

The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire



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ABSTRACT

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

First, in discrete but critical ways, the United States no longer represents the comparatively laissez-faire approach to federal business regulation.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

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

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TABLE OF CONTENTS

INTRODUCTION	356
I. INTERNATIONAL BUSINESS LAW: RECONSIDERING	
THE DOMINANT PARADIGM	361
A. The Misleading “Washington Consensus”	361
B. International Business Law: A Jurisdictional Oxymoron	363
C. Repudiating Laissez-Faire: The Progressive Era	366
II. REDEFINING THE U.S. PARADIGM: PROGRESSIVE CAPITALISM	370
A. Combating Corruption: The Foreign Corrupt Practices Act	371
B. Promoting Democracy and Human Rights	374
1. The Alien Tort Statute	374
2. Economic Sanctions for Human Rights Abuses	380
3. The Extraterritorial Application of Employment	
Discrimination Laws	383
C. Income Taxation: The Antideferral Regime for Extraterritorial	
Corporate Profits	385
III. CHINA’S NEW LAISSEZ-FAIRE	388
A. The Political Purposes of Chinese Business	389
B. China’s Alternative to Progressive Capitalism	391
1. Corruption	392
2. Human Rights	395
IV. THE IMPACT OF PROGRESSIVE CAPITALISM IN DEVELOPING COUNTRIES	397
A. Empirical Data: The Enforcement Concentration	
in Developing Countries	398
B. Constructive Engagement Theory and the Problem	
of the Black Knight	406
CONCLUSION: AVOIDING A RACE TO THE BOTTOM	410

INTRODUCTION

This case is decided upon an economic theory which a large part of the country does not entertain.

—Justice Oliver Wendell Holmes,
dissenting in *Lochner v. New York*¹

It doesn't matter if a cat is black or white, so long as it catches mice.

—Deng Xiaoping, former leader of the People's Republic of China, on market reforms²

While Justice Holmes was crafting his famous *Lochner* dissent,³ the United States was in the midst of an intellectual and political movement that would confirm his observation and refashion federal law. Academics and policymakers of the Progressive Era⁴ repudiated the laissez-faire doctrine of commercial regulation and expanded federal power to combat corruption, promote democracy and human rights, and mitigate economic inequalities.⁵ International business law was at first largely untouched by this movement, principally because business was then overwhelmingly domestic. But as U.S. business has expanded overseas and into emerging markets,⁶ U.S. law has ineluctably followed, seeking to conform conduct in those countries to (some of) the same domestic standards.⁷ However, our understanding of the paradigm of U.S. international

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1. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
 2. Johanna McGeary, *Deng Xiaoping Set Off Seismic Changes in China*, TIME, Mar. 3, 1997, at 6, available at <http://www.time.com/time/magazine/article/0,9171,985990-6,00.html>.
 3. For recent commentary on the enduring impact of Justice Holmes's dissent on federal regulation, see, for example, Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009); Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463 (2009).
 4. For the influence of the Progressive Era on contemporary law and academic commentary, see, for example, Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Erwin Chemerinsky, *A Progressive Visionary: Stephen Reinhardt and the First Amendment*, 120 YALE L.J. 515 (2010); Edward J. McCafferey & James R. Hines, Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031 (2010).
 5. See *infra* Part I.B.
 6. See Neil Hodge, *Is the Sun Beginning to Shine on Emerging Markets?*, INT'L B. NEWS, Feb. 2009, at 22.
 7. See, e.g., KURT MOORE, THE ORIGINS OF GLOBALIZATION (2009).

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

We are therefore unable to grasp, and much less remedy, the adverse and ironic effects of U.S. business law enforcement in the developing world. U.S. legal scholars continue to debate individual components of the U.S. international business law regime such as the Alien Tort Statute⁸ (ATS) or the Foreign Corrupt Practices Act (FCPA).⁹ But we have not meaningfully engaged the questions of how these components combine to form a paradigm or how that paradigm operates in developing countries. Meanwhile, another vein of legal literature rigorously compares the “legal origins” of various nations’ domestic legal regimes to understand whether they promote economic growth.¹⁰ While this literature is comparative, it is not international and does not consider how the international business law regimes of powerful nations impact the legal and economic growth of developing nations. The legal academy has thus by default left that question to scholars from other disciplines;¹¹ we should not be surprised by the resulting omissions.

