

# EXPLAINING INTERNATIONAL VARIANCE IN FOREIGN BRIBERY PROSECUTION: A COMPARATIVE CASE STUDY

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## INTRODUCTION

A major military contract is on the line. Your company has seen too many recent financial troubles to lose it to the competition. So your company opts to slip \$38 million under the table to foreign political officials to make sure the contract is yours.<sup>1</sup> This story is not unusual: an estimated 1.5% of the world's Gross Domestic Product (GDP) goes to paying bribes.<sup>2</sup> Giving bribes decreases efficiency in the private sector and misallocates government funds to overpriced contracts with the best bribe rather than the best project.<sup>3</sup> Yet some of the world's major economies have prosecuted as few as three foreign bribery cases since 1999.<sup>4</sup> In 1977, after recognizing that over \$300 million in "questionable payments" went from United States firms to foreign officials,<sup>5</sup> the U.S. enacted the Foreign Corrupt Practices Act (FCPA).<sup>6</sup> For twenty-two years, the United States was alone in the push to punish foreign bribery through the FCPA.<sup>7</sup> Today, the Organisation for Economic Co-operation and Development (OECD) has created an international body of countries resolved to combat foreign bribery practice.<sup>8</sup>

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1. This hypothetical scenario follows the foreign bribery scandal of Lockheed Aircraft Corp. in 1975. See James F. Peltz, *Lockheed Agrees to Pay Record Fine: Aerospace: Calabasas Firm Pleads Guilty in Connection with Bribing an Egyptian Politician*, L.A. TIMES (Jan. 28, 1995), [http://articles.latimes.com/1995-01-28/business/fi-25231\\_1\\_egyptian-politician](http://articles.latimes.com/1995-01-28/business/fi-25231_1_egyptian-politician); see also *SCANDALS: Lockheed's Defiance: A Right to Bribe?*, TIME, Aug. 18 1975, at 71.

2. Michael Paul Gieger, *220 Years Later and the Commonwealth is Still Imposing Laws on the United States: A Comparative Look at U.S. Antibribery Legislation and the United Kingdom's Bribery Act 2010*, 47 VAND. J. TRANSNAT'L L. 1381, 1383 (2013).

3. See Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 85–86 (2007).

4. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF PUBLIC OFFICIALS 31 (2014) [hereinafter OECD FOREIGN BRIBERY REPORT].

5. Krever, *supra* note 3, at 87 (citing William L. Larson, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 STAN. L. REV. 561, 561 n.1 (1980); SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976); Henry H. Roszbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509, 518 (1997)).

6. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3 (2012).

7. The FCPA was passed in 1977 and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force in 1999. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3 (2012)); *OECD Anti-Bribery Convention: Entry into Force of the Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/oecdanti-briberyconventionentryintoforceoftheconvention.htm> (last visited Apr. 27, 2015).

8. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 12, Dec. 18, 1997, 37 I.L.M. 4 [hereinafter OECD Convention].

But nearly two decades after the OECD resolved to combat bribery on an international scale, the variation in foreign bribery prosecution by member states remains dramatic. Where the U.S. has prosecuted 128 foreign bribery schemes since the OECD began targeting bribery, the next highest is Germany with only twenty-six.<sup>9</sup> France and Japan have prosecuted only five and three cases, respectively.<sup>10</sup> At the same time, the U.S. has grown more aggressive in prosecuting bribery beyond its borders. The U.S. has targeted foreign corporations offering bribes in foreign countries with only tangential U.S. ties. In fact, of the ten FCPA cases resulting in the highest fines, eight were not brought against U.S. companies.<sup>11</sup> It seems that the U.S. remains unsatisfied with its OECD co-parties in the realm of bribery. And as the country that first pushed for an international effort to combat bribery, its dissatisfaction supports the conclusion that the anti-bribery regimes of its fellow signatories are lacking. The international prosecution statistics and U.S. extraterritorial prosecutions underline the problem this Note seeks to address: why do we continue to see such variation in foreign bribery prosecution even among countries that have agreed to combat it?

This Note seeks to expose some possible explanations for the international variation in bribery prosecution. Today, the main vehicle for international cooperation in combating bribery remains the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This Note does not analyze the consequences of the fact that some countries have declined to punish foreign bribery. Instead, it focuses on the problem of countries that have failed to follow through on promised enforcement. The Note uses a case study to examine the variation in enforcement among OECD Convention signatories and to reveal how countries that supposedly have the same enforcement requirements can, nonetheless, reach dramatically different results.

Some analysis in this Note concerns FCPA prosecution abroad. Either internal or external actors can curb foreign bribery in a country. The country can prosecute cases of bribery itself, or it can facilitate cross-border investigations by other countries. The FCPA is a prominent example of the latter. The U.S. is not the only country that pursues extraterritorial foreign bribery prosecution. For example, the United Kingdom Bribery Act

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9. OECD FOREIGN BRIBERY REPORT, *supra* note 4, at 31.

10. *Id.*

11. See Richard L. Cassin, *With Alstom, Three French Companies Are Now in the FCPA Top Ten*, FCPA BLOG (Dec. 23, 2014, 9:45 AM), <http://www.fcpcbog.com/blog/2014/12/23/with-alstom-three-french-companies-are-now-in-the-fcpa-top-t.html>.

of 2010 “expanded liability for acts committed outside of the [U.K.] to individuals who are not U.K. nationals.”<sup>12</sup> But the FCPA provides more cases for analysis due to its longer history. Therefore, this Note analyzes how OECD Convention signatories have reacted to FCPA prosecutions in their territories as a measure of compliance with the international push to punish bribery. If we take the FCPA as a standard of aggressive foreign bribery prosecution, a state’s support or resistance to FCPA enforcement within its borders can provide another way to measure the variation in anti-bribery regimes across countries.

This Note begins with a brief history of the FCPA and the OECD Convention in Part I. The history provides a background for understanding where foreign bribery prosecution started. Part II scrutinizes anti-bribery regimes today using a case study of three OECD Convention countries with differing rates of prosecution: Germany, France, and Japan. Part III begins by outlining how these same countries reacted to international environmental agreements. Comparing compliance with environmental protections to compliance with anti-bribery regimes, demonstrates that something about corruption in particular, rather than a general disdain for international interference, is causing this prosecution variation. Lastly, Part III analyzes foreign corruption prosecutions in Germany, France, and Japan to identify the factors causing compliance and cooperation variations. Ultimately, it appears that economic, cultural, and political pressures all influence a country’s willingness to prosecute foreign bribery. More specifically, internal pressure from corporations, the citizenry’s view of bribery, and personal political motivations all affect how Germany, France, and Japan have approached foreign bribery. Even where a country has agreed to combat foreign bribery, these factors can play important roles in shaping a country’s willingness to enforce those laws.

## I. A BRIEF HISTORY: SHIFTING FOREIGN BRIBERY PROSECUTIONS ON TO THE INTERNATIONAL STAGE

### A. The U.S. Response to Foreign Bribery

In the wake of the Watergate scandal, the U.S. Securities and Exchange Commission (SEC) found over \$300 million in “questionable payments” made by U.S. firms to foreign officials.<sup>13</sup> In December 1977,

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12. Gieger, *supra* note 2, at 1405.

13. Krever, *supra* note 3, at 87 (citing William L. Larson, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 STAN. L. REV. 561, 561 n.1 (1980); SEC. & EXCH. COMM’N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS

Congress responded by enacting the FCPA: “the first legislation in the world to recognize and seek to curb the contribution of domestically based corporations to foreign corruption.”<sup>14</sup>

The FCPA’s anti-bribery provision makes it a crime to bribe foreign officials.<sup>15</sup> Under the FCPA, foreign bribery is generally the act of offering a foreign official payment in exchange for a business advantage.<sup>16</sup> The anti-bribery provision covers three types of actors: issuers,<sup>17</sup> domestic concerns,<sup>18</sup> and any person who violates the provision while corruptly using U.S. instrumentalities in U.S. territory.<sup>19</sup>

The coverage of multiple actors has given the U.S. a flexible tool for prosecuting foreign actors for bribery. For example, foreign corporations can be issuers for FCPA purposes. Foreign shares can be traded in U.S. markets as American Depositary Receipts (ADR).<sup>20</sup> Therefore, the issuing foreign corporation becomes an issuer subject to the FCPA.<sup>21</sup> Absent ADRs, U.S. prosecutors can look for acts that occurred “while in the territory of the United States” that violate the FCPA.<sup>22</sup> And as evidenced by

AND PRACTICES (1976); Henry H. Rossbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT’L L. 509, 518 (1997).

