of income per capita or years of schooling for persons over 25.[22] In other words, higher rates of corruption were linked to lower levels of development. Lastly, the misallocation of "public procurement contracts through a corrupt system may lead to inferior public infrastruc-

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[15] Jakob Svensson, *Eight Questions about Corruption*, 19 J. OF ECON. PERSP. 19, 36-37 (2005).

[16] *Id. (citing* Gunnar Myrdal, Asian Drama (1968)).

[17] *See* Nathaniel Leff, *Economic Development through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8 (1964).

[18] Bowles, *supra* note 8, at 475.

[19] *Id*. *See also* Rose-Ackerman, *Political Economy of Corruption*, *supra* note 8, at 56 (identifying corruption as "a second-best response to government failure.")

[20] *See* Paulo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditures: A Cross Country Analysis, in* CORRUPTION AND THE GLOBAL ECONOMY 83 (Kimberly A. Elliott ed., 1997); *See also* Rose-Ackerman, *Law and Economics of Bribery*, *supra* note 11, at 218 (supporting Mauro's claim that "[c]ross-country empirical research demonstrates that corruption is associated with lower levels of investment, productivity, and growth and that corruption discourages both capital inflows and foreign direct investment."); *See generally* Ray Fishman & Jay Svensson, *Are Corruption and Taxation Really Harmful to Growth? Firm Level Evidence*, 83 J. OF DEV. ECON. 63 (2007) (corruption in Uganda harms firm growth more than taxation).

[21] Mauro, *supra* note 20, at 87.

[22] Ades & Di Tella, *supra* note 13, at 498.

ture and service."[23] Government officials may select the lowest quality bidder or may allow the circumvention of regulatory safety requirements in exchange for a bribe. The detrimental effect on infrastructure, in turn, further reduces incentives to invest in the country both by foreign and domestic companies. As governments in the Americas internalized these adverse effects, fighting corruption emerged as in important political and economic strategy in the region.

III. The Global Corruption Game and the Shift towards International Collaboration

Game theory provides a helpful modeling technique for analyzing transnational corruption. Overseas bribery often involves few players and the optimal strategy for one player depends on the other players' choices.[24] The most relevant work in this field is Tarullo's essay on the enforcement of the Anti-Bribery Convention of the Organisation for Economic Co-operation and Development of 1997 ("OECD Convention"), an international agreement that focuses on eliminating supply-side corruption in overseas transactions.[25]

Tarullo tracks the payoffs that led the United States to enact the FCPA and that drove OECD member states to adopt the OECD Convention. He explains why, more than a decade later, the United States was the only country to prosecute seriously overseas bribery, putting U.S. companies at a disadvantage relative to foreign competitors.[26] To address that imbalance, Tarullo proposes multilateral mechanisms to prosecute international bribery across contracting states.[27] Building on Tarullo's framework, this section analyzes the payoffs that motivated the adoption and implementation of the IA-

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[23] Mauro, *supra* note 20, at 87.

[24] *See* Robert Cooter & Thomas Ulen, Law & Economics 33 (6th ed., 2012); *see also* Bowles, *supra* note 8, at 463 (defining corruption in terms of game theory); Xiaoyan Hao, *Analysis on Corruption and Collusive Behaviors in Government Procurement in a Game Theory Perspective*, 2 J. Of Mgmt. & Strategy 38 (2011) (using game theory to explain corruption in government procurement); John Macrae, *Underdevelopment and the Economics of Corruption*, 10 WORLD DEV. 677, 677 (1982) (asserting that "if one is interested in answering the question, what is the basis for decisions of reasonable men to be corrupt, then a game theory approach would seem to provide a useful methodology."); Era Dabla-Norris, *A Game-Theoretic Analysis of Corruption in Bureaucracies*, International Monetary Fund Working Paper WP/00/106 (2000), available at https://www.imf.org/external/pubs/ft/wp/2000/wp00106.pdf.

[25] Daniel Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 Va. J. Int'l L. 665 (2004).

[26] *Id.* at 666-667.

[27] *Id.*

CAC, beginning with a review of how the FCPA set the stage for the internationalization of the fight against corruption.

A. The United States' Unilateral Fight against Overseas Bribery

Before the FCPA, no country criminalized or sanctioned international bribery. On the contrary, many countries recognized tax deductions for overseas bribes as a cost of doing business.[28] Demand-side governments often lacked the political will and institutional know-how to combat public corruption. Absent moral constraints, multinational companies and government officials had strong incentives to be corrupt.

Tarullo characterizes companies vying for government contracts under those circumstances as players in a prisoner's dilemma, each company relying only on its own beliefs of what other companies will do.[29] Government officials also act based on what they believe other players will do. Following Tarullo's assumptions, Figure 1 demonstrates how, in a non-regulated environment, bribery is the dominant strategy for U.S. and foreign companies, as well as for government officials (lower right quadrant in Scenario A).

FIGURE 1: BRIBERY GAME BETWEEN MULTINATIONAL COMPANIES AND GOVERNMENT OFFICIALS

Scenario A: Foreign Company Bribes

U.S. Company \ Foreign Gov't Official	Refuse Bribe	Take Bribe
No Bribe	4, -2	0, 2
Bribe	4, -2	3, 2

Scenario B: Foreign Company Does Not Bribe

U.S. Company \ Foreign Gov't Official	Refuse Bribe	Take Bribe
No Bribe	4, 0	4, 0
Bribe	4, -2	6, 2

Scenario A depicts the situation in which a U.S. company believes that its foreign competitor is a committed briber, and Scenario B

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[28] Bowles, *supra* note 8, at 461. In some circles, corruption was conceived as a cultural rather than economic problem, and efforts to combat it were characterized as moral hegemony. *See* Mark Pieth, *International Cooperation to Combat Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY 119, 120 (Kimberly A. Elliott ed., 1997) (explaining that "[i]t used to be standard for business representatives in industrialized countries to refer to the endemic character of corruption in many developing countries and to claim that it was not up to them to intervene and change local customs.").

[29] Tarullo, *supra* note 25, at 669

presents the situation in which the foreign company is a committed non-briber. Economic rents from winning a government contract are set at [8] units above those available if a company pursued a different business opportunity, such as a non-government contract.[30] Bribes are fixed at [2] units.[31] Bids for large government contracts typically involve two or three companies, and their competitive advantages cancel each other out.[32] Thus, the probability that either company will win the contract is set at [.5] representing a 50 percent chance of winning the bid.[33]

In theory, regardless of whether a government official is a bribe taker or not, U.S. and foreign companies would be better off if they agreed to become cooperative non-bribers (upper quadrants in Scenario B). The expected payoff for each company would be [4] units (i.e., the economic rents from the contract [8] discounted by the chance of winning the bid [.5]). In that situation, the government official could expect [0] units of gain, because neither company would offer a bribe. Although companies could reasonably achieve this outcome through a process of repeated games whereby they could signal to each other their intent to cooperate, the competitive and random nature of international bidding makes it difficult to achieve this outcome independently.[34]

The companies' payoffs would remain constant if government officials voluntarily refused to take bribes (left quadrants in both scenarios). However, if one of the companies were a committed briber, the government official would then be giving up [2] units of personal gain. In other words, his opportunity cost in that situation would be [-2] (left quadrants in Scenario A and lower left quadrant in Scenario B). By contrast, if a government official accepts a bribe, the payoff structure changes for the official and for the companies. The government official can expect a payoff of [2] units as long as one of the companies is a briber (right quadrants in Scenario A and lower right quadrant in Scenario B). A U.S. company that abstained from bribing would risk losing the contract to a bribing competitor (upper right quadrant in Scenario A). Conversely, the bribing company could expect to gain a payoff of [6], i.e., the economic rents from the contract [8] minus [2] units for the bribe without discounting for the risk of losing the bid (lower right quadrant in Scenario B). To avoid the risk of losing the contract, U.S. and foreign companies are better off bribing and therefore securing a potential payoff of [3] units, i.e., [8] units of expected

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[30] Tarullo, *supra* note 25, at 669.

[31] *Id*.

[32] *Id*. at 669-70.

[33] *Id*.

[34] *Id*. at 670-71.

rents minus the cost of the bribe [2] discounted by the probability of winning the bid [.5] (lower right quadrant in Scenario A). Knowing that companies are in this prisoner's dilemma, the government official's dominant strategy is also bribery.

This dynamic began to change in the mid-1970s when, as a result of the Watergate Scandal, the American public learned that U.S. companies were engaged in rampant corruption at home and abroad.[35] As an "exporter" of democracy and free market economics, the United States could not accept the increased reputational costs of allowing its companies to engage in overseas bribery.[36] Spurred by foreign criticism and domestic outrage, the United States pioneered the fight against international bribery by enacting the FCPA.[37] The FCPA criminalized the act of bribing a foreign government official, and required stricter accounting and internal controls. For the most part, the FCPA did not affect companies operating outside the United States.

Members of the business community and some commentators argued that the FCPA would put U.S. companies at a serious disadvantage in overseas markets, because it only addressed the supply-side of corruption and subjected only U.S. companies to legal liability for a reportedly widespread practice.[38] U.S. companies would have to withdraw from some markets altogether, because it would be impossible to compete without bribing.[39] In Latin America, where the United States had traditionally been the most important trade partner, U.S. companies were under increasing pressure from competitors who could continue to bribe with impunity.[40] The FCPA also increased the costs

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[35] Glynn, Kobrin & Naim, *supra* note 7, at 17.

[36] Tarullo, *supra* note 25, at 673.

[37] Glynn, Kobrin & Naim, *supra* note 7, at 17.

[38] *Id*. at 18.

[39] *See* Andrew Spalding, *Unwitting Sanctions: Understanding Antibribery Legislation as Economic Sanctions against Emerging Markets*, 62 FL. L. REV. 351, 371-72 (2010).

[40] *See id*. at 397-98 (observing that the FCPA has deterred U.S. investment away from bribery prone countries, clearing the way for companies from other capital-rich countries that do not penalize overseas bribery, such as China and Russia, to enter these markets); *see also* John Paul Rathbone, *China is now region's biggest partner*, FINANCIAL TIMES (Apr. 26, 2011 https://www.ft.com/content/cce437bc-6ef5-11e0-a13b-00144feabdc0; Tyler Bridges, *China makes its move as U.S. falls back in Latin America*, MCCLATCHY NEWSPAPERS (July 8, 2009), http://www.mcclatchydc.com/news/nation-world/national/economy/article24545203.html. *But cf.* Paul Beck, Michael Maher & Adrian Tschoegl, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL & DECISION ECON. 295 (1991) (providing empirical evidence that the FCPA has negatively affected US exports to non-Latin American countries, but not to bribery-prone Latin America states).

of doing business abroad for U.S. companies, because they were now forced to spend more on compliance and monitoring measures or risk costly investigations and prosecution.[41] In essence, the United States shifted the costs of overseas bribery to U.S. companies, altering their payoffs for bribing.[42]

Under Tarullo's assumptions, U.S. companies calculate the costs of an FCPA violation, discounted by the probability of detection and prosecution, at [-10] units. United States companies would now expect the highest payoff only if foreign competitors or government officials became cooperative non-bribers (the upper left quadrant under Scenario B), an unlikely result since the foreign players could continue to engage in corrupt acts outside the FCPA's purview. To address this imbalance, the United States lobbied OECD member states to adopt the OECD Convention, purportedly to impose FCPA-type sanctions on foreign companies and make non-bribery the dominant strategy for supply-side players.[43] However, as Tarullo explains, the OECD Convention has failed to curb overseas bribery because the payoffs that motivated OECD member states to adopt the convention were not aligned with their payoffs for enforcing it.[44]

The experiences with the FCPA and the OECD Convention reveal the challenges associated with combating international bribery from the supply side only. Effective strategies to defeat transnational corruption must also address the demand side.[45]

B. Moving towards International Cooperation in the Fight against Demand-side Corruption

By the 1980s, the belief that corruption was a significant barrier to economic growth gained momentum in developing countries.[46] In Latin America, a surge of democratization brought to power new

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[41] Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES (May 6, 2010), http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket_print.html.

[42] Tarullo, *supra* note 25, at 673.

[43] *Id.* at 674.

[44] *Id*. at 674-75.

[45] *See* S. Douglas Beets, *Understanding Demand-side Issues of International Corruption*, 57 J. OF BUS. ETHICS 65 (2005); Bruce Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARVARD J. LEGISLATION 303, 361 (2012).

[46] *See* Tarullo, *supra* note 25, at 680 (noting Latin America's newfound concern over corruption's negative effects was one of the factors that pressured European states to sign the OECD Convention); Bowles, *supra* note 8, at 478-79 (finding that "corruption in LDCs [i.e., Least Developed Countries] is of particular concern" and that it "may impose greater costs [on LDCs] than [on their] counterparts in the North.").

governments that made fighting corruption an important part of their political platforms.[47] César Trujillo, an economist who was elected president of Colombia in 1990 and OAS secretary general in 1994, stated: "It is obvious that corruption is an evil that undermines the legitimacy of institutions and the rule of law. It has many social costs and harms development and economic growth."[48]

Latin American states chose to tackle corruption through the OAS. In 1992, an Argentine legal expert raised concerns over corruption's ill effects and proposed treating it as an international problem.[49] By April 1994, the Chilean delegation requested that the issue of "Probity and Civic Ethics" be included on the agenda of the General Assembly, which established a working group to study the issue within the Permanent Council.[50] While a few member states argued against international cooperation, the majority recognized that fighting corruption required collective action.[51]

The United States welcomed Latin America's interest in the subject. At a press briefing in 1994, Vice President Al Gore said that fighting corruption in the region "was an issue pushed on the agenda by Latin American countries" and that the United States was "very supportive of their initiative."[52] Less than two years later – a "record breaking speed" for a multilateral convention – twenty-one countries signed the IACAC on March 29, 1996.[53] By 2004, all member states, except Barbados and Cuba, had ratified the convention.