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

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8. 28 U.S.C. § 1350 (2006); *see, e.g.*, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007); Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117 (2011); Harold Hongju Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 274 (2004); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153.
 9. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd(1)–(3), 78ff (2006)), *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff).
 10. *See, e.g.*, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006).
 11. *See, e.g.*, Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489 (2011).

While it certainly remains true, as the literature posits, that the U.S. and Chinese regimes of international business law are distinguishable by the extent to which the state limits economic freedom to advance social goals, I argue that the roles are in fact reversed. The U.S. regime, with roots traceable to the Progressive Era, uses the coercive power of the federal state to compel corporations toward social ends that are not narrowly related to market efficiency and economic growth. By contrast, following the death of Mao Zedong and the rise of Deng Xiaoping in the late 1970s, China instituted a series of market reforms to promote growth and forestall social discontent,¹² without imposing comparable obligations on corporations to promote progressive values in their extraterritorial conduct.¹³ Accordingly, in a dramatic and yet unrecognized irony of international business law, the United States, in discrete but important respects, now represents the heavier hand of government regulation, while communist China has become comparatively *laissez-faire*. Indeed, the contrasting regimes and their contest for influence in the developing world regrettably resemble a peculiar sort of postmodern, turned-on-its-head cold war.¹⁴ China, communist in name but no longer in fact, increasingly represents value-free profit-seeking to the developing world, while the United States, once the self-styled beacon of free market economics, knowingly curtails corporate profit-seeking to promote greater public good and increasingly asks other countries to do the same.

The contrast between the United States and China, properly understood, proves even more deeply ironic for their impact in developing countries. Drawing on empirical research in economics and political science, this Article shows that because U.S. progressivism significantly increases the costs of investing in developing countries, it tends to cause a decrease in such investment.¹⁵ This effect is at times by design (for example, economic sanctions for human rights abuses), but at others by accident (for example, the FCPA). In striking contrast, Chinese companies do not incur these added costs because their legal regime does not impose penalties on the methods of doing business that U.S.

12. See *infra* Part III.A.

13. See *infra* Part III.B.

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

15. See *infra* Part IV.B.

progressivism proscribes.¹⁶ As U.S. enforcement increases and companies invest less than they otherwise would, the unmet capital need in developing countries becomes a void that Chinese companies fill. And those companies are able to conduct business without fear of violating laws concerning corruption and human rights. The U.S. enforcement of norms against corruption and human rights violations thus creates the very conditions in which those practices thrive. The cost is thus born by the developing countries whose prospects for legal, social, and economic growth are otherwise highly promising.

Part I of this Article explains the dominant paradigm through which academics understand the U.S. model of regulating business conduct—the “Washington Consensus.” This paradigm holds that federal law governing commercial activity is defined chiefly, if not exclusively, by the neoliberal commitment to market deregulation.¹⁷ It includes such policy prescriptions as privatization through reducing government ownership and regulation, removing constraints on trade, allowing interest rates to respond more directly to market conditions, reducing government subsidies, and removing obstacles to foreign direct investment. The theme among these prescriptions is, of course, reducing the role of law and government in commerce; they suggest that the United States stands for less government regulation of business vis-à-vis other legal systems, and not more. Although the Washington Consensus paradigm is indeed accurate in describing principles of industrial and financial regulation, it does not incorporate the body of federal law that specifically applies to extraterritorial business conduct. Academics, even in the legal academy, nonetheless continue to view U.S. commercial regulation through the Washington Consensus lens, as through a glass, darkly.

Part II seeks to define more accurately the U.S. paradigm of extraterritorial business law. It illustrates how the principles of the Progressive Era explain the areas of federal law with which U.S. companies principally contend: The FCPA¹⁸ seeks to reduce corporate corruption in international business; democracy and human rights are variously promoted through economic sanctions,¹⁹ the

16. See *infra* Part IV.B.

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

18. See *infra* Part II.A.

19. See *infra* Part II.B.2.

ATS,²⁰ and the extraterritorial application of employment discrimination laws;²¹ and provisions of the U.S. tax code that apply to extraterritorial corporate profits obligate corporations to fund the federal government and its myriad programs.²² These principles, not the doctrine of laissez-faire capitalism, describe most accurately the legal regime that governs the overseas conduct of U.S. business.