14. *Id.* at 84.

15. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2012). The entire FCPA is part of the Securities Exchange Act of 1934. *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–pp (2012).

16. The anti-bribery provision is a criminal statute. It prohibits the actor from corruptly using “the mails or any means of instrumentality of interstate commerce” to further an “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” to a foreign official or political party to improperly influence that recipient’s actions. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2012). All three subsections use the same language. The text qualifies acts as improper when done “in order to assist . . . in obtaining or retaining business.” *Id.*

17. *Id.* § 78dd-1. The covered issuers are those with a class of securities registered under § 781, or which are “required to file reports” under § 78o(d). *Id.* Additionally, § 78dd-1 regulates “any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer.” *Id.*

18. *Id.* § 78dd-2. A domestic concern for purposes of § 78dd is “any individual who is a citizen, national, or resident of the United States,” and any corporation or business organization “which has its principal place of business in the United States, or which is organized under the laws” of a State, territory, possession, or commonwealth therein. *Id.* § 78dd-2(h)(1).

19. *Id.* § 78dd-3.

20. *See* Mauro M Wolfe, *Does the US Government Have Limitless Jurisdiction Enforcing the FCPA?*, NEWSL. CRIM. L. SEC. LEGAL PRAC. DIVISION INT’L B. ASS’N (Int’l B. Ass’n, London, U.K.), May 2010, [http://www.martindale.com/members/Article\\_Atachment.aspx?od=299343&id=1055878&filename=asr-1055918.pdf](http://www.martindale.com/members/Article_Atachment.aspx?od=299343&id=1055878&filename=asr-1055918.pdf) (citing Complaint ¶ 7, SEC v. Fiat S.p.A., No. 08-cv-02211 (D.D.C. Dec. 22, 2008) (“Throughout the relevant period, Fiat’s American Depositary Receipts were registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange under the symbol ‘FIA.’”)).

21. *Id.*

22. 15 U.S.C. § 78dd-3(a) (2012).

recent FCPA cases against foreign corporations, a violation can occur in the U.S. simply by routing the funds through a U.S. bank.<sup>23</sup> Overall, the language of the FCPA gives the U.S. broad jurisdiction over actors inside and outside the United States.

While Congress initially passed the FCPA in response to U.S.-based bribery, concern transitioned to ensuring that bribery did not disadvantage U.S. companies abroad. After 1977, U.S. firms were bound by the FCPA, but foreign firms were not.<sup>24</sup> A poll administered two years after enactment showed that “71% of respondent executives of multinational companies thought U.S. companies would lose business to foreign competitors as a direct result of the [FCPA].”<sup>25</sup> The “uneven playing field” resulted in a loss of approximately \$30 billion per year in international business for the U.S. to companies outside of FCPA regulation.<sup>26</sup> Given these concerning figures, the U.S. needed to ensure that foreign bribery was punished to eliminate the handicap on U.S. businesses abroad. In addition to permissive FCPA jurisdiction allowing prosecutors to target foreign actors, the U.S. began pushing for a more international response to foreign bribery by pressuring the OECD to take up the issue.

## B. The OECD Convention: The International Answer to Foreign Bribery

### 1. The Text of the OECD Convention

The first major step toward a united, international front against bribery was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention). After several years of urging by the U.S., the OECD Council approved the Recommendation on Bribery in International Business Transactions.<sup>27</sup> In 1997, thirty-three countries signed the Convention.<sup>28</sup> Today, the OECD Convention boasts forty-one signatories<sup>29</sup> and remains the main vehicle for

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23. See *infra* Part II.B–D.

24. 15 U.S.C. §§ 78dd-1 to 78dd-3. Sections 78dd-1 and 78dd-2 were enacted in 1977, though § 78dd-3 was not enacted until 1998.

25. Krever, *supra* note 3, at 90.

26. Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998), <http://www.justice.gov/criminal/fraud/fcpa/docs/signing.pdf>; see also Krever, *supra* note 3, at 90 (noting that the CIA estimated that the “U.S. lost \$36 billion in international business to bribe-paying international competitors” from 1994 to 1995).

27. H.R. REP. NO. 105-802, at 10 (1998).

28. *Id.* at 11.

29. The signatories include the 34 OECD member countries plus Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, OECD (May 21, 2014), <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>.

international cooperation in anti-bribery enforcement.<sup>30</sup> But even among signatories, there is notable variation in anti-bribery enforcement.

The Convention's proactive bribery prosecution requirements explain the confusion over why anti-bribery enforcement remains so erratic outside of the U.S. The Convention imposes positive requirements on its parties and creates a regime that caters to cross-border prosecution. It recognizes that "bribery is a widespread phenomenon in international business transactions," and that "all countries share a responsibility to combat bribery."<sup>31</sup> The language declares that Convention signatories shall criminalize bribery.<sup>32</sup> Furthermore, parties are to provide legal assistance to any investigations or proceedings under the Convention.<sup>33</sup> And the parties are to cooperate in follow-up monitoring and implementation as overseen by the OECD Working Group on Bribery in International Business Transactions.<sup>34</sup> The Convention imposes a duty to punish bribery, requires aid to other states doing so, and creates an accountability system. Therefore, it ensures the ability to flush out bribery regardless of national boundaries.

The Convention also has permissive jurisdiction language in line with extraterritorial prosecution. Article 4 instructs parties to establish jurisdiction over "the bribery of foreign officials when the offence is committed in whole or in part in its territory," or by its nationals abroad.<sup>35</sup> The commentaries add that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."<sup>36</sup> Therefore, compliance with international anti-bribery expectations for a country means not only punishing foreign bribery itself, but also aiding extraterritorial investigations by other countries.

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30. While several regional and nongovernmental organizations have begun addressing international bribery, the United Nations Convention Against Corruption is the only other truly international anti-bribery effort. See Gieger, *supra* note 2, at 1387 (identifying the OECD Convention, the 2003 UN Convention, and then only regional and nongovernmental organizations); see also Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 468–69 (2012) ("Thus, because all of the 1998 changes incorporate treaty provisions, the FCPA as currently written must be considered in light of the OECD Convention according to norms for implementing legislation.").

31. OECD Convention, *supra* note 8, at preamble.

32. *Id.* art. 1. If nations lack a corporate criminal liability statute in their legal regime, they are to "provide for non-criminal sanctions, such as fines." H.R. REP. NO. 105-802, at 11; OECD Convention, *supra* note 8, art. 3(2).

33. H.R. REP. NO. 105-802, at 11; OECD Convention, *supra* note 8, art. 9.

34. OECD Convention, *supra* note 8, art. 12.

35. *Id.* art. 4.

36. *Id.* at 16, cmt. 25.

## 2. From 1999 to Today

The OECD Convention has successfully increased foreign bribery prosecution internationally. Seventeen countries have had successful anti-bribery cases since signing the OECD Convention.<sup>37</sup> These governments have investigated 263 individuals and 164 entities for a total of 427 foreign bribery cases.<sup>38</sup> And the number of cases concluded per year has increased dramatically since 1999. In 2003, there were still fewer than ten cases a year, but by 2011 the rate had increased to nearly eighty.<sup>39</sup> Overall, the OECD Convention seems to have prompted governments to prosecute bribery.

However, while these general numbers are promising, they obscure underlying variations in enforcement. U.S. anti-bribery efforts continue to dwarf those of the rest of the world.<sup>40</sup> Of the thirty-nine OECD member countries, the U.S. has prosecuted the most corruption schemes since the Convention with 128 cases, over one-fourth of the total prosecutions.<sup>41</sup> Germany is the next highest and has prosecuted only twenty-six to date.<sup>42</sup> It is not as though the U.S. accounts for one-fourth of the world's corruption schemes, and the other States simply have fewer crimes to prosecute. Of the ten FCPA cases resulting in the highest fines, eight have been against foreign firms.<sup>43</sup> Bribery is occurring in countries aside from the U.S., but the U.S. is just the one prosecuting it. Thus, despite the admirable strides made by OECD Convention signatories in addressing and prosecuting foreign bribery, there is still something causing the U.S. to pick up the slack left by the continued disparity.

## II. ANTI-BRIBERY PROSECUTION TODAY: A CASE STUDY

This Part uses case studies of Germany, France, and Japan to examine the variation in anti-bribery prosecution today. All three were party to the OECD Convention and participated in its drafting.<sup>44</sup> At the time of the

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37. OECD FOREIGN BRIBERY REPORT, *supra* note 4, at 7. Data was collected from February 15, 1999 to June 1, 2014. *Id.*

38. *Id.* at 8.