The IACAC was the first international anti-corruption agreement. It criminalized active and passive bribery (art. VI), international bribery (art. VIII), and illicit enrichment (art. IX), signaling a shift in the way Latin American governments calculated their payoffs from corruption. Figure 2 below illustrates the shift that motivated OAS member states to adopt the IACAC. This model maintains Tarullo's assumption that U.S. companies calculated the cost of an FCPA violation at [-10] units. For heuristic purposes, this paper assumes Latin American states expected to gain [10] units of socio-eco-

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[47] Glynn, Kobrin & Naim, *supra* note 7, at 11.

[48] César G. Trujillo, UNA DÉCADA DE TRANSFORMACIONES: DEL FIN DE LA GUERRA FRÍA A LA GLOBALIZACIÓN EN LA OEA 186 (2004) (The original quote in Spanish states: "Es evidente que la corrupción es un mal que mina la legitimidad de las instituciones y el Estado de derecho, tiene enormes costos sociales y afecta el desarrollo y el crecimiento económico.").

[49] Carlos Manfroni and Richard Werksman, THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION: ANNOTATED WITH COMMENTARY 2 (2003).

[50] *Id*.

[51] Trujillo, *supra* note 48, at 184.

[52] Press Briefing by Vice President Al Gore, U.S. NEWSWIRE, Dec. 8, 1994 WL 3825026.

[53] Trujillo, *supra* note 48, at 185.

nomic rewards from eradicating corruption. Implementation costs are set at [4] units, including [2] units of compensation to negate the bribe plus another [2] units of administrative costs. *Foreign companies outside the FCPA's reach continue to bribe.*

FIGURE 2: CORRUPTION GAME BETWEEN LATIN AMERICAN STATES AND U.S. COMPANIES

		Foreign Company Bribes: Latin American state (demand side country)	
		Anti-corruption	Corruption
U.S. Company (supply side country)	No Bribe	4, 6	0, -12
	Bribe	-12, 6	-7, -12

All else being equal, Latin American states expected to gain [6] units from implementing anti-corruption measures effectively, i.e., the socio-economic rewards from reducing corruption [10] minus the costs of implementing anti-corruption measures [4] (quadrants on the left). If they failed to address public corruption, their payoffs would decrease significantly. They would lose the [2] units diverted from public coffers in the form of bribes, and would forego the opportunity to gain [10] units of socio-economic rewards for a net loss of [12] units (quadrants on the right). Failing to address demand-side corruption also hurt U.S. companies because they would have to choose between losing government contracts (upper right quadrant) and risking FCPA sanctions for a net loss of [7] units (lower right quadrant), i.e., [8] units of rewards from a government contract minus [2] units for the bribe, discounted by a [.5] probability of winning the contract, minus [10] for the FCPA violation. Effective efforts to combat demand-side corruption would benefit U.S. companies by leveling the playing field with foreign competitors (upper left quadrant). Latin American states and U.S. companies, and by extension the United States, now shared common payoffs for combating public corruption, and thus cooperative non-bribery (upper left quadrant) became the dominant strategy in the region. The IACAC was the outcome of that strategic alignment.

Leaders from different sectors celebrated the new convention with enthusiasm. The Secretary General of the OAS exalted the convention as the most important step in fighting corruption at the international level.[54] In the United States, the American Bar Association

[54] *Id*. at 184.

endorsed the IACAC with limited reservations and urged all OAS member states, including the United States, to sign and ratify it quickly.[55] Commentators were also optimistic about the IACAC's potential to combat corruption.[56]

IV. Assessing the IACAC'S Effectiveness

March 2016 marked the IACAC's 20th anniversary, and the precise impact of this innovative convention is still unclear. The surreptitious nature of corruption makes it difficult to measure actual corruption rates.[57] Nonetheless, studies suggest that, while progress is trending in a positive direction, corruption in Latin America is still a widespread problem.[58] In its latest *Corruption Perceptions Index*, Transparency International noted "2016 was a good year in the fight against corruption in the Americas," but concluded "there is still a long way to go."[59]

Hathaway has offered several theories for understanding state compliance or non-compliance with international agreements.[60] Although her focus is on compliance with international human rights treaties, her survey of the various approaches for understanding state behavior is enlightening. Hathaway finds that in some situations countries sign international treaties without intending to comply.[61] Adoption is a strategy for gaining the benefits of being a signatory without assuming the costs of compliance. According to Tarullo, that

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[55] American Bar Association, Recommendation and Report No. 301, at 1 (1997), *available at* http://www.americanbar.org/content/dam/aba/migrated/intlaw/policy/investment/IAconventioncorruption.authcheckdam.pdf; *see also* Lucinda Low, *American Bar Association Section of International Law and Practice Report to the House of Delegates: Inter-American Convention against Corruption*, 31(4) Int'l Lawyer 1121 (1997).

[56] *E.g.*, Robert H. Sutton, *Controlling Corruption Through Collective Means: Advocating the Inter-American Convention Against Corruption*, 10 Fordham Int'l L. J. 1427 (2004); Lucinda Low, Andrea Bjorklund, and Kathryn Atkinson, *The Inter-American Convention against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 Va. J. Int'l L. 243, 291-92 (1998).

[57] Mauro, *supra* note 20, at 83.

[58] Miguel Peñalillo, *Anticorruption Programmes in Latin America and the Caribbean* 24-35 (2012), *available at* http://anti-corruption.org/pmb321/pmb/opac_css//doc_num.php?explnum_id=656.

[59] Transparency International, *Corruption Perceptions Index 2016*, http://www.transparency.org/news/feature/americas_sometimes_bad_news_is_good_news (most Latin American countries are still ranked closer to the "Highly Corrupt" end of the spectrum) (last visited Mar. 19, 2017).

[60] *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*,111 Yale L.J. 1935 (2002)

[61] *Id.* at 1940.

is precisely what happened with the OECD Convention.[62] European states did not follow through with actual enforcement, because they never internalized the perceived costs of overseas bribery the same way the United States did.[63] By signing the OECD Convention, European states were merely hoping to appease their domestic and foreign critics and take the corruption debate out of the public spotlight.[64]

While Hathaway's and Tarullo's approach may offer some insight for why some Latin American states have failed to comply with the IACAC, the convention's history points in a different direction. Unlike European states that were pressured into adopting the OECD Convention, Latin American states pro-actively pursued the IACAC's development.[65] There is no indication that external players were pressuring these countries to tackle corruption through an international agreement. On the contrary, these countries believed coordinated action had the best chance of success in the region.[66] And, they understood that there was little to be gained from adopting the convention without compliance.[67] Why, then, has the convention failed at reducing corruption or, at the very least, changing perceptions of corruption?

To date, research has revealed only one empirical study that specifically evaluates the IACAC's effectiveness. Altamirano analyzed the impact the IACAC has had on corruption perceptions and risk levels in four member states: Guatemala, Honduras, Jamaica, and Trinidad and Tobago.[68] She found that these countries' scores on perception and risk indexes did not improve, and in some instances actually worsened, after ratification.[69] Implementation through domestic legislation and anti-corruption programs did not lead to better outcomes.[70] Altamirano posits that, despite state compliance with the IACAC's legislative and programmatic objectives, the convention has not

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[62] Tarullo, *supra* note 25, at 666-80.

[63] *Id.*

[64] *Id.*

[65] *See* Bowles, *supra* note 8.

[66] *See* Manfroni, *su*pra note 49 at 6.

[67] *Id.*

[68] Giorleny Altamirano, *The Impact of the Inter-American Convention Against Corruption*, 38 U. OF MIAMI INTER-AM. L. REV. 487, 490 (2006). (relying on three of the most common corruption indexes: Transparency International's Corruption Perception Index (CPI), the World Bank's Governance Research Indicatory Country Snapshot (GRICS), and the PRS Group's International Country Risk Guide (ICRG)). All of these indexes are *subjective* measures of corruption, and do not reflect the actual rate of corruption in these countries. *Id.*

[69] *Id* at 491.

[70] *Id.*

been effective at reducing actual corruption because it failed to create a credible threat of sanctions for public officials.[71]

This paper's game theoretic analysis supports Altamirano's hypothesis. As Figure 1 demonstrates, government officials have a strong incentive to take bribes in a non-regulated environment. Figure 2 illustrates that the payoffs that motivated the IACAC's adoption are not aligned with the government officials' payoffs as depicted in Figure 1. Aligning those payoffs may be the key to unlocking the IACAC's full potential.

V. Achieving Alignment: Moving Towards Exogenous, Multilateral Enforcement Strategies

Instead of relying solely on domestic anti-corruption programs, contracting states should consider more robust exogenous and multilateral enforcement strategies to create a credible threat of sanctions and deter demand-side corruption.

Domestic anti-corruption programs face serious challenges in developing countries. For example, Becker and Stigler promoted the idea of paying bureaucrats more, especially those in areas prone to higher incidences of corruption.[72] But raising wages sufficiently high to deter grand corruption is not always feasible.[73] Other proposals involve publishing offenders' names on government or third-party websites, affecting their career prospects and reputations.[74] Given a government's "multiplicity of objectives," however, it can be difficult to identify the specific performance measures that should trigger the incentives or penalties.[75] Moreover, these programs require compliant, non-corrupt supervisors to implement them effectively.[76]

Some economists have proposed market-based solutions, arguing that bureaucratic performance depends on the market structure of the bureaucracy itself.[77] This approach calls for making institutions more open and competitive. The classic example is decentralizing a government agency that provides a public good such as a passport or permit. If an individual can obtain the same service from multiple agencies, then corrupt bureaucrats would have to compete with each

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[71] *Id.* at 492-493

[72] *See generally* Gary Becker & George Stigler, *Law Enforcement, Malfeasance and the Compensation of Enforcers*, 3 J. of Legal Studies 1 (1974).

[73] Ades & Di Tella, *supra* note 13, at 505.

[74] *Id*. at 507. For an example of a website that permits individuals to report petty corruption, *see* www.ipaidabribe.com.

[75] Ades & Di Tella, *supra* note 13, at 504-05.

[76] *Id*. at 505.

[77] Svensson, *supra* note 15, at 33-34.

other to capture a potential bribe.[78] This competition would make it more difficult to collude, thus pushing the price of bribes down to an efficient level (possibly zero).[79] One of the difficulties with this approach is that redesigning bureaucracies to act more like competitive firms often requires more resources and expertise than many developing countries can provide. Such institutional transformations would take time and large upfront investments without any guarantees of success. Also, institutional designs without supervision from outsiders do not necessarily eliminate the risk of collusion,[80] which makes domestic enforcement less likely and, therefore, less credible.

By contrast, an exogenous strategy would focus on eliminating the principal/supervisor/agent problem inherent in demand-side corruption by introducing enforcement mechanisms that are outside the control of domestic government officials. Antoci and Sacco analyzed the effects of using "an external, incorruptible supervisor" to monitor public officers in contract bidding games and concluded that, "if pushed far enough," such monitoring significantly reduces the probability of public corruption even when companies continue to bribe.[81] Along those lines, in 2001, the OAS General Assembly created a peer review Follow-Up Mechanism known as the MESICIC.[82] This multilateral committee of experts does not have any authority to investigate or prosecute individual corruption cases. It simply provides an avenue for contracting states to report on their progress towards implementation of the convention's substantive provisions.[83] The MESICIC is an important tool for monitoring progress, but falls short of creating a credible threat of sanctions for bureaucrats.

Currently, the United States has the most active and credible enforcement regime for prosecuting international corruption under the FCPA.[84] In its *2015 Year-End FCPA Update*, the U.S. law firm Gibson Dunn concluded that "the stakes for multinational companies have never been higher."[85] Indeed, strong opposition to the FCPA from the

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[78] *Id.* at 34.

[79] *Id.*

[80] Tirole, *supra* note 12, at 186-87.

[81] *See generally* Angelo Antoci and Pier Sacco, *A Public Contracting Evolutionary Game with Corruption*, 61 J. ECON. 89 (1995).

[82] Roberto De Michele, *The Follow-Up Mechanism of the Inter-American Convention Against Corruption: a Preliminary Assessment: Is the Glass Half Empty?*, 10 SW. J.L. & TRADE AM. 295, 296-97 (2004) (reviewing the history, structure and performance of MESISIC, and suggesting actions for improvement).

[83] *Id*. at 303-05.

[84] *OECD Foreign Bribery Report*, *supra* note 9, at 9.

[85] *2015 Year-End FCPA Update*, GIBSON DUNN (Jan. 4, 2016), http://www.gibsondunn.com/publications/Pages/2015-Year-End-FCPA-Update.aspx.

business the community is one indication that this law presents a credible threat of sanctions.