Part III explains how the misunderstanding concerning the impact of U.S. international business law in developing countries is only compounded by efforts to define the principal alternative to the U.S. model. That model is now represented by China, a country that is well capitalized, aggressive in its foreign policy and international business conduct, and governed by a very different legal regime. That regime, sometimes called the “Beijing Consensus”²³—but more often described as “state capitalism”²⁴ or the “socialist market economy”²⁵—is generally viewed in implicit or explicit contrast to the U.S. model. This scholarship suggests that owing both to its communist past and its present fear of social unrest, China imposes significantly greater restrictions on individual freedoms in the political and economic spheres alike.²⁶ The literature further details the appeal of China’s alternative legal model to developing countries across Asia, Latin America, and Africa, particularly those that lack political accountability.²⁷ This contrast between the neoliberal Washington Consensus and socialist/authoritarian Beijing Consensus—which is becoming increasingly popular in academic and popular commentary alike²⁸—is at best incomplete and at worst misleading. In fact, although the Chinese government owns, controls, and/or subsidizes most of its major multinational corporations, the governing legal regime does not have meaningful analogues to the FCPA, ATS, economic

20. See *infra* Part II.B.1.

21. See *infra* Part II.B.3.

22. See *infra* Part II.C.

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

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

25. YUQING XING, NAT’L GRADUATE INST. FOR POLICY STUDIES, *CONSUMPTION, INCOME DISTRIBUTION, AND STATE OWNERSHIP IN THE PEOPLE’S REPUBLIC OF CHINA* 11 (2010), available at <http://r-center.grips.ac.jp/gallery/docs/10-18.pdf>.

26. See, e.g., HALPER, *supra* note 23; MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* (2009).

27. See, e.g., HALPER, *supra* note 23, at 39; JACQUES, *supra* note 26, at 321; Raymond W. Copson, *US Response to China’s Rise in Africa: Policy and Policy Options*, in *AFRICA IN CHINA’S GLOBAL STRATEGY* (Marcel Kitissou ed., 2007).

28. See, e.g., Thomas L. Friedman, *Power to the (Blogging) People*, N.Y. TIMES, Sept. 14, 2010, <http://www.nytimes.com/2010/09/15/opinion/15friedman.html>.

sanctions for human rights abuses, or Title VII of the Civil Rights Act of 1964.²⁹ More generally, the Chinese government does not expect Chinese corporations to advance social goals in their overseas conduct other than the preservation of social stability—and the Communist Party's hold on power—through otherwise value-neutral profit-seeking. Ultimately, in comparison to the progressive norms that define the U.S. regime of international business law, China is more accurately understood as substantially laissez-faire.

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

I. INTERNATIONAL BUSINESS LAW: RECONSIDERING THE DOMINANT PARADIGM

This Part first describes the existing paradigm through which academics and policymakers generally understand the U.S. regime of international business law—the "Washington Consensus"—and highlights the paradigm's limitations. This Part then explores the tension—which I will call a jurisdictional oxymoron—inherent in the notion of a U.S. regime of international business law, and proposes parameters for choosing those federal statutes that rightly belong in an analysis of that regime. After selecting the laws for inclusion, this Part shows that these laws have a common origin in the Progressive Era of U.S. history and the intellectual movement that it spawned.

A. The Misleading "Washington Consensus"

The prevailing view of U.S. international business law emerged in the 1980s. After several decades in which the Keynes model of comparatively heavy economic regulation dominated post-World War II economic thinking, the

29. See *infra* Part III.B.

world recession of the 1970s gave rise to a new model of economics generally and, specifically, to the theory of Western development economics known as the Washington Consensus.³⁰

The new model, promoted most famously by Milton Friedman, held that economic growth would increase only when markets could operate freely and efficiently, thus requiring deregulation, liberalization, and privatization.³¹ More specifically, this meant deregulating markets, removing controls on investment, allowing interest and exchange rates to float in response to world markets, reducing public spending and government ownership of industry, and reducing subsidies.³² With the elections of Margaret Thatcher and Ronald Reagan, this model became the guiding philosophy of the leading Western liberal nations. This paradigm also came to dominate the agendas of the two leading global financial institutions, both of which were headquartered in Washington, D.C.: the World Bank and the International Monetary Fund (IMF). Against this background, the term “Washington Consensus” emerged in 1989 and included a number of points: imposing fiscal discipline; reforming taxation; liberalizing interest rates; securing property rights; privatizing state-run subsidies; deregulating markets; adopting a competitive exchange rate; removing barriers to trade; and removing barriers to foreign direct investment.³³ Western lending agencies termed these reform packages “structural adjustment programs” (SAPs) and imposed them universally without regard to the recipient country’s unique economic and legal conditions.³⁴ Between 1980

30. HALPER, *supra* note 23, at 51; *see also* Buckley, *supra* note 17 (comparing the policies of China and India with Washington Consensus policies as applied in the Americas and Africa); Williamson, *supra* note 17 (giving a brief history of the term and its understanding today).