39. *Id.* at 13, fig. 1.

40. Gieger, *supra* note 2, at 1387.

41. OECD FOREIGN BRIBERY REPORT, *supra* note 4, at 31, fig. 19.

42. *Id.*

43. Cassin, *supra* note 11.

44. See Press Packet, Fr., Nat'l & Int'l Approaches to Improving Integrity and Transparency in Gov't, at 1 (July 1998), <http://www.oecd.org/france/2090381.pdf> (discussing French and German efforts to form a binding agreement during the Convention, and recognizing that the convention was prepared by all twenty-nine Member countries and five non-Members); see also *History*, OECD,

OECD Convention, the U.S., Germany, Japan, and France were the largest OECD exporters.<sup>45</sup> In 2014, all four countries were still in the top five.<sup>46</sup> A larger export market exposes corporations to more chances or demands for foreign bribery. Thus, these countries have had the most opportunities and incentives among the OECD Convention parties to be proactive about bribery prosecution. Furthermore, of the top ten FCPA actions, German firms appear twice, French firms appear three times, and Japanese firms appears once.<sup>47</sup> Regardless of the country's prosecution, there are actors in these countries bribing foreign officials. And these cases provide an opportunity to examine how these countries react to extraterritorial prosecution of foreign bribery in their jurisdiction. Overall, this Part reveals three distinct variations in anti-bribery enforcement within the OECD Convention countries: Germany, with a strong anti-bribery regime and a friendly approach to FCPA prosecution; France, which resists prosecution of its nationals in either regard; and Japan, which is lagging in its own enforcement but is open to U.S. intervention.

## A. Germany

### 1. Germany's Response to Foreign Bribery

After the U.S., Germany has taken the strongest stance against foreign bribery. The American Bar Association noted that "Germany has assumed a leading position in the investigation and prosecution of foreign bribery cases."<sup>48</sup> Germany has had twenty-six sanctions for foreign bribery schemes since the OECD entry into force, more than any nation aside from the U.S.<sup>49</sup> In its 2013 follow-up report, the OECD Working Group praised

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<http://www.oecd.org/about/history/> (last visited Apr. 27, 2015) (noting that Japan joined the OECD in 1964).

45. OECD Convention, *supra* note 8, at 13. In 1998 the U.S. accounted for 15.9% of OECD exports, Germany 14.1%, Japan 11.8%, and France 7.7%. *Id.*

46. *International Trade (MEI)*, OECD.STATEEXTRACTS, [http://stats.oecd.org/index.aspx?DataSetCode=MEI\\_TRD#](http://stats.oecd.org/index.aspx?DataSetCode=MEI_TRD#) (last visited Apr. 27, 2015). Since 2008, the Netherlands has surpassed France as the fourth largest OECD exporter. *Id.* In 2014, the top five OECD export countries were the U.S. with 15.0%, Germany 13.8%, Japan 6.8%, the Netherlands 6.4%, and France at 5.5%. *Id.*

47. Cassin, *supra* note 11. The other represented nations are the Netherlands and Italy in a joint action against Snamprogetti Netherlands B.V. and its parent company ENI S.p.A. *Id.*; *Litigation Release No. 21588*, SEC. & EXCH. COMM'N (July 7, 2010), <http://www.sec.gov/litigation/litreleases/2010/lr21588.htm>.

48. T. Markus Funk & Jess A. Dance, *Global Litigator: Germany's Increasingly Robust Anticorruption Efforts*, 38 LITIG. 3, 1 (2012), [http://www.americanbar.org/publications/litigation\\_journal/2011\\_12/spring/global\\_litigator\\_potential\\_collateral\\_estoppel\\_effect.html](http://www.americanbar.org/publications/litigation_journal/2011_12/spring/global_litigator_potential_collateral_estoppel_effect.html) (internal quotation marks omitted).

49. OECD FOREIGN BRIBERY REPORT, *supra* note 4, at 31. The U.S. has had 128 sanctions since the OECD Convention entered into force, and after Germany, Korea has had 11. *Id.*

Germany for its “robust enforcement efforts.”<sup>50</sup> And Transparency International<sup>51</sup> has ranked Germany as an active enforcer (the same category as the U.S.) out of active, moderate, limited, or little or no enforcement.<sup>52</sup> Recommendations by both of these groups focus on the lack of corporate criminal liability for foreign bribery,<sup>53</sup> and urge higher sanctions against individuals.<sup>54</sup>

Germany has embraced foreign influences on its legal regime for bribery. For example, “[w]ithin the last decade, the compliance movement from the [U.S.] has greatly influenced the economic crime debate [in Germany].”<sup>55</sup> Compliance is a key tool for U.S. prosecutors.<sup>56</sup> But recently the importance and usefulness of compliance has become clearer in Germany.<sup>57</sup> Now compliance investigations are “commonplace.”<sup>58</sup> This has caused some German companies to withdraw from foreign countries with high corruption risks.<sup>59</sup> It seems both German corporations and the German government have embraced anti-bribery enforcement.

## 2. Germany and the FCPA

In 2008, the German company Siemens A.G. agreed to pay \$350 million to the SEC, and \$450 million to the U.S. Department of Justice (DOJ) in the biggest FCPA settlement to date.<sup>60</sup> The U.S. government

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50. *Germany: Follow-Up to the Phase 3 Report & Recommendations*, at 3 (Apr. 2013), <http://www.oecd.org/daf/anti-bribery/GermanyPhase3WrittenFollowUpEN.pdf>.

51. Transparency International is an independent organization dedicated to investigating and combating corruption around the world. *Overview*, TRANSPARENCY INT’L, <http://www.transparency.org/whoweare/organisation> (last visited Apr. 27, 2015).

52. *Exporting Corruption: Germany*, TRANSPARENCY INT’L, [http://www.transparency.org/exporting\\_corruption/Germany](http://www.transparency.org/exporting_corruption/Germany) (last visited Apr. 27, 2015).

53. *Germany: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 50, at 8–9; *Exporting Corruption: Germany*, *supra* note 52.

54. *Exporting Corruption: Germany*, *supra* note 52.

55. Marc Engelhart, *Development and Status of Economic Criminal Law in Germany*, 15 GERMAN L.J. 693, 698 (2014).

56. *See id.* at 716 (“The development originated in the USA where compliance is of key importance in mitigating a sentence for companies according to the Federal Sentencing Guidelines.”).

57. *Id.* at 713 (“Beginning with the Siemens case in 2007, compliance investigations have become commonplace.”); *see also* Karl Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal*, 10 GERMAN L.J. 1343, 1350–51 (2009) (describing the growing continuity between U.S. and German compliance standards).

58. Engelhart, *supra* note 55, at 713.

59. European Commission, *Annex 5 (Germany) to the EU Anti-Corruption Report*, at 8, COM (2014) 38 final (Feb. 3, 2014), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_germany\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_germany_chapter_en.pdf).

60. *SEC Charges Siemens AG for Engaging in Worldwide Bribery*, SEC. & EXCH. COMM’N (Dec. 15, 2008), <http://www.sec.gov/news/press/2008/2008-294.htm>; Cassin, *supra* note 11; *Siemens AG and*

found that Siemens had violated the FCPA through a “systematic practice of paying bribes to foreign government officials to obtain business.”<sup>61</sup> The alleged bribes went from the German company to countries including Venezuela, Israel, Mexico, and Iraq, but not any officials in the U.S.<sup>62</sup> The jurisdictional hook came from Siemens issuing securities in the U.S., and from the use of U.S. banks in a number of the bribery transactions.<sup>63</sup> As one practitioner noted, “What these charges foreshadow is that virtually any transaction anywhere in the world, no matter how tangentially (if at all) it touches the U.S., can give rise to allegations of FCPA violations.”<sup>64</sup> And indeed, Siemens was not the end of FCPA enforcement in Germany; Daimler AG in 2010, Deutsche Telekom AG in 2011, and Allianz SE in 2012 all paid multi-million dollar settlements for FCPA violations.<sup>65</sup>

But in Germany these FCPA enforcement actions have not been the product of unilateral American action. Siemens paid an additional estimated \$569 million to the German government, which conducted its own investigation through the Munich Public Prosecutor’s Office.<sup>66</sup> The U.S. Attorney for the District of Columbia announced: “The coordinated efforts of U.S. and German law enforcement authorities in this case set the standard for multi-national cooperation in the fight against corrupt business practices.”<sup>67</sup> The DOJ noted that the collaboration with the Munich Public Prosecutor’s Office was made possible by the OECD Convention legal assistance provisions.<sup>68</sup> Thus, the available evidence indicates that Germany has a positive, working relationship with the FCPA as a parallel to its own corruption proceedings.