In a recent study, Choi and Davis analyzed FCPA actions from 2004 to 2011 and found that U.S. authorities are using the FCPA to prosecute U.S. and foreign companies with particular emphasis "on firms that do business in poor countries with weak legal institutions."[86] To the extent the United States is already playing the role of "an external, incorruptible supervisor" with respect to the suppliers of bribes, it may be able to work with Latin American states to prosecute demand-side corruption as well. For instance, consistent with the IACAC's call for "coordinated action" (Preamble), the United States could pursue foreign government officials who facilitate or conspire to carry out corrupt transactions in violation of the FCPA and related federal statutes.[87] Latin American states could agree to extradite their government officials to the United States pursuant to article XIII of the IACAC, which provides "the legal basis for extradition with respect to any offense" established in accordance with the convention's provisions, including article VI(e)'s prohibition against the "participation as a principal, coprincipal, instigator, accomplice or accessory after the fact . . . or in any collaboration or conspiracy to commit" such offenses.[88]

Another approach could be to create a new multilateral anticorruption enforcement regime modeled on the United States' international antitrust enforcement program.[89] Under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201 *et seq*., U.S. authorities may share evidence with their foreign counterparts for the purpose of enforcing foreign antitrust laws pursuant to mutual assistance agreements.[90] Similarly, U.S. authorities could share evidence with Latin American counterparts in accordance with article XIV of the IACAC, which calls for "the widest measure of mutual assistance" with regards to "investigation and prosecution" and "the widest measure of technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of

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[86] Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUDIES 409 (2014).

[87] Klaw, *supra* note 45, at 334-37 (reviewing cases brought directly against foreign officials under the FCPA and related federal laws, and concluding that the FCPA should be amended to cover foreign officials).

[88] IACAC, art. VI(e), *opened for signature* Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724.

[89] *Antitrust Division: International Program*, U.S. DEP'T OF JUST., http://www.justice.gov/atr/international-program-4 (last updated May 26, 2016).

[90] International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201 *et seq*.

corruption."[91] Latin American states could go a step further by accepting as *prima facie* evidence of corruption any U.S. judgment or settlement resulting from an FCPA investigation that implicate their government officials. Domestic prosecutors could rely on those cases to bring charges against bureaucrats suspected of taking bribes. The bureaucrats would then have the burden of disproving the allegations in accordance with domestic law.

For an added layer of external pressure, OAS member states could link these multilateral enforcement efforts to the MESICIC to emulate the way the United States coordinates with the OECD and the International Competition Network in the context of antitrust enforcement initiatives. For starters, the United States could notify the MESICIC of any FCPA judgment or settlement, and Latin American states who failed to investigate any allegations lodged against their government officials in those proceedings would have to justify such failure during their periodic review.

In line with these exogenous and multilateral enforcement strategies, Figure 3 below shows the shift towards non-bribery that occurs when government officials perceive a credible threat of sanctions. Bribes remain at [2] units. Like U.S. companies, foreign government officials would calculate the cost of an FCPA violation, discounted by the probability of detection and prosecution, at [-10] units. A country's socio-economic rewards from eliminating corruption stay fixed at [10] units. An external enforcement strategy would also result in some savings for Latin American states, at least initially, because the threat of sanctions would be high enough to deter government officials from taking bribes without needing to spend the additional [2] units in compensation to negate the bribe. Thus, Latin American states would only incur administrative costs of [-2] units, rather than the [-4] units needed to implement domestic anti-corruption programs effectively.

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[91] IACAC, art. XIV, *opened for signature* Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724.

FIGURE 3: ENFORCEMENT GAME BETWEEN LATIN AMERICAN STATES AND GOVERNMENT OFFICIALS

		Latin American state (principal): External Enforcement	Latin American state (principal): Domestic Enforcement
Gov't Officials (supervisors/ agents)	No Bribe	0, 8	0, 8
	Bribe	-10, 8	2, -12

Under a domestic enforcement regime, Latin American states could expect a positive payoff only if their bureaucrats voluntarily became committed non-bribers (upper right quadrant). But if bureaucrats continued to take bribes in furtherance of their self-interest, Latin American states would see a payoff of [-12] units, i.e., [-2] units of administrative costs minus an opportunity cost of [10] units from foregoing the benefits of eliminating corruption (lower right quadrant). By contrast, if Latin American states pursue an exogenous enforcement strategy, they could expect a payoff of [8] units, i.e., [10] units for effectively reducing corruption minus the [2] units of administrative costs (quadrants on the left). The dominant enforcement strategy for Latin American states is clear: external enforcement offers the greatest payoff in the present time.

Once bureaucrats see external enforcement as a credible threat, they would recalculate their payoffs and internalize the cost of sanctions. Even though they could gain [2] units from taking bribes under a domestic enforcement regime (lower right quadrant), they would refuse bribes and prefer a payoff of [0] (upper left quadrant) to avoid the credible threat of incurring [-10] units of costs under a credible external enforcement regime (lower left quadrant). Finally, the payoffs of Latin American states and their bureaucrats would be aligned with those of the United States and their companies.

To be certain, exogenous enforcement, such as extending the FCPA's reach, could raise difficult questions relating to national sovereignty, political will and the limits of extraterritorial jurisdiction. These concerns are allayed, however, by the fact that several OAS member states are already experimenting with exogenous and multilateral enforcement strategies. Most OAS member states have ratified the Inter-American Convention on Mutual Assistance in Criminal Matters of 1992 to "render to one another mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over

which the requesting state has jurisdiction" (art. 2).[92] The Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition has been in development since the year 2000.[93] And, in 2004, the process of Meetings of Ministers of Justice or Other Ministers or Attorneys General of the Americas recommended that OAS member states "review their legal regimes to extradite and provide mutual legal assistance with respect to corruption offenses."[94]

For a more concrete example consider Guatemala. In 2006, the Guatemalan government launched an "unprecedented" program to fight public corruption within its territory.[95] It asked the United Nations to establish an independent team of foreign prosecutors, known as the International Commission Against Impunity in Guatemala (CICIG). At that time, Guatemala's Vice President Eduardo Stein explained his frustration with relying solely on domestic anti-corruption programs: "Asking the justice system to reform itself was like tying up a dog with a string of sausages."[96] Although the CICIG has received mixed reviews, in four years it successfully prosecuted four out of five cases involving previously "untouchable" persons.[97] In 2013, at the invitation of Guatemala's then-president Otto Pérez Molina, the CICIG extended its mandate for another two years.[98] Currently, it is investigating and prosecuting corruption charges against Pérez Molina who, in an ironic twist, is now disparaging the CICIG's involvement: "We want independent judges. It's really frustrating to see judges who are afraid of the pressure exerted by CICIG."[99]

Honduras has also asked foreign prosecutors for help,[100] a big step for a country that, until recently, did not extradite its citizens.

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[92] Inter-American Convention on Mutual Assistance in Criminal Matters of 1992, S. Treaty Doc. No. 105-25, O.A.S.T.S. No. 75 (entered into force on April 14, 1996).

[93] *Introduction*, OAS, http://www.oas.org/juridico/mla/en/index.html.

[94] OAS GEN. ASSEMBLY, FINAL REPORT OF THE FIFTH MEETING OF MINISTERS OF JUSTICE OR OF MINISTERS OR ATTORNEYS GENERAL OF THE AMERICAS, OEA/Ser.K/XXXIV.5, at 40 (2004), available at http://www.oas.org/juridico/english/remjaV_final_report.pdf.

[95] *About the Commission*, CICIG, http://www.cicig.org/index.php?page=About.

[96] *Parachuting in the Prosecutors*, ECONOMIST (Oct. 15, 2011), http://www.economist.com/node/21532292.

[97] *Id*.

[98] CICIG, SIXTH REPORT OF ACTIVITIES OF THE INTERNATIONAL COMMISSION AGAINST IMPUNITY IN GUATEMALA (CICIG) 3 (2013), available at http://www.cicig.org/uploads/documents/2013/COM-045-20130822-DOC01-EN.pdf.

[99] Louisa Reynolds, *Guatemala's former President Pérez Molina to stand trial Dec. 21; until then, jail*, TICO TIMES (Sept. 10, 2015), http://www.ticotimes.net/2015/09/10/guatemala-former-president-perez-molina-to-stand-trial-dec-21-until-then-jail.

[100] ECONOMIST, *supra* note 96.

Now, Honduras may likely extradite former Vice President Jaime Rosenthal to the United States to face various criminal charges, including corruption-related offenses.[101] While asking for outside help is legally and politically complicated, Latin American states are already demonstrating a willingness to explore external enforcement strategies to gain the social and economic benefits of eliminating public corruption.

VI. Conclusion

Corruption harms socio-economic development, distorts trade and undermines democracy and the rule of law. International bribery is one of the most pernicious forms of transnational corruption. Despite state compliance with the IACAC's legislative and programmatic goals, the convention has failed to curb demand-side corruption because domestic enforcement programs alone do not create a credible threat of sanctions. To deter bribe taking, OAS member states should adopt exogenous and multilateral enforcement strategies, such as leveraging the FCPA's enforcement regime across the region, which are more likely to create a credible threat of sanctions and significantly reduce demand-side corruption in the short run.

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[101] Tracy Wilkinson, *Honduras likely to extradite former vice president to U.S.*, Los Angeles Times (Jan. 20, 2016) http://www.latimes.com/world/mexico-americas/la-fg-honduras-extradition-20160120-story.html.

"PAY TO PRESCRIBE": A CASE FOR STRENGTHENED ENFORCEMENT OF THE FCPA IN THE GLOBAL PHARMACEUTICAL INDUSTRY IN 2017 AND BEYOND

*John "Jack" T. Jessee Jr.**

I. Introduction

Bribery is an unfortunate, albeit ubiquitous feature of the modern global economy. So long as there are government officials willing to accept illicit payment in exchange for favors,[1] there have been corporations willing to make illegal payments in order to gain some kind of advantage over their competitors.[2] Bribery undoubtedly exists the world over, and runs the gamut from the richest nations to the poorest, though developing nations have been among the hardest hit.[3] Bribes are solicited not only in exchange for routine work that otherwise would not require a bribe, such as providing a company with utility services without undue delay, but also to secure other, more seriously unethical advantages such as improperly awarding government procurement contracts.[4]

One industry that has been particularly rife with bribery is the global pharmaceutical industry.[5] While few, if any, economic sectors have avoided becoming entangled with bribery entirely, pharmaceutical companies have frequently been investigated and charged under the Foreign Corrupt Practices Act, the chief anti-bribery legislation in the United States.[6] Pharmaceutical giants such as Avon, Merck, As-

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[1] Acceptance of bribery is unfortunately common, especially in developing nations where government workers are often woefully underpaid. *See* Michael Johnston, *Poverty and Corruption,* Forbes (Jan. 22, 2009), http://www.forbes.com/2009/01/22/corruption-poverty-development-biz-corruption09-cx_mj_0122johnston.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Jonathan Webb, *Why Pharma Faces So Many Corruption Allegations,* Forbes (Feb. 23, 2016), http://www.forbes.com/sites/jwebb/2016/02/23/why-pharma-faces-so-many-corruption-allegations/#2db503601bd3; *See also* Jillian Claire Kohler et al., *Corruption in the pharmaceutical sector: Diagnosing the challenges,* Transparency International (2016), http://www.transparency.org.uk/publications/corruption-in-the-pharmaceutical-sector/ (noting that "pharmaceuticals stands out as a sub-sector that is particularly prone to corruption").

[6] 15 U.S.C. § 78dd-1, et seq. [hereinafter "FCPA"].

traZeneca, Pfizer-Wyeth, Bristol-Meyers-Squibb, Eli Lilly, and myriad others were all known to be under investigation by the DOJ for potential violations of the FCPA in 2012 alone.[7] Further, as of 2014, two of the top ten highest FPCA disgorgement[8] payments of all time belong to pharmaceutical giants Avon and Pfizer.[9] Such extensive investigation and enforcement activity seems to indicate that U.S. anti-bribery agencies feel that corruption is a very serious issue within the drug industry, and that they are willing to commit significant resources to prosecuting "Big Pharma."

Several unique features of the pharmaceutical business are believed to create much of the industry's FCPA-related trouble. Firstly, participating in the global drug industry by nature requires a great deal of contact with foreign officials, perhaps more so than most other industries.[10] Performing many critical pharmaceutical industry functions, for example obtaining government regulatory approval for a new drug, requires frequent and intimate contact with foreign government officials.[11] This frequent, close contact with government officials in turn increases the temptation to bribe, as companies naturally seek to achieve a more efficient and favorable regulatory approval process by "buying off" officials.[12] It is no secret that receiving regulatory approval to sell a drug in a given country is absolutely critical to success in the pharmaceutical industry.[13] Failure to do so can amount to catastrophic losses, as the research and development costs of that drug effectively go to waste if it does not receive regulatory approval for consumption in a given country. Therefore, some pharmaceutical companies have proven that they are willing to do almost anything to gain

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[7] Richard Cassin, *The Corporate Investigations List (June 2012),* THE FCPA BLOG (Jul. 3, 2012), http://www.fcpablog.com/blog/2012/7/3/the-corporate-investigations-list-june-2012.html.

[8] Disgorgement refers to the mandatory re-payment of "ill-gotten gains" that were earned as a result of bribery under the FCPA.

[9] Richard Cassin, *Avon Disgorgement Lands on Top Ten List,* THE FCPA BLOG (Dec. 26, 2014), http://www.fcpablog.com/blog/2014/12/26/avon-disgorgement-lands-on-top-ten-list.html.

[10] *See* Jillian Claire Cohen, *Pharmaceuticals and corruption: a risk assessment,* WORLD BANK, http://www1.worldbank.org/publicsector/anticorrupt/corecourse2007/Pharmaceuticals.pdf.

[11] *Id.* at 77-78.