31. HALPER, *supra* note 23, at 54; *see* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (40th Anniversary ed. 2002) (1962); Milton Friedman, *The Hong Kong Experiment*, HOOVER DIGEST, July 30, 1998, <http://www.hoover.org/publications/hoover-digest/article/7696> (stating that Hong Kong has made great strides in the past fifty years because of its laissez-faire market).

32. HALPER, *supra* note 23, at 57.

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

34. HALPER, *supra* note 23, at 57. *See generally* Kwaku Owusu Afriyie, Do the Poor Develop the Rich? Taking a Second Look at Structural Adjustment Programmes (Dec. 2, 2008) (unpublished manuscript), *available at* <http://ssrn.com/abstract=1284993> (discussing how structural adjustment programs (SAPs) were introduced, what countries must go through to receive funding, and how SAPs, in general, have failed); Benzarour Choukri, *Macroeconomic Policies for Structural Adjustment Policies* (Munich Personal RePEc Archive, Paper No. 14980, 2009), *available at* <http://ssrn.com/abstract=1398729> (analyzing and explaining the main provisions of SAPs); William Easterly, *What Did Structural Adjustment Adjust? The Association of Policies and Growth With Repeated IMF and World Bank Adjustment Loans*, 76 J. ECON. DEV. 1 (2005) (examining the top twenty recipients of repeated SAP lending and their growth); Sebastian Edwards, *Structural Adjustment*

and 1995, approximately 80 percent of the world's population found itself on the receiving end of a SAP.³⁵

Discussions about international economics and the role of the United States vis-à-vis developing countries thus came to be predicated on a widely held assumption that the United States was fundamentally promoting laissez-faire economics. Consider, however, the kinds of issues encompassed in this paradigm: They generally pertain to financial and trade regulations, both of which are narrowly economic in their focus. Absent from this paradigm, however, is much discussion of the legal obligations that the U.S. government imposed directly on U.S. businesses in their overseas conduct. The Washington Consensus encompassed the regulation of finance and trade, but not of business more generally. Throughout this period, business law nonetheless continued to be characterized to a very large extent by the federal laws that had emerged prior to the 1980s deregulation movement and had imposed substantial responsibilities on U.S. businesses to promote social and political goals at the expense of profit.³⁶ Although the recession of the 1970s and the deregulation movement of the 1980s would displace much of Keynesian economics, it would not displace the legacy of the Progressive Movement in international business.

B. International Business Law: A Jurisdictional Oxymoron

Despite its ever-increasing prominence in modern business practice, there is something faintly awkward in the U.S. context about the field of international business law. It proves a difficult concept to define. A casual perusal of a typical law school textbook in the field of International Business Transactions (IBT) reveals somewhat of a hodge-podge: a bit of contract law, some import/export controls, a little bit on the extraterritorial application of antitrust laws, and so forth.³⁷ I surely was not the first bright-eyed young business law student to

Policies in Highly Indebted Countries (NBER Working Paper No. W2502, 1989), available at <http://ssrn.com/abstract=425541> (analyzing highly indebted countries between 1982 and 1987 and the type of adjustment received); Jason Morgan-Foster, Note, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577, 578-83 (2003) (providing a short overview of SAPs and concluding that they do not improve growth). For a general look at conditions imposed under SAPs, see *IMF Conditionality*, INT'L MONETARY FUND, Sept. 14, 2011, <http://www.imf.org/external/np/exr/facts/conditio.htm>.

35. HALPER, *supra* note 23, at 60.

36. *See infra* Part II.