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*Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, DEP’T OF JUSTICE (Dec. 15, 2008), <http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> [hereinafter *Siemens Pleads Guilty to FCPA Violations*].

61. SEC Charges Siemens AG for Engaging in Worldwide Bribery, *supra* note 60.

62. *Id.*; *Siemens Pleads Guilty to FCPA Violations*, *supra* note 60.

63. Audrey Kravets, *Introduction to the U.S. Foreign Corrupt Practices Act in Germany*, 38 DAJV NEWSL. 32, 33 (2013); *Siemens Pleads Guilty to FCPA Violations*, *supra* note 60.

64. Claudius O. Sokenu & Tiffany A. Archer, *Alarming Lessons From Siemens*, 28 INT’L FIN. L. REV. 42, 42 (2009).

65. Kravets, *supra* note 63, at 34. The Daimler settlement ranks tenth in the top ten FCPA enforcement cases with a \$185 million payment. Cassin, *supra* note 11.

66. See *Siemens Pleads Guilty to FCPA Violations*, *supra* note 60 (stating that Siemens paid approximately \$569 million in corporate fines and disgorgement of profits to dispose of the Munich Public Prosecutor’s investigation); Sokenu & Archer, *supra* note 64 (stating that Siemens paid an additional \$528 million to Germany); Sidhu, *supra* note 57, at 1344–45 (stating that Siemens paid €596 million to German authorities).

67. *Siemens Pleads Guilty to FCPA Violations*, *supra* note 60.

68. *Id.*

## B. France

### 1. France's Response to Foreign Bribery

France has yet to convict a French company for foreign bribery.<sup>69</sup> As evidenced by three FCPA proceedings, however, that is not to say French companies are not bribing foreign officials.<sup>70</sup> While France has prosecuted five foreign bribery schemes since the OECD Convention, no prosecution has resulted in the conviction of a French company.<sup>71</sup> And while France has opened twenty-four new foreign corruption procedures since 2012,<sup>72</sup> the prosecution rate given the size of its economy is still low.<sup>73</sup> Only three individuals have been prosecuted as a result of those proceedings.<sup>74</sup> In contrast to Germany, the Working Group “considers that France is insufficiently in compliance with the Anti-Bribery Convention. . . .”<sup>75</sup>

The Working Group also found that French prosecutors lack proactivity in seeking convictions.<sup>76</sup> This inactivity can be attributed to a lack of prosecutorial independence.<sup>77</sup> The Working Group is concerned that prosecutors cannot conduct their cases free of influence from those holding political power.<sup>78</sup> France has sought to curb this political influence by eliminating the practice of having the Minister of Justice issue individual instruction to prosecutors.<sup>79</sup> But a contemplated reform that would allow

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69. *Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention*, OECD (Oct. 23, 2014), <http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm>.

70. *See id.* (noting that French companies have been convicted abroad for foreign bribery).

71. *See* OECD FOREIGN BRIBERY REPORT, *supra* note 4, at 31, fig. 19 (showing that France has sanctioned five foreign bribery schemes since the OECD Convention, but noting that the sanctions need not have been against companies headquartered in the listed country); *Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention*, *supra* note 69 (stating that France has yet to convict a French company of foreign bribery); *see also France: Follow-Up to the Phase 3 Report & Recommendations*, at 4 (Dec. 2014), <http://www.oecd.org/daf/anti-bribery/France-Phase-3-Written-Follow-up-ENG.pdf> (noting that no legal person has been convicted for foreign bribery in France, though a number of individuals have been convicted).

72. *Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention*, *supra* note 69.

73. European Commission, *Annex 10 (France) to the EU Anti-Corruption Report*, at 7, COM (2014) 38 final (Feb. 3, 2014), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_france\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chapter_en.pdf).

74. *France: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 71, at 4.

75. *Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention*, *supra* note 69.

76. *Id.*

77. *See France: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 71, at 5 (finding a lack of prosecutorial independence from political power).

78. *Id.*

79. *Id.*

prosecutors to operate free of political oversight has not yet materialized; accordingly, the Working Group's concern has not abated.<sup>80</sup> Additionally, Transparency International dubbed France a limited enforcement country, citing, among other things, the same concern with prosecutorial independence.<sup>81</sup>

Statutory issues also hamper foreign bribery prosecution in France. France has a dual criminality requirement for foreign bribery; the act must be an offense in both countries involved in the bribe.<sup>82</sup> Additionally, France will only assert jurisdiction if the offender or victim is a French national.<sup>83</sup> And corporations can get around criminal liability by dealing through intermediaries that are not French nationals.<sup>84</sup> Overall, a prosecutor faces many challenges from legal and political pressures when pursuing a foreign bribery case in France. And as long as these limits exist, it is unlikely that France will achieve the level of foreign bribery enforcement seen in Germany.

## 2. France and the FCPA

Of the top ten FCPA cases, three were brought against French companies, more than any other represented nation.<sup>85</sup> The 2014 settlement with Alstom S.A. is the second largest in FCPA history at \$772 million.<sup>86</sup> Total S.A. at \$398 million and Technip S.A. at \$338 million also make the top ten.<sup>87</sup> Alstom plead guilty to the FCPA violations as an issuer of securities in U.S. markets.<sup>88</sup> As with Siemens, none of the bribery took

80. *Id.*

81. *Exporting Corruption: France*, TRANSPARENCY INT'L, [http://www.transparency.org/exporting\\_corruption/France](http://www.transparency.org/exporting_corruption/France) (last visited Apr. 27, 2015).

82. *Annex 10 (France) to the EU Anti-Corruption Report*, *supra* note 73, at 7.

83. *Id.*

84. *Id.* at 7–8.

85. Cassin, *supra* note 11.

86. *Id.*; *Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges: Largest-Ever Foreign Bribery Resolution Within the Department of Justice*, DEP'T OF JUSTICE (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> [hereinafter *Alstom Pleads Guilty*].

87. Cassin, *supra* note 11; *French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection With an International Bribery Scheme*, DEP'T OF JUSTICE (May 29, 2013), <http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international>; *Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty*, DEP'T OF JUSTICE (June 28, 2010), <http://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million>.

88. Plea Agreement at 2, *United States v. Alstom S.A.*, No. 14-CR-246 (D. Conn. Dec. 22, 2014).

place in the U.S.<sup>89</sup> But Alstom was charged as an issuer of securities in the U.S.<sup>90</sup> The DOJ settled similar charges against Total S.A. in 2013 as an issuer on the New York Stock Exchange.<sup>91</sup> The French company had been using bribes in Iran to obtain oil concessions.<sup>92</sup> During the Total case, the U.S. worked with French law enforcement in the “first coordinated action” for foreign bribery between the two countries.<sup>93</sup> The Acting Assistant Attorney General for the U.S. added that the “two countries are working more closely today than ever before to combat corporate corruption.”<sup>94</sup> And France referred Total, its Chairman, its Chief Executive Officer, and other individuals to the Criminal Courts.<sup>95</sup>

However, France’s relationship with extraterritorial prosecution continues to face strains not seen in Germany. The DOJ settled with Total in 2013, and in November 2014 Parisian magistrates were just concluding that Total should be put on trial.<sup>96</sup> It remains to be seen if French courts will actually convict their oil giant. Additionally, despite “working more closely . . . than ever,” France continues to change what are traditionally “boilerplate obligations to cooperate” post-settlement with U.S. prosecutors.<sup>97</sup> The changes reveal some of the major challenges FCPA enforcement in France faces, including French data protection, and labor and blocking statutes.<sup>98</sup> Data protection has proved especially problematic for FCPA enforcement. The Commission nationale de l’informatique et des libertes (CNIL) must authorize all “personal data” transfers to the U.S.<sup>99</sup>

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89. *See generally id.* (discussing bribes in Saudi Arabia, the Bahamas, Taiwan, Egypt, and Indonesia but not the U.S.).

90. *Id.* at B-1 to B-2. Alstom was charged with a books and records violation and failure to implement a system of sufficient internal controls. *Id.* at B-2.

91. *French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection With an International Bribery Scheme*, *supra* note 87.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Inti Landauro, *France to Prosecute Total SA Over Iranian Contracts in the 1990s*, WALL ST. J. (Nov. 25, 2014), <http://www.wsj.com/articles/france-to-prosecute-total-sa-over-iranian-contracts-in-the-1990s-1416940041>.