[12] *Id.*

[13] Andrew Ceresney, Director, SEC Div. of Enforcement, Remarks at CBI's Pharmaceutical Compliance Congress in Washington D.C., (March 3, 2015) (transcript available at http://www.sec.gov/news/speech/2015-spch030315ajc.html#.VPX7KkaSJxU).

regulatory approval, and bribery is often the vehicle used to achieve that end.[14]

Secondly, many nations other than the United States utilize a public, nationalized healthcare system in which the government itself is the chief provider of healthcare to its citizens. In this kind of healthcare system, doctors also double as public officials, as they are government employees that also often wield considerable influence over the general direction of the nation's medical treatment, notably including broad discretion over drug prescription policies.[15] This means that the FCPA anti-bribery provisions also govern corporate relationships with doctors in a nationalized health system, as the FCPA's text broadly covers dealings with any "foreign official."[16]

Such nationalized healthcare systems create even more opportunity for bribery to rear its ugly head. Doctors in a nationalized healthcare system generally maintain wide discretion in deciding which drugs to prescribe, meaning that drug companies can bribe public doctors to prescribe their brand of drugs more often than necessary, or prescribe them instead of a competitor's drugs.[17] These "kickback" bribery payments to doctors, also known as "pay-to-prescribe" bribes, are a very common source of corruption in the industry. These "pay to prescribe" bribes are perhaps more insidious than bribes aimed at cheating regulatory approval, as they often take the form of more discreet, non-monetary gifts, such as luxurious, all-expenses-paid travel under the guise of an "educational opportunity" or "reward programs" for high-prescribing doctors.[18] Further, "pay to prescribe" bribes can often be harder for enforcement agencies to detect, due to their more subtle nature.[19] Because this sort of "pay to prescribe" bribery has become so commonplace in the modern era, it is the chief type of bribery examined in this paper.

Regardless of the specific form the bribery takes or the exact motives behind it, one thing remains clear—the pharmaceutical industry has a very serious problem with bribery, and that problem continues today largely unabated.[20] This is not to suggest however, that the U.S. government has stood idly by while such behavior occurs. Government enforcement agencies have indeed taken steps to curb improper influence over prescribing, and have commenced several high-profile enforcement actions against the industry in recent years. In 2015

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[14] *Id.*

[15] *Id; See also* Cohen, *supra* note 10.

[16] 15 U.S.C. §78dd-1(A).

[17] *See* Ceresney, *supra* note 13.

[18] *Id.*

[19] *Id.*

[20] *See generally* Kohler, *supra* note 5.

alone, the SEC prosecuted multiple high-level FCPA violations throughout Big Pharma, including judgments against household names like Bristol-Meyers-Squibb.[21] Unfortunately, however, even these enforcement actions have not eradicated bribery from the pharmaceutical industry, as corruption offenses continue to occur to this day.[22]

Noting this problem, this paper will use these recent FCPA enforcement actions to argue that a revamped and increased enforcement of the FCPA's anti-bribery provisions in the pharmaceutical industry will be an absolutely critical task in 2017 and beyond, as there is much work to be done in cleaning up the industry. The paper will begin by outlining a brief history of the FCPA and examining its basic enforcement provisions. It will then examine the nature of the pharmaceutical industry's bribery through a detailed analysis of several recent high profile enforcement cases within the industry. Lastly, the paper will propose several policy prescriptions as to what changes might be made to the current FCPA enforcement regime in order to continue eradicating bribery within Big Pharma.

II. A Brief History of the FCPA and its Enforcement

The Foreign Corrupt Practices Act of 1977 ("FCPA"), though now enforced the world over, was initially enacted as a mostly symbolic piece of legislation.[23] The law was in large part passed to show that the U.S. Government was responding appropriately to the high-profile corruption incidents of the era, namely President Nixon's Watergate Scandal.[24] The SEC and other government agencies were concerned not just with the infamous Watergate Hotel break-in, but also the discovery of numerous illegal political contributions that Nixon was found to have received in the aftermath of his impeachment and resignation.[25] Discovery of these suspicious payments to Nixon led to further investigation, and SEC officials soon uncovered that many corporations were using extensive webs of secret bank accounts for il-

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[21] *See* Bristol-Myers Squibb Co., Exchange Act Release No. 76073, SEC File No. 3-16881 (Oct, 5, 2015), https://www.sec.gov/litigation/admin/2015/34-76073.pdf.; *See also* Richard Cassin, *Bristol-Meyers-Squibb Pays $14 Million to Resolve China FCPA Offenses,* The FCPA Blog (Oct. 5, 2015), http://www.fcpablog.com/blog/2015/10/5/bristol-myers-squibb-pays-14-million-to-resolve-china-fcpa-o.html.

[22] *See* Johnston, *supra* note 1 (discussing the 2016 anti-bribery raid on Novartis' South Korea Operations, and noting that, "This is a structural problem within the industry. . . Corruption will persist. . .")

[23] Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act 1977-2010,* 12 San Diego Int'l L.J. 89, 90 (2010).

[24] *Id.* at 92.

[25] *Id.* at 93.

licit purposes.[26] Further, investigators soon found that these same invisible corporate accounts that were used to curry favor with the Nixon administration were also used to make extensive bribes abroad, as the trail of illicit payments could be linked to many foreign officials as well.[27] Recognizing this very serious problem of secret "slush funds" and extensive use of hard-to-trace bribery payments, Congress passed the FCPA.[28] The FCPA set out to ban giving anything of value (or even promising to give something of value) to a foreign official in exchange for influence, inducement, or improper advantage.[29] The FCPA's language was groundbreaking in that it not only prohibited this kind of bribery as it pertained to U.S. officials, but rather sought to ban bribery anywhere in the world, by intentionally utilizing the term "foreign official" to criminalize bribery regardless of the locale.[30]

However, though the FCPA featured very strong and idealistic language, the law laid mostly dormant for over two decades. The government only brought a handful of minor enforcement cases before 1998, a year in which the law saw several key amendments that increased its scope.[31] The reasons behind the curious lack of initial enforcement of the FCPA are complex, but in general stem from the law's initially symbolic intent—the act was likely passed to allow the government to show that it was "tough" on bribery and appease the post-Watergate public outcry for reform without requiring the government to commit the immense resources required to properly enforce the act.[32] Further, the United States was for quite some time the only nation with a global anti-bribery ban on its books, and so U.S. companies complained that actually enforcing the law was "bad business" and would place them at a distinct competitive disadvantage relative to foreign competitors.[33] Apparently heeding this concern, the U.S. Government appeared to "look the other way" regarding foreign corporate corruption for many years.[34]

The FCPA's period of dormancy, however, met an abrupt end in the early 2000's, when the U.S. government began to enforce the act with great vigor and severity.[35] Emboldened by a new global anti-bribery norm (which arose after other nations began to acknowledge the economic havoc that bribery was causing in their countries), the

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] 15 U.S.C. §78dd-1(a).
[30] *Id.*
[31] Bixby, *supra* note 23, at 103.
[32] *Id.*
[33] *Id.* at 98.
[34] *Id* at 99-102.
[35] *Id.* at 104.

strengthened financial transparency norms of the Sarbanes-Oxley era, and also newfound concerns that bribery slush funds could be used to finance global terrorism, U.S. enforcement agencies began to aggressively prosecute FCPA violations at a rate that would have been unimaginable only a few years prior.[36] This exponential increase in prosecution has continued to the present day, bringing us to the modern era of FCPA enforcement, where most companies now actively fear potential FCPA prosecution and take great pains to implement effective anti-bribery compliance systems.[37] Overall, the FCPA in the modern era is one of the U.S. government's chief tools in combating white collar and corporate crime, and wields a formidable anti-bribery enforcement scheme.

Interestingly, however, even the new, more fearsome era of FCPA enforcement features a fairly glaring loophole—the "grease payments" exception.[38] While making a gift to a foreign official to secure favors is of course banned by the FCPA, making that same gift to "expedite a routine government action," (i.e. a "facilitating payment" or "grease payment") is actually allowed under the current prevailing interpretation of the law.[39] This means that an otherwise illegal bribe paid to ensure that, for example, a foreign government keeps a company's utilities operating as normal or provides the usual police protection during periods of domestic unrest, is perfectly legal under the FCPA because such activities are "routine."[40] The problem with such a loophole, of course, is that it inherently blurs the contours between a "facilitating payment" and an illegal bribe. To date, the exact boundaries of that line are still unclear, and so the current landscape of FCPA enforcement is somewhat muddled—while companies certainly fear FCPA repercussions and most actively seek to ensure compliance, the relatively ambiguous text of the law and the current "grease payment loophole" make perfect compliance very difficult.[41]

This ambiguity in large part contributes to the problem today— despite FCPA enforcement, bribery is still an ongoing issue, especially in the pharmaceutical industry. Therefore, subsequent sections of this paper will examine this extensive bribery within the pharmaceutical industry using several recent, high profile settlements as a case study.

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[36] *Id.*

[37] *Id.* at 109.

[38] 15 U.S.C. §78dd-1(a); Rebecca Koch, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance,* 28 B.C. INT'L & COMP. L. REV. 379, 380 (2005).

[39] *See* Koch, *supra* note 38, at 380-81.

[40] *Id*. at 385-86.

[41] *Id.* at 89.

III. Bribery in Big Pharma and the FCPA

It is well established that bribery has long been a serious issue plaguing the pharmaceutical industry, and in recent years, it appears that this general maxim has not changed much, if at all.[42] In fact, as recently as October of 2015, Bristol-Meyers-Squibb ran afoul of the FCPA due to the activities of its Chinese subsidiaries and was forced to pay fines to the SEC.[43] Therefore, it is clear that though FCPA enforcement has perhaps reached its highest levels ever, much work remains to be done in cleaning up the pharmaceutical industry in particular.[44] This section of the paper will examine three recent high-profile pharmaceutical enforcement actions that have occurred between 2012 and 2015—- the actions brought against Pfizer-Wyeth, Eli Lilly, and Bristol-Meyers-Squibb. These cases were chosen to illustrate several unique bribery issues inherent in the modern Big Pharma landscape—a landscape that hinges on utilizing a mixture of secrecy, clever accounting tricks, and legal loopholes to maintain illegal bribery practices. Further, each case provides an excellent insight into the workings of the ubiquitous "pay to prescribe" bribery scheme, which is seemingly the bribery method of choice in modern Big Pharma.[45]

A. FCPA Enforcement Action Against Pfizer-Wyeth

Beginning chronologically with the earliest case of the trio—- the FCPA enforcement action against Pfizer-Wyeth (hereafter "Pfizer"), it is immediately clear that all is not well in the world of Big Pharma. Pfizer, one of the largest drug companies in the world, was found to have bribed doctors and other health officials in over half a dozen countries, spanning much of the old Soviet Bloc (Bulgaria, Croatia, the Czech Republic, Kazakhstan, Russia, and Serbia), as well as Italy.[46] For its crimes, Pfizer paid a $60M civil settlement to the SEC, $15M in criminal penalties to the DOJ, and disgorged over $44M in illegally earned profits.[47]

The Pfizer case hinged on the company's fairly egregious use of a "pay to prescribe" scheme, in which the Pharma giant provided both direct and indirect payments to doctors around the globe in exchange

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[42] *See* Webb, *supra* note 5.
[43] *See* Cassin, *supra* note 21.
[44] *See* Bixby, *supra* note 23, at 104-16.
[45] *See* Ceresney, *supra* note 13.
[46] *See* Pfizer Inc., Wyeth LLC, SEC Accounting & Auditing Enforcement Release No. 3399, https://www.sec.gov/litigation/litreleases/2012/lr22438.htm (Aug. 7, 2012).
[47] *Id.*

for prescribing or otherwise promoting Pfizer products.[48] Further, these payments were disguised using a system of false accounting, which buried the illegal payments within the company's books by disguising them as benign expenses like travel, promotional activities, and marketing.[49] This is an excellent example of the common "pay to prescribe" scheme, and shows the complex financial arrangements that are often used to conceal funds used for bribery.[50] Admittedly, the use of secret bribery "slush funds" is nothing new, and is in fact quite similar to the practices that gave rise to the initial passage of the FCPA.[51] But, in the new post-Sarbanes-Oxley accounting world that features much stricter reporting and transparency requirements, the exact methods of bribery appear to have adapted to become much more sophisticated and subtle. The methods used by Pfizer and others seems to indicate that due to the newly increased financial transparency requirements of the 21st century, corporations have learned to bury bribery funds even more deeply within their sprawling financial statements in order to avoid detection. This trend is worrisome, as it indicates that rather than genuinely seeking to comply with the FCPA's anti-bribery provisions, many actors in the pharmaceutical industry are instead finding increasingly clever workarounds to stay one step ahead of regulators.

B. FCPA Enforcement Action Against Eli-Lilly

The second major enforcement action examined by this paper is the FCPA action against another U.S.-based Pharma giant, Eli Lilly, which was found to have violated FCPA provisions in Russia, Brazil, China, and Poland, for a period of over fifteen years.[52] For its crimes, Eli Lilly paid a $29M settlement to the SEC.[53] The Lilly case is particularly illuminating and pertinent to this study, as it featured a perhaps even more shocking example of "pay to prescribe" bribery spanning nearly the entire globe.[54] In Russia, for example, Lilly's subsidiary paid millions of dollars into a suspicious "marketing agree-

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[48] Richard L. Cassin, *Pfizer, Wyeth Pay $60M in Settlement*, FCPA BLOG (Aug. 7, 2012), http://www.fcpablog.com/blog/2012/8/7/pfizer-wyeth-pay-60-million-in-settlement.html.