37. *See, e.g.*, DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS (2d ed. 2010); RALPH H. FOLSOM,

open his IBT textbook for the first time and feel discombobulated. This awkwardness is due, in very large part, to the peculiar jurisdictional scheme of U.S. federalism. In ratifying the U.S. Constitution, the states sought to preserve their authority over domestic business, while creating a federal government with a more limited authority to regulate international conduct.³⁸ Business law has, with a few historic exceptions such as the Exchange Act of 1934³⁹ or the Sarbanes-Oxley Act of 2002,⁴⁰ generally remained with the states, while international matters are typically federal.⁴¹ International business law, then, awkwardly falls somewhere in between. It is not quite fully federal, yet not quite within the province of the states. Where, then, does it come from, and what exactly is it?

This Article does not propose a comprehensive redefinition of the field of international business law. However, it does propose that we momentarily set aside the inherited definitions of international business law and start from scratch, with a few criteria for selecting the areas of law to include in this study. First, laws in this study should be federal—and not state law. Only federal law reflects a national policy determination that a set of legal obligations is rightfully imposed on businesses in their international conduct. Second, this Article focuses on laws that the United States enforces unconditionally in international business, irrespective of their effects on U.S. markets. These are laws that the

MICHAEL W. GORDON & JOHN A. SPANOGLA, JR., INTERNATIONAL BUSINESS TRANSACTIONS, TRADE & ECONOMIC RELATIONS (2005).

38. Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 555–56 (1993) (examining the evolution of U.S. business law starting after the Revolutionary War); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1124 (1986) (stating that the framers of the Constitution wanted to keep regulation of commerce with foreign nations in Congress to further national mercantilist policy, thus avoiding inconsistent state regulation).
39. Securities and Exchange Act of 1934, 15 U.S.C. § 78(a) (2006). *See generally* Peter V. Letsou, *The Changing Face of Corporate Governance Regulation in the United States: The Evolving Roles of the Federal and State Governments*, 46 WILLAMETTE L. REV. 149, 171 (2009) (identifying the Securities and Exchange Act of 1934 as one of the few federal laws governing business).
40. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; Letsou, *supra* note 39, at 185–86 (stating that Sarbanes-Oxley, along with the Exchange Act of 1934, is one of the few federal laws governing business conduct).
41. *See, e.g.*, ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION 2 (2002) (“[I]t would be most descriptively accurate to say that federal securities law has occupied the securities field and that state law development has been marginal.”); Robert H. Jerry, II & Steven E. Roberts, *Regulating the Business of Insurance: Federalism in an Age of Difficult Risk*, 41 WAKE FOREST L. REV. 835, 837–40, 878 (2006) (describing how insurance is regulated by the individual states, but advocating for increased federal presence to deal with new insurance issues (for example, loss via terrorism)).

United States enforces because it believes that business should conduct itself internationally in conformance to these principles, irrespective of their impact on the U.S. economy; such are the truest examples of U.S. international business law. This excludes those areas of federal business law historically governed by the effects test in their extraterritorial application, such as securities⁴² and antitrust.⁴³ Third, this Article does not look at treaties, such as the World Trade Organization⁴⁴ or the North American Free Trade Agreement;⁴⁵ though unmistakably business-oriented and international in focus, they are compromises