97. GIBSON, DUNN & CRUTCHER LLP, 2013 MID-YEAR FCPA UPDATE 5 (2013), <http://www.gibsondunn.com/publications/Documents/2013-Mid-Year-FCPA-Update.pdf>.

98. *See id.* (“But the DPA itself reveals some of the challenges of French-U.S. law enforcement coordination, qualifying what is usually a boilerplate obligation to cooperate with U.S. authorities post-settlement with notations that any such cooperation must be consistent with French data protection, labor, and blocking statutes.”).

99. Paul Berger et al., *Conducting Third Party FCPA Diligence in France*, GLOBAL LEGAL POST (Oct. 24, 2012), <http://www.globallegalpost.com/global-view/conducting-third-party-fcpa-diligence-in-france-87881254/>.

This includes information on an individual's affiliations, government affiliations, and criminal records,<sup>100</sup> which the U.S. may want in establishing bribery relationships during FCPA enforcement. Data protection also makes it difficult for companies to comply with FCPA due diligence requirements.<sup>101</sup> The French Data Protection Act applies to all activity in a French territory.<sup>102</sup> If a company is trying to investigate potential business partners in France, they may be unable to obtain necessary information about the individual to ensure they are not involved in corrupt payments.<sup>103</sup>

Moreover, in December 2014 the Working Group assessed: "With regard to mutual legal assistance, no measure has been taken to ensure that the granting of such assistance in foreign bribery cases not be influenced by considerations of national economic interest under the guise of protecting 'the fundamental interests of the nation.'"<sup>104</sup> Thus, while the Total S.A. case marked a promising step toward future cooperation, that openness does not seem to have continued. In the Alstom case a year later, the DOJ thanked the law enforcement departments in Indonesia, Switzerland, the United Kingdom, Germany, Italy, Singapore, Saudi Arabia, Cyprus, and Taiwan, but did not mention any coordination with France.<sup>105</sup> And it does not appear that France has started any of its own enforcement proceedings against Alstom yet.<sup>106</sup> Overall, France's open cooperation with FCPA enforcement seems short-lived. And the country's general unwillingness to convict its own firms of foreign bribery offers little promise for change in the near future.

## C. Japan

### 1. Japan's Response to Foreign Bribery

Japan is facing heavy criticism from the OECD for its insufficient anti-bribery regime and enforcement. In 2005, the Working Group was "so critical of Japan that [it] ordered that Japan undergo a second review."<sup>107</sup>

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *France: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 71, at 6.

105. *Alstom Pleads Guilty*, *supra* note 86.

106. The author was unable to find any sources referencing a French action against Alstom resulting from the bribery scheme discovered by the U.S.

107. Charles Duross & James E. Hough, *Japan Discloses New Efforts to Combat Foreign Bribery, as OECD Steps Up Pressure on Japan to Increase Enforcement*, MONDAQ (May 20, 2014), <http://www.mondaq.com/x/314688/White+Collar+Crime+Fraud/SEC+Staff+Guidance+On+The+Use+>

By 2011, in the wake of an FCPA case, Japan had increased the importance of enforcement and sent officials to attend foreign bribery training in the U.S.<sup>108</sup> But the OECD still considers Japan's foreign corruption approach lacking.<sup>109</sup> Japan has the third largest economy in the world and robust import and export businesses.<sup>110</sup> But it has only prosecuted four corruption schemes since the OECD Convention,<sup>111</sup> even though the Japanese media has reported on several allegations of corruption in Japanese companies.<sup>112</sup> Transparency International ranked Japan as a "little or no enforcement" country, the lowest category possible.<sup>113</sup>

The Working Group raised a number of specific concerns about Japan's approach to foreign corruption. Firstly, there is a "lack of targeted resources for the purpose of detecting, investigating and prosecuting foreign bribery cases."<sup>114</sup> In other words, Japan has no clear organization for preventing, investigating, or prosecuting foreign bribery.<sup>115</sup> Secondly, the organization that seems to have the most control, the Ministry of Economy, Trade, and Industry (METI) has not clarified what comprises a facilitation payment versus a bribe, and to what extent the former is legal.<sup>116</sup> Lastly, Japan has not ensured that tax inspectors are equipped to identify "miscellaneous" tax return expenses that are actually suspicious payments.<sup>117</sup> Where France faces challenges in its regime in converting investigations to convictions, Japan seems to face challenges in identifying possible corruption schemes to begin with.

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tests.

108. *Id.*

109. *Statement of OECD on Japan's Efforts to Increase Foreign Bribery Enforcement*, OECD (June 12, 2014), <http://www.oecd.org/corruption/statement-of-oecd-on-japan-efforts-to-increase-foreign-bribery-enforcement.htm>.

110. *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan*, OECD 8 (Dec. 2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanphase3reportEN.pdf>.

111. OECD FOREIGN BRIBERY REPORT, *supra* note 4, at 31; Bruch Einhorn & Isabel Reynolds, *Japan is Pressed to Step Up Foreign Bribery Prosecutions*, BLOOMBERG (Oct. 30, 2014), <http://www.bloomberg.com/bw/articles/2014-10-30/japan-is-pressed-to-step-up-foreign-bribery-prosecutions>.

112. *Japan: Follow-Up to the Phase 3 Report & Recommendations*, at 4 (Feb. 2014), <https://www.oecd.org/daf/anti-bribery/JapanP3WrittenFollowUpReportEN.pdf>.

113. *Exporting Corruption: Japan*, TRANSPARENCY INT'L, [http://www.transparency.org/exporting\\_corruption/Japan](http://www.transparency.org/exporting_corruption/Japan) (last visited Apr. 27, 2015).

114. *Japan: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 112, at 4.

115. *Id.* at 5.

116. *Id.* at 4.

117. *Id.*

## 2. Japan and the FCPA.

Japan makes its appearance on the FCPA top ten enforcements list with the JGC Corporation case from 2011.<sup>118</sup> JGC Corporation paid \$218.8 million in exchange for a deferred prosecution agreement.<sup>119</sup> The DOJ charged JGC for authorizing a joint venture to hire agents that would pay bribes to Nigerian government officials in order to obtain contracts.<sup>120</sup> Although JGC was not an issuer,<sup>121</sup> the U.S. established jurisdiction through a vicarious liability theory through an American joint-venture partner,<sup>122</sup> and by citing wire transfers through New York banks that created a territorial act in furtherance of the bribery.<sup>123</sup> In fact, all FCPA actions in Japan have been against companies that are not issuers in the U.S.<sup>124</sup>

It is not clear whether Japan has provided official support to U.S. prosecutors during these FCPA enforcement cases. In the JGC case, the U.S. cited significant assistance from France, Italy, Switzerland, and the U.K., but made no mention of Japan.<sup>125</sup> However, Japan and the U.S. do have a Mutual Legal Assistance Treaty (MLAT).<sup>126</sup> An MLAT “enable[s] law enforcement authorities to obtain evidence and other procedural measures abroad in a form that is admissible in the courts of the requesting country and to provide assistance to their counterparts in such a form.”<sup>127</sup> France and the U.S. also have an MLAT,<sup>128</sup> which shows that such an

118. *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty*, DEP’T OF JUSTICE (Apr. 6, 2011), <http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188> [hereinafter *JGC Corp. Resolves FCPA Investigation*]; Cassin, *supra* note 11.

119. *JGC Corp. Resolves FCPA Investigation*, *supra* note 118.

120. *Id.*

121. See *Deferred Prosecution Agreement* at 3, *United States v. JGC Corporation*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011) (recognizing Technip S.A. was an issuer under the 1934 Act, but not alleging the same for JGC).

122. For a more in-depth discussion of the JGC vicarious liability theory of jurisdiction, see generally Ross, *supra* note 30.

123. Ross, *supra* note 30, at 447; see also *Deferred Prosecution Agreement*, *supra* note 121, Attachment A at 16–17 (“[E]mployees, agents, and co-conspirators of JGC willfully aided, abetted, counseled, commanded, induced, procured, and caused the commission of FCPA violations by . . . aiding and abetting KBR in causing wire transfers of \$39.8 million . . . via a correspondent bank account in New York, New York.”).

124. Duross & Hough, *supra* note 107, at 5.

125. See *JGC Corp. Resolves FCPA Investigation*, *supra* note 118 (“Significant assistance was provided by the SEC’s Division of Enforcement and by authorities in France, Italy, Switzerland and the United Kingdom.”).