[49] *Id.*

[50] *See* Ceresney, *supra* note 13.

[51] *See generally* Bixby, *supra* note 23.

[52] *See* Eli Lilly & Co., SEC Lit. Release No. 22576, https://www.sec.gov/litigation/litreleases/2012/lr22576.htm (Dec. 20, 2012); *See also* Richard Cassin, *Eli Lilly Pays $29 Million in SEC Settlement,* THE FCPA BLOG (DEC. 20, 2012), http://www.fcpablog.com/blog/2012/12/20/eli-lilly-pays-29-million-in-sec-settlement.html.

[53] Eli Lilly & Co., SEC Lit. Release, *supra* note 51.

[54] *Id.*

ment" account, which in a nutshell paid money to those loyal to promoting Lilly's products.[55] Further, in China, Lilly's subsidiary used a slightly different "pay to prescribe" scheme, this time making direct gifts to doctors in the form of spa treatments, jewelry, and other impermissible benefits.[56] Though the gifts themselves were somewhat more brazen and obvious, Lilly again took great pains to hide the illicit payments within its books.[57] In Brazil and Poland, payments were made to get Eli Lilly drugs on government-approved prescription reimbursement lists, which would have significantly increased its market share by allowing more government-insured patients to acquire their drugs.[58]

Lilly's actions are again highly suggestive of a serious problem. Because of the public healthcare systems in nearly all of the countries where it committed FCPA violations, Lilly knew that it could influence the public doctors to prescribe its drugs using various gifts and payments, and did so flagrantly for the better part of two decades. Taken as a whole, the Lilly case shows the lengths to which Pharma giants are willing to go in order to ensure that their products survive stiff competition in public health systems. The Lilly incident further indicates that the current system is structured in such a way that making bribery payments can be so lucrative and beneficial to Pharma companies that they are willing to risk monetary loss, damage to their reputation, or even more serious criminal penalties because the rewards outweigh the perceived risks.

C. FCPA Enforcement Action Against Bristol-Meyers-Squibb

The final case examined in this paper is the FCPA enforcement action levied against Bristol-Meyers-Squibb (hereafter "BMS") for violations that occurred within its Chinese subsidiary from 2009-2014.[59] For its violations, BMS was assessed around $14M in total penalties by the SEC.[60] Here, BMS's violation was quite similar to those committed by Eli Lilly and Pfizer—the company allowed its Chinese subsidiary to dispense cash payments, lavish gifts, travel, entertainment, and other improper gifts to Chinese doctors in exchange for prescription referrals.[61]

The parallels to the Lilly and Pfizer cases do not end there—BMS was also found to have used a great deal of financial trickery,

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *See* Bristol-Myers Squibb Co. SEC Lit. Release, *supra* note 21.
[60] *Id.; See also* Cassin, *supra* note 21.
[61] *Id.*

including faking invoices, receipts, and purchase orders to disguise the illegally dispensed funds.[62] This is yet another excellent example of the sophisticated and subtle tactics that define modern pharmaceutical bribery. It seems that the days when a person might brazenly approach an official with a suitcase full of cash are over. Unfortunately, the same process is still being carried out in other ways. Now, a would-be briber must use sophisticated accounting techniques, extensive secrecy, and a great deal of discretion in bribing. Thus, the *modus operandi* has changed, but the root of the problem is the same.

Taken collectively, these case studies reveal that there remains a very strong incentive to bribe within the pharmaceutical industry, even in the face of potentially serious consequences. Though BMS, for example, saw two of its competitors punished under the FCPA for nearly identical practices in the two years prior to its own prosecution, it did not act to clean up its own transgressions, and instead wound up facing an FCPA enforcement action of its own.[63] It is therefore quite puzzling that pharmaceutical companies appear to be engaging in the much the same behavior as before, apparently in complete disregard of the punishments levied upon their competitors for committing the exact same offenses.

Though there are many possible inferences one might draw from this somewhat bleak state of affairs, one reasonable conclusion is that international bribery remains an ongoing and severe issue within the pharmaceutical industry, and that it will continue unless significant changes are made. Thus, this paper will proceed by arguing that reforms must be made to the current anti-bribery legal structure in order to rectify this situation.

IV. The Case for Revamped and Strengthened FCPA Enforcement in Big Pharma: Prescriptions for 2017 and Beyond

Even a cursory glance at the case studies discussed in Section III reveals that bribery remains a very serious, ongoing issue within Big Pharma. The fact that three of the world's leading drug-makers, whose names are so ubiquitous as to be featured in medicine cabinets around the world, were prosecuted for violations in the past four years alone is a very troubling statistic. The obvious conundrum is thus how the U.S. enforcement agencies ought to respond. This section will make several prescriptions as to how a more robust FCPA enforcement regime should proceed against pharmaceutical corporations.

I will begin with a brief overview of the penalties and remedies available under the current FCPA regime. The main remedy available to government enforcement agents under the FCPA is to impose mone-

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[62] *Id.*
[63] *Id.*

tary fines on violators, including a disgorgement of any profits that were illegally earned as a result of the bribery.[64] In assessing such fines, the SEC and DOJ give great weight to the company's degree of cooperation, and the enforcement agencies give significant "cooperation credit" for genuine, fulsome, and pre-emptive cooperation by the corporation.

In determining an appropriate dollar value for such fines, it appears that government agencies generally defer to the U.S. sentencing guidelines, which prescribe a broad range of permissible fines based on a number of factors.[65] Issues taken into consideration include the number of employees in the organization; whether high-level personnel were involved in or condoned the conduct; prior criminal history; whether the organization had a pre-existing compliance and ethics program; voluntary disclosure; cooperation; and acceptance of responsibility.[66]

Imprisonment for a period of up to 5 years is also possible in cases where the FCPA violation can be readily attributed to an individual actor.[67] The current enforcement regime thus chiefly consists of levying monetary fines, buttressed by a system of self-reporting and corporate cooperation, as well as imprisonment for individual offenders. Further, it appears that the current regime offers enforcement agencies rather wide discretion in determining appropriate penalties, as the system is characterized by a system of broad guidelines rather than specific prescriptions.

I argue that this basic array of penalties under the FCPA is largely sound, but I propose two incremental policy changes that Congress, the SEC, and the DOJ might implement in a "perfect world." Factors such as political gridlock, lobbying efforts on behalf of the pharmaceutical industry, and other real-world constraints such as budget and manpower shortages might prevent these changes from being perfectly implemented as described. The purpose, therefore, is to simply inject potentially promising ideas into the public debate over how the U.S. might improve its anti-bribery regime in 2017 and beyond. With this disclaimer in mind, I argue that Congress, as well as the SEC and the DOJ, should make two fairly modest changes to the

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[64] 15 U.S.C. §78ff (2002).

[65] THE FCPA PROFESSOR, HOW ARE FCPA FINES, PENALTIES, AND SENTENCES CALCULATED*?,* http://fcpaprofessor.com/fcpa-101.

[66] *Id.*

[67] *Id*.; While imprisonment is an effective deterrent as to individual conduct, this paper focuses chiefly on policy at the firm level. For more on individual criminal sentencing under the FCPA, *see generally* Warin & Speice, *Go Directly to Jail: Sentencing of Individual Criminal Defendants in Foreign Corrupt Practices Act Cases,* 1 BLOOMBERG LAW REPORTS: RISK & COMPLIANCE No. 6, http://www.gibsondunn.com/publications/Documents/Warin-FCPAByline.pdf.

FCPA and its enforcement protocol that will provide a significant boost to their efforts in the war against bribery in Big Pharma.

Firstly, I posit that the enforcement agencies ought to substantially increase the dollar-value of fines, disgorgement payments, and other damages that are assessed in FCPA cases involving pharmaceutical companies. Second, I argue that Congress should amend the FCPA to remove the "grease payment" loophole, as the current law is simply too ambiguous, and thus encourages "borderline" behavior that is still effectively bribery.[68] I further argue that these prescriptions work symbiotically, and in fact their efficacy would likely be enhanced if both were implemented simultaneously.

A. Increase Fines and other Monetary Penalties for Pharmaceutical Companies under the FCPA

My first policy prescription is that enforcement agencies ought to substantially increase the monetary value of fines, damages, and disgorgement payments that are assessed for FCPA violations in the pharmaceutical industry. Given the wide sentencing discretion that is already afforded to the enforcement agencies,[69] this change could likely be accomplished by merely altering internal regulatory policy, avoiding the more arduous task of amending the FCPA itself. This recommendation is admittedly quite simple, but could nonetheless be very effective in reducing bribery within the industry, as I argue that the current level of fines assessed is simply not sufficient to act as an effective deterrent.[70]

A quick glance at the financial statements of the three companies examined by this paper—Eli Lilly, Pfizer-Wyeth, and Bristol-Meyers-Squibb— reveals that each earns well in excess of $5B in profits each year, and some earned much more. The giant Pfizer exceeded an eye-popping $22B in profits in 2013.[71] Yet, for their fairly flagrant

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[68] *See* Koch, *supra* note 38.

[69] *See* FCPA Professor, *supra* note 65.

[70] This paper originally argued that enforcement agencies should not only increase the range of monetary penalties under the FCPA, but also proportionately increase the value of *benefits* available to good faith cooperating corporations under the cooperation credit system. While this paper was being edited for publication, the DOJ did indeed implement such an overhaul to the cooperation credit system in a new one-year pilot program. Because this policy has already been enacted, the argument has largely been omitted. *See* Jonathan R. Barr et al., *DOJ Attempts to Encourage Corporate Self-Disclosures With the Announcement of a One-Year FCPA Pilot Program,* BAKER & HOSTETLER LLP, *available at* https://www.bakerlaw.com/alerts/doj-attempts-to-encourage-corporate-self-disclosures-with-the-announcement-of-a-one-year-fcpa-pilot-program.

[71] Richard Anderson, *Pharmaceutical Industry Gets High on Fat Profits,* BBC NEWS (Nov. 6, 2014), http://www.bbc.com/news/business-28212223.

FCPA violations, the trio was fined only $29M, $60M, and $19M, respectively.[72] While these settlement figures may appear quite robust to the lay reader, it is apparent that these fines are insufficient when they are weighed against the enormous sums that these pharmaceutical corporations earn in profits each year— in my opinion, a true "drop in the bucket" that does not constitute a genuine threat to their ability to conduct ongoing operations. Thus, I argue that these fines are simply not substantial enough to act as an effective deterrent to bad corporate behavior— it is not hard to imagine an executive "shrugging off" a $20M fine as merely a "bad day" when the company that they lead earns many times that amount in a given week.

The relatively modest fines assessed under the current system create a dangerous calculus for those within the pharmaceutical industry. Clearly, at least some Big Pharma executives that are engaging in a cost-benefit analysis of whether to commit a potentially illegal act feel that they are better off skirting the FCPA's rules, or even flagrantly violating them in some cases, as evidenced by the industry's continuing violations despite the known risks of an enforcement action. Though we obviously cannot know their subjective mindsets for certain, it is not unreasonable to conclude that many pharmaceutical industry actors have simply determined that the potential profits earned by "bribing to the top" of a given market in most cases far exceed the middling fines that the SEC or DOJ might assess, even when considering that all profits earned as a result of the bribery must theoretically be disgorged.

To date, only one fine levied against a pharmaceutical company under the FCPA is featured on the FCPA Blog's "Top 10" list, which compiles the largest FCPA settlements to date, as of the end of 2016.[73] That statistic is puzzling, given that the level of bribery in the pharmaceutical industry is notoriously high, and that the giant companies within the industry could certainly afford to pay larger fines.[74] Fines similar to the record FCPA damages paid by telecom giants Siemens ($800M) and Alstom ($772) or those levied against oil titan Halliburton/KBR ($579M) seem wholly appropriate for very serious FCPA violations, and given that pharmaceutical companies are in the same financial "ballpark" as those companies that received some of the largest fines ever, it seems necessary to increase fines toward that range.[75]

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[72] *See* Cassin, *supra* notes 21, 48, 52.

[73] *See* Richard Cassin, *Teva Announces $519m Settlement,* FCPA BLOG (Dec. 22 2016), http://www.fcpablog.com/blog/2016/12/22/teva-announces-519-million-fcpa-settlement.html (discussing Teva Pharmaceuticals' $519M FCPA fine in December 2016, good for the fourth highest penalty on the FCPA Blog's "top ten" list. Prior to this settlement, however, no pharmaceutical fines had cracked the top 10.)

[74] Anderson, *supra* note 71.

[75] *Id.*

Thus, this first policy prescription essentially acknowledges the obvious—Big Pharmaceutical companies are some of the wealthiest corporations in the world by almost any measure, and in fact boast the highest profit margins of any industry.[76] Therefore, if the SEC and the DOJ are seeking to "scare" the pharmaceutical industry into FCPA compliance, they must substantially increase the potential punishments that they may administer, or "become scarier," for lack of a better term.

In sum, I argue that the law must quickly adapt to remove any incentives whatsoever to bribe in the pharmaceutical industry. A simple, yet effective step towards that goal is to increase fines and other damages. As it stands, the law is inadvertently tempting pharmaceutical actors to bribe, as the profits that can be realized in doing so often outweigh the relatively modest fines that have been assessed to date. Once the financial calculus of deciding whether to bribe is changed, it follows logically that actors within the pharmaceutical industry will have to think much harder before deciding to violate the FCPA.