126. *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan*, *supra* note 110, at 51.

127. OECD, *TYPOLOGY ON MUTUAL LEGAL ASSISTANCE IN FOREIGN BRIBERY CASES 14* (2012), <http://www.oecd.org/daf/anti-bribery/TypologyMLA2012.pdf>.

128. See generally, *Mutual Legal Assistance, U.S.-Fr.*, Dec. 10, 1998, T.I.A.S. No. 13,010.

agreement does not necessarily mean the two countries will have uninhibited cooperation during FCPA enforcements.<sup>129</sup> But unlike France, the Working Group has not criticized Japan's legal assistance to other nations.<sup>130</sup> This could indicate that, while not proactively aiding U.S. prosecutors during FCPA prosecution, Japan at least operates in the full spirit of the MLAT and the cooperation obligations of the OECD Convention and does not hinder investigations in service of domestic interests.<sup>131</sup>

### III. ANALYSIS: IDENTIFYING THE FACTORS DRIVING THE VARIED RESPONSE TO FOREIGN BRIBERY

Germany, France, and Japan illustrate three different reactions to international anti-bribery commitments. Germany illustrates high-compliance, high-enforcement, and a positive relationship with FCPA prosecutors. In France, on the other hand, there is limited anti-bribery enforcement hampered by political considerations and a conflicted relationship with the FCPA characterized by moments of cooperation overshadowed by challenging demands. And Japan gives insight into a country with little anti-bribery enforcement but an open attitude towards FCPA prosecution of its companies. In examining Germany, France, and Japan, it is possible to discern some factors that may explain why these countries have the compliance levels that they do.

This Part begins with a point of comparison for complying with an international agreement: environmental protection agreements. Part III.A outlines how Germany, France, and Japan have complied with international agreements on the environment to show that these countries do not generally resist compliance with international agreements. While all three show strong records of compliance with environmental protection agreements, there is something about foreign bribery that is preventing the same result for compliance with the OECD Convention. With that in mind, this Part uses the next three sections to outline three likely factors that are affecting how these countries approach foreign bribery: economic, cultural, and political. Part III.B examines the economic influence of free-riding and

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129. See *supra* Part II.B.2 (detailing strains in France's relationship with extraterritorial prosecution).

130. See *France: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 71, at 6 (criticizing French policies regarding the prosecution and prevention of bribery and corruption); see also *Japan: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 112, at 9 (saying only that Japan should seek out MLA earlier in proceedings, not that it fails to provide other nations with assistance).

131. See *supra* Part II.B.1 (discussing the Working Group's suspicion that France fails to cooperate in international foreign bribery cases to protect its domestic interests).

internal pressure from domestic corporations. Part III.C looks at the “culture” of bribery in a country, or in other words, how internal views on corruption influence anti-bribery implementation. And Part III.D finishes with a discussion on how individual political motivations are driving some politicians away from bribery prosecution.

#### A. A Point of Comparison: Environmental Protection Agreements

To explain why these countries’ approaches to foreign bribery differ and whether these differences are attributable to broader resistance to international requirements, reviewing compliance with another international agreement is helpful. International agreements on protecting the environment are similar to those regulating foreign bribery. Like foreign bribery enforcement, environmental protections create a free-rider problem; there is an incentive to let other nations shoulder the costs of ensuring their companies abide by environmental regulations while letting one’s own companies benefit from non-enforcement. But companies can also benefit from environmental regulations that lead to more efficient use of resources.<sup>132</sup> This is also similar to anti-bribery, as companies benefit from putting funds that would go to bribes back into the company. And like foreign bribery enforcement, there are international treaties meant to enforce the agreed upon standards.<sup>133</sup> Thus, the general similarities of international environmental expectations and anti-bribery can provide insight into countries’ differing reactions to the two.

Unlike their foreign corruption reviews, Germany, France, and Japan all receive high praise from the OECD for their active environmental commitments and international co-operation.<sup>134</sup> The OECD hails Germany as “a leader in climate policy,”<sup>135</sup> with a “wide-ranging and successful

132. See, e.g., OECD, ENVIRONMENTAL PERFORMANCE REVIEWS: FRANCE 17 (2005), [http://www.keepeek.com/Digital-Asset-Management/oecd/environment/oecd-environmental-performance-reviews-france-2005\\_9789264009141-en](http://www.keepeek.com/Digital-Asset-Management/oecd/environment/oecd-environmental-performance-reviews-france-2005_9789264009141-en) (“Attention to environmental issues has reinforced economic development through the conservation of resources such as water and energy . . .”).

133. In fact, the UN Environment Programme has found up to “500 internationally recognised agreements in the past 50 years.” John Vidal, *Many Treaties to Save the Earth, But Where’s the Will to Implement Them?*, GUARDIAN (June 7, 2012), <http://www.theguardian.com/environment/blog/2012/jun/07/earth-treaties-environmental-agreements>.

134. Since this Note used the OECD reviews as a standard for assessing German, French, and Japanese performance in foreign corruption enforcement, the same organization was used in the environmental comparison for consistency.

135. OECD, ENVIRONMENTAL PERFORMANCE REVIEWS HIGHLIGHTS: GERMANY 1 (2012), <http://www.oecd.org/env/country-reviews/50418430.pdf>.

programme of international co-operation.”<sup>136</sup> While the report mentions that there is room for improvement, it applauds German policy overall as “proactive” and “ambitious.”<sup>137</sup> Similarly, the OECD notes that “France has been very active” in international environmental policy and “generally manages to reconcile its international trade with its environmental commitments.”<sup>138</sup> While the OECD seems to have more concerns with policy in France than in Germany,<sup>139</sup> the report is still positive overall, and adds that France is “engaged in bilateral, regional and global environmental co-operation.”<sup>140</sup> Lastly, the OECD report for Japan highlights the country’s innovation and leadership.<sup>141</sup> It further states, “Japan has played a proactive and constructive role in international environmental co-operation.”<sup>142</sup> And the government has a “good record of meeting international commitments in multilateral and other environmental agreements.”<sup>143</sup>

These reviews reveal a contrast between the countries’ compliance with anti-bribery measures and their compliance with environmental measures. They also reveal discrepancies in France and Japan in implementing and enforcing these two international commitments. Both countries are far more proactive with their environmental policy than anti-bribery policy. None of the OECD environmental reports covered a markedly longer time than the OECD anti-bribery reports.<sup>144</sup> Therefore, while France and Japan have had more time to implement environmental

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136. OECD, ENVIRONMENTAL PERFORMANCE REVIEWS: GERMANY 32 (2001), [http://www.keepeek.com/Digital-Asset-Management/oecd/environment/oecd-environmental-performance-reviews-germany-2001\\_9789264189447-en](http://www.keepeek.com/Digital-Asset-Management/oecd/environment/oecd-environmental-performance-reviews-germany-2001_9789264189447-en).

137. ENVIRONMENTAL PERFORMANCE REVIEWS HIGHLIGHTS: GERMANY, *supra* note 135, at 1.

138. ENVIRONMENTAL PERFORMANCE REVIEWS: FRANCE, *supra* note 132, at 207.

139. *See id.* at 17 (“Major concerns remain as regards pollution from agriculture and transport, the development of energy policy, improvement of environmental health and management of natural and technological risk.”).

140. *See id.* (discussing positive changes in French environmental management).

141. *See* OECD, ENVIRONMENTAL PERFORMANCE REVIEWS HIGHLIGHTS: JAPAN 1 (2010), <http://www.oecd.org/env/country-reviews/46412900.pdf> (“Japan is a world leader in a range of green technologies.”).

142. OECD, ENVIRONMENTAL PERFORMANCE REVIEWS: JAPAN - ASSESSMENT AND RECOMMENDATIONS 9 (2010), <http://www.oecd.org/env/country-reviews/45137541.pdf>.

143. *OECD’s Environmental Performance Reviews: Japan*, MINISTRY ENV’T: GOV’T JAPAN, [http://www.env.go.jp/en/coop/oecd2010/poll\\_oecd\\_2010\\_international.html](http://www.env.go.jp/en/coop/oecd2010/poll_oecd_2010_international.html) (last visited Apr. 27, 2015).