B. Close the "Grease Payment" Loophole

A second, and perhaps more ambitious suggestion, is to close the "grease payment" or "facilitating payment" loophole that is currently plaguing FCPA enforcement.[77] Generally speaking, the "grease payment" loophole refers to a provision of the FCPA that actually permits certain small acts of bribery—i.e., a "facilitating or expediting payment" to a foreign official in order to secure a "routine governmental action."[78] This exception is technically limited to small payments that are made to ensure delivery of "ordinary" government services, which encompasses granting permits and visas, providing police protection, mail service, prompt inspections, utility services, or any "routine" other services "of a similar nature."[79] However, I argue that the "grease payment" loophole must be closed because it can poison an executive's decision-making process and inadvertently incentivize bribery, merely by acknowledging the existence of a permissible category of bribery.

I note that this suggestion has already been the subject of considerable scholarship, and that the subject likely merits a paper or book of its own.[80] Further, many other Western anti-bribery regimes, such as the UK Bribery Act, have already taken steps to remove any "facilitating payment" language from their statutes, and have moved

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[76] *Id.*
[77] 15 U.S.C. §78dd-1(a); *See* Koch, *supra* note 38.
[78] 15 U.S.C. § 78dd-2(b).
[79] *Id.*
[80] *See generally* Koch, *supra* note 38.

to categorically ban bribery of any sort.[81] I also note that implementing this suggestion would most likely require Congress to amend the FCPA itself, rather than merely change regulatory directives, admittedly increasing the difficulty of enacting such a policy. Therefore, I will address this suggestion as narrowly as possible, solely as it pertains to alleviating the current bribery issues in the pharmaceutical industry.

The mere existence of a category of "permissible" bribery creates a dangerous and false dichotomy. If bribery of all stripes was made categorically illegal—regardless of whether the favor being solicited is "routine" or not, it stands to reason that most companies would know that they ought to steer clear of the practice entirely. But, the current loophole that legally permits *some* bribes, but not others, naturally encourages actors to push the limits of "permissible" bribery as far as possible. Pharma executives know that if they can somehow construe their actions as being within the safe harbor of a "grease payment," they are generally safe from FCPA enforcement.[82] Worse, many of the government activities that pharmaceutical industry actors pay bribes in exchange for might readily be construed as "routine"—is a payment made to entice a doctor to prescribe a drug really any different than one made to an official to ensure that a company will be afforded proper police protection? While the answer to the former is less clear, the latter action is in fact explicitly permitted as a "facilitating payment" under the statute. This false distinction opens the door for pharmaceutical executives to assert that their more flagrant bribery is permissible as well, as it could be argued to be "of a similar nature."[83]

Thus, it is evident that engaging in this sort of line drawing as to which bribes are allowed is inherently problematic. Allowing some kinds of bribes and not others fatally undermines the powerful moral argument that bribery of *any* sort is simply wrong. Permitting some bribes can instead portray bribery as a "sliding scale" of wrongs, with some types of bribery arbitrarily deemed more acceptable than others.[84] Thus, I argue that a categorical ban on all types of bribery, regardless of whether a payment is intended as a "facilitating payment" or not, is absolutely necessary to move towards a bribery-free pharmaceutical industry.

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[81] *See* Ben Hallman, *Bribery Law Loophole Leads to Confusion and Abuse, Lawyers Say,* HUFFINGTON POST (Apr. 26, 2012), http://www.huffingtonpost.com/2012/04/26/bribery-law-walmart-foreign-corrupt-practices-act-loophole_n_1450474.html.

[82] *Id.*

[83] 15 U.S.C. § 78dd-2(b).

[84] *Id.*

This recommendation works in conjunction with my proposal to increase monetary fines outlined in subsection "A." If both proposed changes were put in place simultaneously, the anti-bribery landscape in Big Pharma would look quite a bit different. In such a world, the calculus of deciding whether to bribe will have drastically changed. Executives would appreciate that all bribery is illegal, regardless of its type; that fines for committing this bribery would be so punitive as to be extremely dangerous to their companies' ongoing viability; and that they could self-report any good-faith violations that do occur or "whistle-blow" without hesitation.[85] In this new world, bribery as a whole would simply appear to be a less appealing option, and so it follows logically that corruption within the pharmaceutical industry would in turn be reduced. Facing a new set of rules, I argue that far fewer pharmaceutical actors would be tempted to bribe, and a degree of normalcy could return to the industry.

V. Conclusion

It is now widely accepted that bribery is a truly damaging practice that has far-reaching negative effects on the modern global economy.[86] Bribery causes market distortions, reduces economic output, and undermines faith in a democratic, capitalist society.[87] Bribery even creates dangerous and occasionally lethal situations: shoddily-built skyscrapers and bridges have collapsed in nations such as Turkey and China after building inspectors were bribed to look the other way and expedite construction.[88] It is therefore critical that the U.S. government implement and enforce as robust an international anti-bribery regime as possible.

Though the FCPA has risen to achieve unprecedented levels of anti-bribery enforcement around the globe, and compliance with the law appears to be increasing on the whole, the pharmaceutical industry seems to be particularly resistant to its reaches, as similar violations occur within the industry year after year.[89] Therefore, it is abundantly clear that some legal reform is required to address bribery in the global pharmaceutical industry in 2017. Delaying action is simply not an option, as maintaining the status quo will only lead to more of the same kinds of unethical behavior.

Though my policy prescriptions as to the direction that FCPA enforcement should take in 2017 are admittedly somewhat lofty, they do not seem to be manifestly unreasonable. In fact, with the proper

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[85] *See* Barr, *supra* note 70.
[86] *See* Johnston, *supra* note 1.
[87] *Id.*
[88] *Id.*
[89] *See* Cassin *supra* notes 9, 21, 48, 52, 73.

political climate and degree of motivation, each could be implemented without much upheaval. Further, it is not difficult to see the profoundly positive effects such changes might have. By fundamentally altering the calculus that a pharmaceutical company must consider before directing its company to bribe, it is possible to reduce the seemingly insatiable temptation to solicit bribes in order to gain an edge over the competition. In sum, implementing a more robust FCPA enforcement regime will have wide-ranging benefits, chiefly the creation of a more ethical pharmaceutical industry that re-directs its focus to where it ought to be: developing and providing the best possible medications to as many patients as possible.

OUR OCEANS NEED SHARKS: A COMPARATIVE ANALYSIS OF SHARK AND TURTLE CONSERVATION LAW IN AUSTRALIA AND THE UNITED STATES

Gabrielle Stiff Heim

I. INTRODUCTION

Many species within the world's oceans have become endangered or threatened in the past century because of human intervention in the ocean. These species must now coexist with humans and their threats. Turtles face the threat of "incidental takings by fisheries, development on nesting beaches, and general habitat alteration."[1] Similarly, sharks are facing global threats through fisheries, bycatch, and habitat alteration. The increasing amount of human exploitation of the seas, coupled with evidence of declines and population extinctions, may forewarn of increasing loss of coastal and oceanic biodiversity.[2] Effects on the turtle and shark populations cause a dip in biodiversity in the greater marine habitat. Each species that is on the verge of extinction, such as several species of sharks and turtles, causes a ripple effect in the ecosystem. The shark population has declined astronomically in the past years as they are "threatened by overexploitation in high-seas fisheries, which is exacerbated for sharks by the high value of and demand for their fins."[3] In a process known as finning, the shark's fin is removed and the live carcass is thrown back into the ocean to die a slow death. Finning is a growing problem as Asian economies profit from the value of shark fin soup. Another means by which shark population has decreased is the serious problem of bycatch in which sharks are caught in longline, purse seine, and gillnet fisheries that are targeting more economical marine species, such as tuna. Twenty-one species of sharks are listed as endangered, vulnerable, or near threatened under the International Union for Conservation of Nature's Red List Status.[4]

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[1] Marjorie Palmer, *Turtle Power Down Under the Sea?: Comparative Domestic and International Legal Protection of Marine Turtles by Australia and the United States*, GA. J. INT'L. COMP. L., 115-149, (2008).

[2] Baum, et al., *Collapse and Conservation of Shark Populations in the Northwest Atlantic*, 229 Sci. 389 (2003).

[3] *Id.*

[4] Polidoro, et. al. *Status of the World's Marine Species,* ICUN (2008) http://cms data.iucn.org/downloads/status_of_the_world_s_marine_species.pdf.

A. Why Are Sharks Important?

Sharks, as a species, are crucial to the biodiversity of the marine ecosystem. The current system relies on each species within it to maintain the diversity. Sharks are a main predator within the ecosystem and without them the food chain would collapse. The extinction of the shark population would cause a ripple effect in which their prey would become too numerous and their prey's population would die out. Sharks are needed to maintain the biodiversity of the ecosystem.[5]

The model used for turtle conservation and recovery would be an accurate model for conserving and recovering the endangered shark species, as well. As sharks are crucial to the marine environment, action needs to be taken in the form of policies that parallel those that protect turtles. Specifically, the models of protection for turtles in both Australia and the United States can serve as examples for shark conservation and recovery policies. As sharks are migratory species like turtles, international efforts and treaties are also crucial to providing boundaries and regulations for sharks in the global arena. The future of sharks depends on effective domestic and international law equally.

II. Protection Under National Law

A. The Species Specific Approach: the United States

In 1973 the United States enacted the Endangered Species Act (ESA) as a means to protect species that were considered endangered or threatened.[6] The United States also uses a system of Marine Protect Areas (MPAs), which set up areas of protection for species.[7] The ESA is a "relatively expansive law, enacted to address the problem of species extinction."[8] The main purpose is to protect species whose survival is considered in danger and it is imperative to conserve and recover such species. It is the job of the Secretary of the Interior to craft plans of recovery for species labeled as endangered so that the "conservation and survival" of these species is maintained.[9] For each species that is in jeopardy, the Secretary of the Interior must "to the maximum extent prudent and determinable. . . designate any habitat of such species. . . to be a critical habitat."[10] Such an area is entitled an MPA which is "any area of the marine environment that has been re-

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[5] Griffin, et al, *Predators as Prey: Why Healthy Oceans Need Sharks,* OCEANA, July 2008, at 3.
[6] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973).
[7] Exec. Order No. 13,158, 65 Fed. Reg. 105 34,909 (May 26, 2000).
[8] Palmer, *supra note* 1.
[9] Endangered Species Act, *supra note* 6.
[10] *Id*.

served by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein."[11] The MPAs seek to protect species from the detrimental human actions that have caused harm.

The National Oceanic and Atmospheric Administration (NOAA) is exclusively responsible for applying the ESA in the United States' waters, within 200 nautical miles of the coast.[12] The National Marine Fisheries Service (NMFS) can also issue regulations that protect species whose survival is in jeopardy, such as turtles and sharks.

Under the model for turtles, the ESA has a supplemental amendment for sea turtles that states that governments that trade seafood with the United States must have laws that protect the sea turtle population within their own oceans.[13] An amendment of the same to the ESA for shark populations would aid sharks as it has turtles because it would force the Asian countries that the United States trades with to enact shark conservation policies; the same Asian countries that are causing immense decline in the population because of finning. A shark amendment to the ESA would effectively regulate shark finning, the most detrimental human action to their survival. While the international community has not looked favorably on the turtle amendment, it has been successful for turtles and can be successful for sharks as well.

B. The Strengths of Biodiversity: Australia

Australia enacted the Environment Protection and Biodiversity Conservation Act (EPBC) in 1999 as a means of increasing biodiversity in marine environments in a comprehensive and broad approach. The goal of the EPBC is to "promote ecologically sustainable development. . .and. . .conservation of biodiversity."[14] The Department of the Environment, Water, Heritage, and the Arts is in charge of orchestrating the EPBC and catering to environmental protection. The Department minister is also in charge of implemented recovery plans for the species that are considered threatened through eliminating

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[11] *All about Marine Protected Areas,* National Marine Protected Areas Center, http://marineprotectedareas.noaa.gov/aboutmpas/ The National Marine Protection Areas Center, stabled by the Departments of Commerce and the Interior, leads many federal, state, tribal, public, and other organizations to create a scientifically based MPA program that protects natural and cultural marine resources.

[12] National Oceanic and Atmospheric Administration, Endangered and Threatened Marine Species, http://www.nmfs.noaa.gov/aboutus/our_mission.html, (last visited on October 5, 2015).

[13] Endangered Species Act, supra note 6.

[14] Environment Protection and Biodiversity Conservation Act, 1991, https://www.environment.gov.au/epbc/about.

negative impacts and fostering recovery in the wild. Under the recovery stipulation, the Minister must also develop monitoring programs, habitat protection, adherence to existing agreements, and development of treaties with neighboring countries. The EPBC, as it is focused on biodiversity, also requires a reduction in bycatch, protection of all marine flora and fauna, and continental shelf organisms. It also established an assessment and approval process in which "activities that will or might significantly impact listed threatened species, migratory species, or an endangered ecological community, as well as any activities involving the marine environment, are subject to the assessment and approval process.[15] Not only are certain endangered or threatened species protected, but entire threatened ecological communities as well.[16] The Australian government also has the power to designate MPAs to protect species and conserve the greater marine environment as a means to further biodiversity. As biodiversity is the focus of the EPBC, both turtles and sharks are protected under Australian law.