144. The Japan report assessed improvements made since 2002. ENVIRONMENTAL PERFORMANCE REVIEWS: JAPAN - ASSESSMENT AND RECOMMENDATIONS, *supra* note 142, at 3. The German report covered data since 2000. ENVIRONMENTAL PERFORMANCE REVIEWS HIGHLIGHTS: GERMANY, *supra* note 135, at 2. And the French report covered information since 1996. ENVIRONMENTAL PERFORMANCE REVIEWS: FRANCE, *supra* note 132, at 17. Meanwhile, OECD data on anti-bribery has been available since 1999. OECD FOREIGN BRIBERY REPORT, *supra* note 4.

changes than anti-bribery changes, this does not explain the discrepancies. Rather, this information suggests that none of the examined countries are particularly adverse to abiding by international commitments that influence their domestic policy decisions. Rather, there is something specific about OECD commitments that drives these discrepancies in compliance.

## B. Compliance Factors: Economic

### 1. The Free Rider Problem

A major concern for countries in implementing anti-bribery regimes is the effect it will have on their corporations. As the U.S. quickly discovered after implementing the FCPA, companies subject to anti-bribery regimes may lose business opportunities to companies that can make bribes without fear of repercussions.<sup>145</sup> While a country may agree bribery is bad, it may not want to bear the cost of implementing an anti-bribery regime at an economic expense to its companies. At the same time, countries that do prosecute bribery cannot stop countries that do not from benefitting from their enforcement. In short, foreign bribery enforcement creates a free rider problem.

Free riding occurs when an actor can forgo the costs of receiving a non-excludable good. Anti-corruption prosecution creates a non-excludable good because countries that do not spend the resources to implement or enforce anti-corruption regimes still benefit from enforcement by other countries.<sup>146</sup> This benefit can be twofold. First, the non-enforcement country can save resources while other governments prosecute corporations for bribery that may affect the non-enforcement country. Bribery causes economic inefficiencies by shifting resources to the project with the best bribe rather than the best quality.<sup>147</sup> It is an additional expense for the individual or company paying the bribe that could be going to a better use within the company. A country such as the U.S. may prosecute a company based in a non-enforcement country. This prosecution forces other companies in the non-enforcement country to consider removing their bribery practices or risk FCPA prosecution. Thus, the non-enforcement country benefits from more efficient, bribery-free companies without having to expend its own resources.

Second, a non-enforcement country can give its corporations an “edge” abroad. Its corporations can use bribery to win contracts or get

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145. See *supra* Part I.A; see also *supra* note 26 and accompanying text.

146. See HEATHER MARGUETTE & CARYN PEIFFER, CORRUPTION AND COLLECTIVE ACTION 3 (2015), <http://publications.dlprog.org/CorruptionandCollectiveAction.pdf>.

147. Krever, *supra* note 3, at 85–86.

around barriers while corporations from anti-bribery enforcing countries cannot pay the bribes without fear of prosecution.<sup>148</sup> Furthermore, a country can wait until other countries have implemented anti-bribery regimes. Then once a number of countries where competing businesses are located have adopted anti-bribery regimes, the non-enforcement country can start prosecuting bribery without fearing that its companies will lose contracts to competitors paying bribes.

Free riding helps explain why countries may hold off on prosecuting foreign bribery. But it does not explain the variation in prosecution across countries if they all face free riding considerations. Additionally, environmental protections also present a free rider problem. But Germany, France, and Japan generally comply with environmental agreements. Thus, free riding is an important factor to keep in mind in analyzing the economic considerations a country faces in implementing an anti-bribery regime, but it is not the end of the analysis.

## 2. Internal Pressure from Corporations

A factor working against free riding, and providing better insight into variation across countries, is the internal pressure a government receives from its corporations to comply with international foreign bribery standards. In 2012, thirty German company executives wrote a letter to every political party in the German Bundestag that called for Germany to ratify the United Nations Convention Against Corruption.<sup>149</sup> Germany had been hesitant due to language that would require “clear and meaningful punishments for elected officials found guilty of accepting bribes.”<sup>150</sup> However, the executives argued that “[t]he failure to ratify hurts the reputation of German businesses.”<sup>151</sup> Germany ratified the UN Convention

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148. *See id.* at 100 (recognizing that there is an incentive to help business abroad by under-enforcing anti-bribery laws). For example, U.K.’s Serious Fraud Office was ordered to halt a corruption investigation into BAE after initially receiving approval from the Attorney General. David Leigh & Rob Evans, *Blair Forced Goldsmith to Drop BAE Charges*, *GUARDIAN* (Feb. 1, 2007), <http://www.theguardian.com/world/2007/feb/01/bae.saudiArabia>. The Attorney General ordered the halt two days after the initial approval, citing security concerns that were not confirmed by the relevant agencies. *Id.* But the political opposition has accused the Attorney General of simply giving in to political pressures to hide a questionable BAE arms deal. *Id.*

149. Arnd Riekmann, *German Push for Anti-Corruption Convention*, *DEUTSCHE WELLE* (Aug. 9, 2012), <http://www.dw.de/german-push-for-anti-corruption-convention/a-16152697>. The signatories of the letter included major German corporations: Deutsche Bank, Commerbank, Allianz, Siemens, Deutsche Telekom, Daimler, Linde, Bayer, Eon, Metro. *Id.*

150. *Id.*

151. *Id.*

in late 2014.<sup>152</sup> Here, German corporations took on an initiative not seen in France or Japan to petition for *more* anti-bribery enforcement.

Internal pressure from corporations for the government to adopt robust anti-bribery programs both increases the pressure to implement anti-bribery laws, and decreases a government's concern that such laws would hurt its businesses abroad. As an expert in compliance and corruption from the Frankfurt School of Finance and Management noted, "The credibility of companies, individuals and entire countries in relation to agreed-upon rules - upon compliance - has an enormous economic value."<sup>153</sup> The spread of anti-bribery laws under the OECD Convention and increased FCPA prosecutions have forced companies to reevaluate their policies even if their home country is not an active enforcer. And with the increased focus on foreign bribery since the OECD Convention, companies want to advertise their compliance to attract possible buyers or partners that also need to ensure non-corrupt dealings. This advertising becomes easier if the company can point to strict compliance in their home country.

But this internal pressure may exist in Germany rather than other countries because Germany has no corporate criminal liability.<sup>154</sup> For German corporations, adopting stricter bribery laws gives the benefit of an image of compliance without having to suffer the danger of prosecution. The state may prosecute an individual, but someone representing the corporation as an entity need not worry about corporate liability. In contrast, we do not see the same internal pressure from corporations in France, where there is corporate criminal liability.<sup>155</sup> Thus, corporate criminal liability for bribery can be a good predictor of when corporations may be in favor of adopting stricter bribery regulations.

As corporations begin pressuring their government to adopt stronger anti-bribery regulations and withdraw from countries with high corruption

152. *Belatedly, Germany ratifies UN Anti-Corruption Convention*, DEUTSCHE WELLE (Nov. 14, 2014), <http://www.dw.de/belatedly-germany-ratifies-un-anti-corruption-convention/a-18066424>.

153. Riekman, *supra* note 149.

154. *Germany: Follow-Up to the Phase 3 Report & Recommendations*, *supra* note 50, at 8–9; see also William M. Hannay, § 1:55. *Antibribery Laws in Other Countries—Enforcement of Antibribery Laws in Various States*, in CORPORATE COMPLIANCE SERIES: DESIGNING AND IMPLEMENTING AN EFFECTIVE FCPA AND ANTI-BRIBERY COMPLIANCE PROGRAM (2015), available at WL Corp. Compl. Series: FCPA § 1:55 (noting that Germany has no corporate criminal liability).

155. CLIFFORD CHANCE LLP, CORPORATE LIABILITY IN EUROPE 10 (Jan. 2012), [http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate\\_Liability\\_in\\_Europe.pdf](http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf). In Japan, corporations can be held liable for some crimes but not others. HENRY PONTELL & GILBERT GEIS, INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME 562–63 (2007). And corporate criminal liability does not exist for bribery. *Id.* It seems that the variations seen in Japan are better explained by the cultural understanding of bribery rather than purely economic pressures. See *infra* Part III.C.

risks,<sup>156</sup> countries with poorer compliance performance may begin to see the economic value in enforcing and strengthening their anti-bribery regimes.

### C. Compliance Factors: Cultural

The international community has recognized that bribery is a worldwide problem.<sup>157</sup> But there are disagreements over how to identify and punish corruption.<sup>158</sup> While all agree bribery is morally bad, there is disagreement about when an act becomes bribery and about how harshly it should be punished.<sup>159</sup> What someone in the U.S. may see as clear preference-seeking activity may be seen as a routine, even expected practice of gift-giving in another culture. This disconnect becomes especially problematic during extraterritorial prosecution. When the U.S. prosecutes a foreign company under the FCPA, many countries and their citizens may see it as the extension of American values into their legal systems, rather than as an adherence to an international standard.<sup>160</sup> And the worse a country is at prosecuting bribery on its own, the more an FCPA case there looks like legal imperialism rather than compliance with an international expectation of combating bribery. This increases the danger of citizens pressuring their government to move away from cooperation in bribery cases and may negatively impact how the country approaches foreign bribery on its own as well.