III. International Roles of the United States and Australia in Affording Legal Protection to Sharks:

A. America's Commitment

a. Sea Turtles

The United States, when affording protection to endangered species, uses a species specific approach to safeguard species on the verge of extinction. The Endangered Species Act is the foundation for environmental protection for species currently facing extinction in the territory of the United States.[17] The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) are responsible for implementing and enforcing the rules set forth by the original Endangered Species Act and its subsequent amendments.[18] An amendment set forth in the ESA requires the Executive branch of the government strive to protect sea turtles by partaking in international treaties and agreements.[19] This amendment, the Sea Turtles Convention Amendment, asserts that it is the job of the Secretary of Commerce and the

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[15] Palmer, *supra note* 1; Robert, Blomquist, *Protecting Nature 'Down Under:' An American Law Professors View of Australia's Implementation of the Convention of Biological Diversity-Laws, Policies, Programs, Institutions, and Plans 1992-2000*, 227 Dick J. Environmental Law and Policy 324 (2000).

[16] Biodiversity Act, *supra note* 14; Blomquist, *supra note* 15.

[17] Endangered Species Act, *supra note* 6.

[18] Fish and Wildlife Service, https://fws.gov/endangered/about/index.html; National Marine Fisheries Service, http://www.nmfs.noaa.gov/.

[19] Sea Turtle Conservation Amendment of 1989, Pub. L. No. 101-162, 103 Stat. 1037, 1038 (1989).

Secretary of State to acquire international negotiations that protect sea turtles through the protection of the land and sea that they survive on as well as to "initiate negotiations with other nations to develop bilateral or multilateral sea turtle conservation agreements."[20] One of these agreements is the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC).[21] The IAC was created in 1996 in response to the growing need for Sea Turtle preservation between the American continents, and the United States joined in 2000.[22] The purpose of the IAC is "to promote the protection, conservation and recovery of sea turtle populations and of the habitats on which they depend, based on the best available scientific evidence taking into account the environmental, socioeconomic, and cultural characteristics of the parties."[23] Specifically, the IAC regulates fishing practices and encourages the protection of the habitats of sea turtles.[24] The primary goal of the treaty is to restrict human actions that are detrimental to the survival of sea turtles.[25] Furthermore, the members of the IAC are encouraged to protect sea turtles through beach protection and protection of areas in which sea turtles lay eggs.[26] While the IAC aids in the protection of sea turtles, it does not require specific actions – a fact of which some are critical.[27] However, one benefit of the treaty lies in its monitoring and compliance mechanisms.[28] The treaty requires its members to meet bi-annually to discuss their goals for sea turtle protection and the extent to which those goals have been met.[29] Furthermore, the IAC established a monitoring committee which analyzes the sea turtle populations and the issues affecting them and, thus, is able to set forth strategies to better protect the turtle populations.[30] New parties to the treaty are subscribed to stricter rules as they must meet annually to discuss their efforts on sea turtle conservation.[31] As an enforcer of the IAC, the United States maintains a global leadership position regarding sea turtle conservation.

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[20] *Id*.
[21] NOAA, *Inter-American Convention for the Protection and Conservation of Sea Turtles,* http://www.nmfs.noaa.gov/pr/species/turtles/iac.htm.
[22] *Id.*
[23] *Id.*
[24] Chris Wold, *The Status of Sea Turtles Under International Environmental Law and International Environmental Agreements*, 5 J. INT'L. WILDLIFE L. & POL'Y 11, § 5.4-5.4.1 (2002).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*at §5.4.3
[29] *Id*.
[30] *Id*.
[31] *Id*.

b. Sharks

The Endangered Species Act (ESA) currently contains several species of sharks: the Great Hammerhead, the Basking Shark, and the Dusky Shark, while numerous other species of sharks are being considered for listing as endangered or threatened.[32] Policies implemented in the ESA seek to not only protect the species but also to recover the species through the Cooperative Conservation with States programs which assists states who have agreements with the NMFS with recovery.[33]

In affording legal protection to sea turtles, an amendment to the Endangered Species Act required that the United States protect sea turtles through international negotiations and agreements. This amendment caused the United States to propose agreements with various other countries including the Convention for the Protection and Conservation of Sea Turtles (IAC).[34] The amendment that called for International action resulted in various acts of successful turtle protection through monitoring and compliance mechanisms. Likewise, an amendment to the ESA calling for rigorous protection of the endangered and threatened shark species would be advantageous. This proposed amendment would demand the initiation of international negotiations for shark protection and would, thus, increase the protections that sharks are granted in the waters around the world. Sea turtles can be used as a successful model for shark protection as they have many similarities: they share an environment (both near shore and reefs), the similar threat of humans, and similar practices as to their behavior. Considering the success of the amendment to the ESA for the protection of sea turtles, it can be easily suggested that a similar amendment would be successful in furthering the population of the shark species.

B. Australian Obligations for Species Protection

Australia utilizes a slightly different system as it focuses on the wider ecosystem through biodiversity to protect each species through the Environment Protection and Biodiversity Conservation Act (EPBC). The EPBC incorporates the Convention on Biological Diversity,[35] the Convention on the Conservation of Migratory Species of

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[32] National Oceanic and Atmospheric Administration, *Endangered and Threatened Marine Species*, http://www.nmfs.noaa.gov/pr/laws/esa/text.htm.

[33] National Oceanic and Atmospheric Administration, *Recovery of Species under the Endangered Species Act*, http://www.nmfs.noaa.gov/pr/recovery/.

[34] Sea Turtle Conservation Amendment, *supra note* 19.

[35] Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143.

Wild Animals (CMS),[36] and the United Nations Convention on the Law of the Sea (UNCLOS).[3738] The Biodiversity Convention does not specifically address any one species but rather requires "parties to the agreement to undertake efforts to protect species' habitats and the marine environment.[39] The convention suggests that those who agree to it do all they can to promote diversity through environmental sustainability and conservation as well as recover perilous ecosystems and designate protected marine areas.[40] Through the maintenance of struggling ecosystems, the species that live within those systems cannot only be protected but can recover from threatened or endangered status.[41] Additionally, the convention promotes the recovery of the endangered and threatened species themselves.[42] While the Convention on Biological Diversity aids the entire ecosystem through its conservation policies, which attempt to better the ecosystem as a whole, those policies can also be the downfall of the biodiversity convention, as it does not directly aid the various species that are threatened and endangered by giving them priority.[43]

The Convention on Migratory Species (CMS) is another agreement in which Australia participates. The CMS directly aids conservation, recovery, and protection for various types of sharks, including the Great White, which frequently migrates in and around the waters outside of Australia, especially in the Great Barrier Reef.[44] Australia

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[36] Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 28395.

[37] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[38] Australian Government Department of the Environment, *Environment Protection and Biodiversity Conservation Act 1999*, http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999, (last visited on November 3, 2015).

[39] Biological Diversity, *supra note* 35; Palmer, *supra note* 1.

[40] Biological Diversity, *supra note* 35.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Convention on Migratory Species, http://www.cms.int/sites/default/files/instrument/CMS-text.en_.PDF; Parties to the Convention on the Conservation of Migratory Species of Wild Animals and Its Agreements as at October 2008, http://www.cms.int/en/parties-range-states; The Great Barrier Reef is the world's largest reef and coral system composed of 2,900 reefs and 900 islands that stretch for 132,973 square miles. The Great Barrier Reef is situated northeast of Australia and is home to approximately 125 different species of Sharks. Unfortunately, due to human life and its effects, the coral reef has lost much of its coral in the last several decades. It is crucial that Australia attempt to recover and maintain the wonders of the Great Barrier Reef as it is the largest animal made structure in existence and is one of the 7 wonders of the world.

joined the CMS in 1991.[45] The CMS strives to unite governments to remedy the loss of migratory species.[46] The CMS seeks to aid the protection of endangered species by requiring countries comply with generalized agreements and create national laws to protect the migratory species.[47] Five species of sharks are listed in the appendix of species that deserve special attention: protection and recovery.[48] The CMS requires nations to "undertake restoration efforts and minimize adverse impacts on such species" so that they may recover from endangered or threatened status.[49] The CMS supplies funding to countries who undertake restoring endangered species such as the five species of sharks on the CMS list and, therefore, has promoted shark protection and recovery by creating restoration initiatives for shark species.[50] The funding the CMS has provided for endangered species and special rehabilitation projects has directly aided the threatened shark species that are included in the CMS appendices.[51] Additionally, the CMS allows for agreements with non-party states called Memoranda of Understanding in which these states can also further the protection and recovery of endangered species like the Great White Shark, the Basking Shark, the Whale Shark, and several species of Mako Sharks through creating rehabilitation projects.[52]

Australia is also a party to the United Nations Convention on the Law of the Sea (UNCLOS).[53] UNCLOS dictates that its members have an "obligation to protect and preserve the marine environment."[54] UNCLOS asserts that sovereign states have the duty and right to maintain and protect the species that are endangered or possibly threatened in their own coastal waters while preventing practices or activities that could infringe upon the safety of the species.[55] UN-

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[45] CMS, *supra* note 44.

[46] Richard Caddell, *International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention,* 16 COLO. J. INT'L ENVTL. . L. & POL'Y 113, 115-116 (2005).

[47] CMS, *supra note* 44.

[48] The Convention on Migratory Species Appendices, http://www.cms.int/sites/default/files/document/Appendices_COP11_E_version5June2015.pdf, (last visited on Feb. 24, 2017).

[49] Marjorie Palmer, *supra note* 1.

[50] Convention on Migratory Species, *supra note* 44; Convention on Migratory Species Appendices, *supra note* 48.

[51] *Id.*

[52] *Id.*

[53] United Nations Convention on the Law of the Sea, *Table recapitulating the status of the Convention and of related Agreements*, http://www.un.org/depts/los/reference_files/status2010.pdf.

[54] United Nations Convention on the Law of the Sea, *supra note* 33; Marjorie Palmer, *supra note* 1.

[55] United Nations Convention on the Law of the Sea, *supra note* 33.

CLOS requires states to "protect and preserve rare or fragile ecosystems as well as the habitat of. . . threatened or endangered species and other forms of marine life."[56]

It can be seen that Australia is committed to the maintenance and recovery of endangered species through biodiversity as it actively partakes in international agreements and roles to protect all species, including sharks, by protecting and enhancing the environment in which they live. Australia's methods of biodiversity orchestrate the implementation of international environmental laws and protections for the greater ecosystem and, therefore, the many shark species that live there, especially in the ecosystem of the Great Barrier Reef.[57]

C. Mutual Responsibilities

Australia and the United States both have international responsibilities and obligations to the marine environment and the protection of sharks. One such responsibility is to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[58] CITES was created as part of international efforts to address the threat of international trade of endangered species as products in conjunction with the World Conservation Union.[59] International trade posed a threat to the wild fauna and flora that was being depleted and killed for trade. Thus, CITES was created in the early 1970s to combat the devastation that trade was causing on marine life. The United States became a party to CITES in 1974, with Australia following in 1976.[60] CITES policy requires its parties "to adopt. . .domestic legislation to ensure that [the treaty] is implemented at the National level."[61] CITES directly forbids commercial trade of species listed as endangered or threatened in Appendix 1 as they are at risk of extinction or are deeply affected by trade and a limited trade of species listed under Appendix 2 as they are not as nearly

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[56] United Nations Convention on the Law of the Sea, *supra note* 33 (Article 194(5) and 192).

[57] Great Barrier Reef, *supra note* 44.

[58] Convention on International Trade in Endangered Species of Wild Fauna and Flora, *Discover CITES: What is CITES?,* https://www.cites.org/eng/disc/what.php, (last visited on Feb. 10, 2017).

[59] *Id.*

[60] Convention on International Trade in Endangered Species of Wild Fauna and Flora *Discover CITES: List of Contracting Parties*, https://cites.org/eng/disc/parties/chronolo.php?order=field_country_official_name&sort=asc, (last visited on Feb. 10, 2017).

[61] What is CITES, http://www.ifaw.org/united-states/our-work/wildlife-trade/what-cites, *supra note 58*; Marjorie Palmer, *supra note* 1.

depleted as a species.[62] Several species of sharks are listed as endangered or threatened and, therefore, are not allowed to be traded according to CITES policy. CITES seeks to eliminate the shark finning and trading system as it is detrimental to the shark population.[63] The goal of the ban on international trade is to eliminate the trading of species that are near extinction, such as sharks.

Through participation in national and international environmental and species protection programs, Australia and the United States are both trying to protect and recover sharks locally and internationally.

IV. Comparative Effectiveness:

A. Comparative Effectiveness of the ESA and the EPBC

The Endangered Species Act (ESA) of the United States and the Environment Protection and Biodiversity Conservation Act (EPBC) of Australia vary immensely in terms of objectives, scope, and judicial application. The issues of bycatch and habitat destruction are addressed differently by each country. While Australia focuses on the loss of biodiversity and the harms of global warming on the ecosystem, the United States mainly disregards these issues to focus on species-specific programs.

The ESA and the EPBC vary in substantial ways in terms of their stated purposes and objectives. The ESA of the United States sets out to ensure "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such. . . species."[64] While the EPBC in Australia takes a holistic approach that is more concerned with the protection of the entire ecosystem rather than a single species which "promotes the conservation of biodiversity."[65] However, one striking similarity between both the ESA and EPBC is that both policies allow the United States and Australia to complete the agreements and obligations set forth under International treaties regarding endangered species.[66] The ESA is a smaller-scale statute that seeks to address specific issues within the ecosystem such as en-

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[62] What is CITES, http://www.ifaw.org/united-states/our-work/wildlife-trade/what-cites.

[63] *See* http://www.ifaw.org/united-states/our-work/wildlife-trade/what-cites; *see also* Baum, et al., *Collapse and Conservation of Shark Populations in the Northwest Atlantic*, 229 Sci. 389-392, (2003).