Thus, understanding how the citizens of a country view bribery can help explain some of the variations in prosecution. A country's bribery "culture" can be a product of a number of factors, including economic trends, history, and societal values. By looking at how the citizens in Germany, France, and Japan view corruption, and what may shape those views, we can see how a country's bribery culture can affect prosecution rates.

A basic indicator of how a citizenry views bribery is to see if they consider it a crime at all. In Germany, ninety percent of employees believe that if they commit bribery crimes, a public prosecutor will investigate

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156. *Annex 5 (Germany) to the EU Anti-Corruption Report*, *supra* note 59, at 8–9.

157. *See* Krever, *supra* note 3, at 85–86 (discussing the "internationalization of anti-corruption" and a recognition that the consequences of bribery are not limited to the United States); *see also* Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, MICH. J. INT'L L. 419, 422 (1999) (recognizing that there is a general global "disdain for corruption").

158. *See* Salbu, *supra* note 157, at 424 (discussing cultural variations in what constitutes bribery and methods of punishing it).

159. *See* Krever, *supra* note 3, at 99 (discussing the cultural challenges to international bribery enforcement).

160. *See* Kravets, *supra* note 63, at 32.

them.<sup>161</sup> In contrast, half of the companies in Japan feel that their employees do not know bribery is a criminal offense.<sup>162</sup> A crime is much harder to deter if the citizenry is not even aware their actions are illegal. It also poses reporting challenges if no one in the company or with access to evidence of bribery thinks to report it to the authorities. Thus, this basic perception on the legality of bribery can have dramatic effects on enforcement.

One explanation for the difference between German and Japanese awareness of the illegality of bribes may be contrasting gift-giving traditions. The boundary between gift-giving and bribery in Japan is complicated by the general gift-giving culture in Asian countries.<sup>163</sup> Unlike most Western traditions, gifts are exchanged as a way to build relationships, which could look like bribery in a business setting.<sup>164</sup> But if the public sees gifts where other countries see bribes, Japan may lack the domestic incentive to expand resources on a problem with no public pressure to fix it.

To be fair, Japan has sought to improve its lack of OECD Convention compliance.<sup>165</sup> But “[o]ne reason for Japan’s laid-back approach might be that U.S. authorities who prosecute Japanese corporations are already so effective.”<sup>166</sup> This theory could explain why Japan has low compliance but is apparently willing to cooperate through MLATs during FCPA enforcements; the lack of public awareness in Japan makes it a free rider country. Without internal pressure to enforce anti-bribery laws, Japan is letting other countries bear the cost of enforcement.

The strength of a country’s economy also affects perceptions of corruption. There is a “correlation between tolerance for corruption and the pain companies in various countries felt during the global financial crisis.”<sup>167</sup> Germany exemplifies this theory. It did better than other European Union countries during the recession.<sup>168</sup> And while in 2009 “one in four German business people said bribes were a legitimate way of expanding business,” today only three percent of managers and twelve

161. Rolf Wenkel, *German Corruption Recedes as Economy Holds Fast*, DEUTSCHE WELLE (Jul. 20, 2011), <http://www.dw.de/german-corruption-recedes-as-economy-holds-fast/a-15251215>.

162. *Exporting Corruption: Japan*, *supra* note 113. The Survey was distributed to 1,115 small and medium-sized enterprises and 295 responded. *Id.*

163. Richard A. Bernardi & Ikki Hayashi, *The Association Between Bribery and Unethical Actions: An Asian Perspective*, 1 EUR. J. BUS. & INNOVATION RES. 70, 70 (June 2013).

164. *Id.*

165. *See supra* Part III.C.1.

166. Einhorn & Reynolds, *supra* note 111, at 3.

167. *Wenkel*, *supra* note 161, at 1.

168. *Id.*

percent of other employees hold that view.<sup>169</sup> In comparison, those same figures across Europe are eighteen percent and seventeen percent, respectively.<sup>170</sup> As companies become less concerned with financial turmoil, they can afford to look to other areas such as bribery compliance standards.<sup>171</sup> And as they focus on bribery compliance, we see the incentive structure that leads to corporate pressure on the government to comply with international anti-bribery standards.

Lastly, the relative value a country puts on its privacy laws can affect anti-bribery enforcement. For example, France has put a premium on its data privacy at the expense of anti-corruption investigations and corporate compliance.<sup>172</sup> So long as France continues to put the protection of personal data over prosecuting bribery, improving conviction rates will be difficult, and countries such as the U.S. pursuing foreign bribery cases in France will face barriers to their investigations.

There could be more factors not seen in this study that play a role in a country's bribery culture. But the analysis of Germany, France, and Japan points to the conclusion that how a citizenry views bribery can affect how its government will punish it.

#### D. Compliance Factors: Political

France exemplifies the situation where political considerations hamper legitimate anti-bribery efforts. Sixty-two percent of French respondents think "the only way to succeed in business is to have political connections."<sup>173</sup> And approximately fifty percent think corruption is widespread in public procurement.<sup>174</sup> As evidenced in the Working Group's concerns, French prosecutors lack independence during anti-bribery investigations.<sup>175</sup> Overall, there is an intertwining of business and politics that, when combined with low anti-bribery enforcement, suggests that bribery convictions may implicate politicians in a way they are trying to avoid.

France is not alone. The German Bundestag's resistance to signing the UN Convention due to its political official liability suggests the existence

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169. *Id.*

170. *Id.*

171. *See id.* ("In other words: Companies with fewer financial problems can afford to concern themselves with ethics and morality.").

172. *See supra* Part II. B.2.

173. *Annex 10 (France) to the EU Anti-Corruption Report, supra* note 73, at 3.

174. *Id.*; *Annex 5 (Germany) to the EU Anti-Corruption Report, supra* note 59, at 3.

175. *Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention, supra* note 69, at 1.

of similar concerns in Germany.<sup>176</sup> With the country's corporations pushing to ratify, the remaining rationale was that politicians were protecting themselves from potential liability for accepting bribes.<sup>177</sup> However, Germany does not have the political oversight of bribery prosecution seen in France.<sup>178</sup> Thus, while German politicians may have personal concerns about anti-bribery liability, prosecutors could continue unhindered in their cases against individuals and businesses. In France, the amount of political oversight, coupled with the perception that businesses must avail themselves of politicians to succeed, indicates both an incentive and a means for French politicians to limit bribery investigations. Overall, politicians' interests may impede OECD Convention compliance and prevent future anti-bribery legislation focused on the political world rather than the business world. And a regime that allows for political control over the bribery prosecution process is more likely to see limited enforcement.

### CONCLUSION

The international community has agreed for nearly two decades that countries must combat foreign bribery. But dramatic variation in foreign bribery prosecution continues even among countries that have signed the OECD Convention. An analysis of how Germany, France, and Japan approach foreign bribery has revealed some of the factors that explain this variation. From an economic standpoint, internal pressure from corporations to adopt anti-bribery measures can push a government to change its approach. But this, in turn, is affected by whether the government has corporate criminal liability. Additionally, a country's bribery culture can influence its stance on foreign bribery. Finally, individual political motivations can act as a barrier to foreign bribery prosecution progress.

Further research is needed across more countries to understand how these factors interact and what other factors may be at work. The analysis of international environmental agreements has shown that a general disdain for bending to international pressure cannot explain non-compliance here. Additional comparisons to other international agreements may reveal when countries are quick to comply with international standards and when they hold out on full compliance. Moreover, empirical research is necessary to establish how governments weigh the factors in this study or other factors

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176. See Riekman, *supra* note 149, at 2 (noting that "CAC would require clear and meaningful punishments for elected officials found guilty of accepting bribes").

177. See *id.* at 3 ("Humborg . . . suspects German parliamentarians are holding back from ratifying CAC to protect themselves . . .").

178. See *supra* Parts II.A.1, II.B.1.

in making foreign bribery regime decisions. This could take the form of analyzing legislative notes or surveying foreign bribery prosecutors. Overall, the area of international foreign bribery prosecution offers an interesting problem given the variation in enforcement. Understanding this variation through further research could provide insight into compliance with international agreements in general and help predict the future of foreign bribery prosecution.