[64] Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973).

[65] Environment Protection and Biodiversity Conservation Act 1999, No. 91, c.1, 3(1)(c), available at https://www.comlaw.gov.au/Details/c2004A00485.

[66] *Compare* 16 U.S.C. 1531(a)(5), *with,* Environment Protection and Biodiversity Conservation Act 1999, 3(1)(e).

dangered species, while the EPBC is a larger-scale comprehensive plan that addresses the ecosystem as a whole. The EPBC approach of biodiversity orchestrates Australia's "realization that effective environmental law must recognize the environment as the interconnected, intricate system that it is, rather than compartmentalizing individual environmental issues in a way that ignores this reality."[67]

The ESA varies from the EPBC in the terminology used to categorize the varied species that are experiencing a threatened existence. The ESA uses the terms "endangered" and "threatened" where endangered means any species that is "in danger of extinction throughout all or a significant portion of its range" and threatened means "any species which is likely to become an endangered species within the foreseeable future."[68] The EPBC uses a slightly different system as it creates three main categories: 'critically endangered,' 'endangered,' or 'vulnerable.'[69] This system allows for a greater precision in aiding these species through the betterment of policies that can prevent extinction. Under the EPBC a species is considered endangered if it "is facing a very high risk of extinction in the wild in the near future."[70] A vulnerable label under the EPBC constitutes that a species "is facing a high risk of extinction in the wild in the medium-term future."[71] However, the main difference is the critically endangered label, which is the final step before a species is declared "extinct in the wild."[72]

The EPBC and the ESA also differ in habitat protection. The EPBC requires listings of threatened ecological communities.[73] Furthermore, it establishes a provision for coastal waters as Marine Protected Areas (MPA's).[74] Australia's MPA's comprise one-third of the MPA's in the world and cover hundreds of thousands of square kilometers.[75] The United States has implemented a starkly different system, as the Secretary of the Interior controls the power to designate areas

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[67] Marjorie Palmer, *supra note* 1.

[68] ESA, *supra note* 64.

[69] Environment Protection and Biodiversity Conservation Act, *supra note* 65, c.5, 179(3-5).

[70] Environment Protection and Biodiversity Conservation Act, *supra note* 65, c.5, 179(4).

[71] Environment Protection and Biodiversity Conservation Act, *supra note* 65, c.5, 179(5).

[72] Environment Protection and Biodiversity Conservation Act, *supra note* 65, c.5, 179.

[73] Environment Protection and Biodiversity Conservation Act, *supra note* 65, c.5, 181.

[74] *See* Environment Protection and Biodiversity Conservation Act, *supra note* 65, c.5, 344(1).

[75] *A Review of Recent Developments in Ocean and Coastal Law,* 12 OCEAN AND COASTAL L.J. 181, 201-02 (2006).

as habitats that are critical for the furthering of species that are considered endangered and to monitor the MPA's after their creation.[76] The MPA's of Australia have a goal of biodiversity while the United States does not recognize biodiversity as an objective of their MPA's.[77] Along with protecting the species that live within the MPA's, Australia recognizes that MPA's allow for ecotourism destinations, such as the Great Barrier Reef, while the United States remains unaware of the benefits of the MPA's.[78]

The ESA and the EPBC are also executed in different ways. Multiple governmental agencies and executive officials are involved in implementing the ESA, including the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Secretary of Commerce, the Secretary of the Interior, the Secretary of State, and the Secretary of the Treasury. On the other hand, the Australian Government's Department of the Environment is the chief body responsible for implementing the EPBC.[79]

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[76] *See generally* Environment Protection and Biodiversity Conservation Act, *supra note* 14; NAT'L MARINE PROTECTED AREAS CTR., ALL ABOUT MARINE PROTECTED AREAS [hereinafter MARINE PROTECTED AREAS]. http://marineprotectedareas.noaa.gov/aboutmpas/. The National Marine Protected Areas Center, established by the Departments of Commerce and the Interior, leads many federal, state, tribal, public, and other organizations to create a scientifically based MPA program that protects natural and cultural marine resources.

[77] *See* MARINE PROTECTED AREAS, *supra note* 76; Exec. Order No. 13, *supra note* 7.

[78] *See* MARINE PROTECTED AREAS, *supra note* 76.

[79] Josh Eagle, *Regional Ocean Governance: The Perils of Multiple-Use Management and the Promise of Agency Diversity,* 16 DUKE ENV. L. AND POL'Y F. 143, 150 (2006) ("NOAA's Office of Protected Resources applies the Marine Mammal Protection Act (marine mammals) and the Endangered Species Act (endangered fish, mammals, and seabirds."). *See* Environmental Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973). The Secretary of the Interior "shall establish and implement a program to conserve (A) fish or wildlife which are listed as endangered species or threatened species pursuant to section 4 of this Act; or (B) plants." *Id*. at § 5(a). The Secretary of the Interior shall work with the Secretary of State in encouraging "(1) foreign countries to provide for the conservation of fish or wildlife including endangered species and threatened species listed pursuant to section 4 of this Act; (2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and (3) foreign persons who directly or indirectly take fish or wildlife in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife and their habitat." *Id*. at § 8(b). The Secretary of Commerce, along with the Secretary of the Interior shall establish whether a species is either "threatened" or "endangered." *Id*. at § 4. The Secretary of Interior shall consult with the Secretary of the Treasury in implementing the ESA and reducing costs. *Id*. at § 11(e). *Cf.* AUSTRALIAN GOV'T, DEP'T OF THE ENVIRONMENT AND ENERGY, ABOUT THE EPBC ACT, https://www.environment.gov.au/epbc/about.

Another means by which the ESA and the EPBC vary is the extent by which their implementers address global warming and its effect on the environment. Australia's environmental protection agency, the Australian Department of Environment and Energy, asserts that its role is to "focus on national environmental issues by: implementing an effective response to climate change."[80] In contrast, while the United States Environmental Protection Agency notes that climate change is an issue, the National Oceanic and Atmospheric Administration and National Marine Fisheries Service do not seek to resolve climate change through marine resource policy.[81]

Additionally, the ESA and the EPBC differ in terms of how they are implemented by the executive branches of the governments of the United States and Australia. The Secretary of the Interior and the Secretary of Commerce implement the ESA by controlling the endangered and threatened species list while creating recovery plans for the species on the list.[82] Further, the National Oceanic and Atmospheric Administration utilizes the Endangered Species Act economically.[83] In Australia, the Department of Environment and Energy is in charge of implementing the EPBC, while the Commonwealth Environment Minister is in charge of developing recovery plans for endangered and threatened species. The differences in how the policies are implemented is caused by the differences in the governments, themselves.

The ESA and the EPBC vary in how they impact the fishing industry – an industry that plays an important role for endangered species. In the United States, the National Marine and Fisheries Service has issued regulations upon the fishing industry that have altered fishing practices and placed import bans on operations that involve disproportionately high levels of bycatch. These bans, while aggressive and effective, are not well-received among fishermen who utilize the nets that cause bycatch. Similarly, the plans set forth in Australia by the Commonwealth Environment Minister are overly ambitious as they set forth goals that are too precise to achieve recovery of each endangered species but rather are more suited to the task of biodiversity, as it emphasizes biodiversity benefits.[84] The biodiversity ap-

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[80] Australian Government, Department of the Environment, Water, Heritage and the Arts, *supra note* 73.

[81] ENVIRONMENTAL PROTECTION AGENCY, 2006-2011 EPA STRATEGIC PLAN: CHARTING OUR COURSE 11 (2006), https://ntrl.ntis.gov/NTRL/dashboard/searchResults/titleDetail/PB2008108863.xhtml; NOAA Fisheries- Mission, http://www.nmfs.noaa.gov/what/mission.htm (last visited on Nov. 5, 2015).

[82] ESA, *supra* note 59.

[83] Eagle, *supra* note 73.

[84] COMMONWEALTH OF AUSTRALIA, ENVIRONMENT AUSTRALIA, RECOVERY PLAN FOR MARINE TURTLES IN AUSTRALIA 2 (2003), http://environment.gov.au/coasts/publication/turtle-recovery/pubs/marine-turtles.pdf.

proach in Australia not only helps the endangered species but also other marine species, organisms, and plant life.

The ESA and the EPBC both have proven to be effective models for sea turtle conservation and recovery. Likewise, the rules and regulations that have been effective in aiding the sea turtle populations can also be effective in assisting the endangered species of sharks. For example, the Sea Turtle Amendment can be a useful model for future amendments to the ESA in providing protection for varying shark species which are considered endangered under the ESA. On the other hand, as the EPBC focuses on biodiversity instead of a specific species, the EPBC has been advantageous to the shark population. The MPAs within Australia also have guaranteed safety and recovery to sharks. However, Australia's model could improve if a further amendment was added to the EPBC that was tailored specifically to shark conservation.

Australia and the United States have varied purposes and objectives set forth in their conservation policies and implement their statues differently through different entities. Both countries not only have different national law, but achieve their international obligations through a wide array of methods.

B. Comparative International Leadership of the United States and Australia

The United States and Australia both have achieved international leadership positions through their success in international agreements in providing legal protection to endangered species, as seen in the turtle model.

The United States effectively obtained a leadership role in its protection of sea turtles through its implementation of the IAC. The IAC's successful monitoring and compliance mechanisms provided that the sea turtle population is maintained and monitored.[85] The United States is primarily responsible for the creation of the IAC through their "bold and responsible leadership."[86]

Similarly, Australia contributed greatly to the international standards for endangered species protection. Australia has participated in international agreements for the protection of endangered and threatened species, such as the Biodiversity Convention, the Convention on Migratory Species, and the United Nations Convention on the Law of the Sea. As a party to the Biodiversity Convention, Australia has demonstrated its commitment to implementing biodiversity in its waters, as well as sustainable use practices.[87] In addition, the Con-

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[85] *See generally,* Wold, *supra* note 24, at 33-8.
[86] Palmer, *supra* note 1, at 144.
[87] *See generally* Biodiversity Convention, *supra* note 35; Wold, *supra* note 20.

vention on Migratory Species lists several species of turtles and sharks under its protection.[88] The Convention on Migratory Species also proclaims that parties "shall endeavor" "to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction."[89] The Convention on Migratory Species provides for education and public awareness to influence the public on the problems faced by endangered species as a means to ensure effective protection. Finally, as a party to the United Nations Convention on the Law of the Sea, Australia is required to adhere to high standards for conservation efforts for marine life.[90]

The United States and Australia are both parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[91] Through participation in CITES, the United States and Australia can prevent trade of both turtles and sharks on international markets. The international agreements to which both the United States and Australia are parties are valuable compliments to their national laws on the protection of endangered species.

C. The Future of Endangered Species: Suggestions for Change

A comparison of the ESA and the EPBC demonstrates the weaknesses of each piece of legislation. The United States would benefit from adjusting the ESA to reflect Australia's focus on biodiversity. Each country could utilize their leadership positions better to protect species internationally.

The United States could also model its Marine Protected Areas to be more like Australia's. Because of Australia's focus on biodiversity, it utilizes Marine Protected Areas for the protection of endangered species. A focus on biodiversity in the United States would result in "better long-term results in the effort to shield endangered species from major threats and to protect the marine environment as a whole."[92] The loss of biodiversity is substantial in the United States. Additional MPAs could garner a more wide-spread support for the marine life within, especially for the endangered animals such as turtles and sharks. The United States can also benefit from stricter regulations on the fishing industry to eliminate bycatch effects on both turtles and sharks while aiding the entire marine ecosystem.

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[88] Convention on Migratory Species, *supra* note 36.

[89] Convention on Migratory Species, *supra* note 36, at Art. III, § 4.

[90] UNCLOS, *supra* note 33, at Art. 194, § 5 (requiring parties to take measures to "protect and preserve . . . the habitat of depleted, threatened or endangered species and other forms of marine life").

[91] *See* CITES: LIST OF CONTRACTING PARTIES, *supra* note 58.

[92] Palmer, *supra* note 1, at 146.

Due to the benefits that would accrue to both countries from incorporating methods from the other method, the best course of action would be to create a hybrid species specific-biodiversity approach to conservation law. This hybrid system would be able to utilize the advantages of both systems without the pitfalls they contain. The best way to implement this plan would be to have a basic biodiversity approach with stringent and specific methods for species identified as endangered. A system structured in this manner will increase the biodiversity and health of the whole ecosystem while putting measures in place to protect and rebound the endangered species.

V. Conclusion

This comparison of American and Australian efforts for protection of marine turtles demonstrates an effective model for shark conservation and recovery. The United States' method of species-specific conservation can be used to protect sharks by including an additional amendment to the ESA that provides for shark protection. Additional means of shark-specific conservation and recovery within the United States, such as that demonstrated by the turtle model, will aid the endangered and threatened populations of sharks. The biodiversity approach within Australia has been very successful in turtle conservation as it protects the ecosystem in which they reside. Furthermore, the Australian model, with additional laws to protect sharks, will also go a long way in saving the population of sharks that are at risk of extinction.

Mutual goals in the international community with the combined approaches of both the United States and Australia is a better means by which endangered populations of turtles and sharks can be conserved and recovered so that the marine ecosystem may be preserved. Together, linked with the international community, Australia and the United States have the power to address the national and global threats to sharks, as seen with their successful collaboration to save the turtle population. As we swim ahead, the best plan would be to create a system in which both methods, biodiversity and species-specific measures, are blended together to secure the advantages of both approaches.