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42. The Supreme Court has recently held that the anti-fraud provision of the Securities and Exchange Act of 1934 § 10(b) will no longer use a “conduct and effects” test. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2879–80 (2010). Rather, the Court has adopted a “transactional test” to determine whether jurisdiction is proper. *Id.*; see also *Lapiner v. Camtek, Ltd.*, No. C 08-01327 MMC, 2011 WL 445849, at *2–3 (N.D. Cal. Feb. 2, 2011) (applying *Morrison*, and finding jurisdiction where the plaintiff purchased stock on NASDAQ even though the stock purchase was made in Israel); *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336–37 (S.D.N.Y. 2011) (applying *Morrison*, and declining to exercise jurisdiction over a claim involving an American plaintiff who purchased securities on a foreign exchange even though the securities were also available on the NYSE); *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620, 627 (S.D.N.Y. 2010) (holding that there was no jurisdiction over a claim involving American investors who had purchased securities on the Swiss Exchange in light of *Morrison*). However, it is unclear whether *Morrison* will apply to cases brought by the Securities and Exchange Commission (SEC) (instead of private individuals) or its impact on other sections of the Exchange Act. Steven M. Davidoff, *How Porsche May Outmaneuver a Securities Suit*, N.Y. TIMES, Oct. 22, 2010, <http://dealbook.nytimes.com/2010/10/22/how-porsche-may-outmaneuver-a-securities-suit>.
43. See, e.g., Jordan A. Dresnick, Kimberley A. Piro & Israel J. Encinosa, *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. MIAMI INTER-AM. L. REV. 453 (2009) (analyzing the evolution of the effects test law through major antitrust cases); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (holding that the Sherman Antitrust Act applies where defendants intend for their conduct to be felt in the United States and such effect occurs); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 945–46 (7th Cir. 2003) (analyzing the effect of the Foreign Trade Antitrust Improvements Act on the Sherman Act's effects test); *Dee-K Enters., Inc. v. Heveafil Sendirian Berhad*, 299 F.3d 281, 295–96 (4th Cir. 2002) (holding that the substantial effects test is used to determine jurisdiction when conduct is primarily foreign).
44. For an explanation of the World Trade Organization (WTO), including history, see *What Is the WTO?*, WTO, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Oct. 17, 2011). For an in-depth analysis of WTO cases for the previous two years, see Raj Bhala & David Gantz, *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. REV. 85 (2010); Raj Bhala & David A. Gantz, *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. REV. 113 (2009).
45. For an explanation of the North American Free Trade Agreement (NAFTA), including history, see *North American Free Trade Agreement (NAFTA)*, U.S. DEP'T OF AGRIC., <http://www.fas.usda.gov/itp/Policy/NAFTA/nafta.asp> (last updated June 30, 2011). For recent NAFTA activity, see Olivia Howe, *Recent Developments in NAFTA Law—Spring Update 2010*, 16 L. & BUS. REV. AM. 613 (2010); Olivia Howe, *Recent Developments in NAFTA Law—Winter Update 2009/2010*, 16 L. & BUS. REV. AM. 361 (2010).

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

C. Repudiating Laissez-Faire: The Progressive Era

The various components of U.S. international business law, which I will detail below, reflect an approach to the federal regulation of business that is wholly unlike laissez-faire capitalism. Rather, it strikes one as a reaction against laissez-faire principles, and in fact, that is exactly what it was, and is. These laws find their origins in the Progressive Era, a historical period and an intellectual movement that began in the late nineteenth century in response to the laws and economic conditions of the Industrial Revolution.⁴⁶ Although the concept of progressivism is alive and well in the legal academy today and is invoked in a dizzying array of fields and literatures,⁴⁷ international business law has not traditionally been among them. This is somewhat ironic, given that the Progressive Movement emerged in part as a direct response to a most (in)famous legal case involving the federal regulation of business activity: *Lochner v. New York*.⁴⁸

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

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

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

48. 198 U.S. 45, 47 (1905).

Fourteenth Amendment liberty of contract.⁴⁹ Justice Holmes, in dissent, criticized the majority for deciding the case “upon an economic theory which a large part of the country does not entertain.”⁵⁰ That theory, of course, was laissez-faire economics.⁵¹

A chorus of scholars joined Justice Holmes in criticizing the Court's decision and its underlying economic theory. Among the most prominent was Richard T. Ely, a political economist at the University of Wisconsin, Madison, who called the doctrine of laissez-faire economics a “complete fiasco”⁵² in practice that was “unsafe in politics and unsound in morals.”⁵³ He rejected the older ideas of Adam Smith and his negative conception of freedom and the state in favor of a positive conception of liberty, associated with John Stuart Mill, in which the powers of government are utilized to advance individual liberties and temper the harmful effects of economic inequalities.⁵⁴ While the proponents of negative liberty sought to protect individual freedoms by limiting the power of the state, the advocates of the new progressive, positive conception of freedom saw “positive state action as the key to reducing economic inequalities and thus to enhancing individual freedom.”⁵⁵ Other scholars of political economy who sounded similar themes and helped give rise to the movement were Henry Carter Adams at the University of Michigan and Henry Seagar and Edwin R.A. Seligman at Columbia University.⁵⁶

The Progressive Movement became a multifaceted push for reform, addressing a diverse array of social and economic issues at both the state and federal levels. But three themes unmistakably characterize both the Progressive Era and the contemporary U.S. regulation of international business. First was

49. *Id.* at 50.

50. *Id.* at 75.

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

52. RICHARD T. ELY, *THE PAST AND THE PRESENT OF POLITICAL ECONOMY* (1884).

53. RICHARD T. ELY, *GROUND UNDER OUR FEET: AN AUTOBIOGRAPHY* 132–44 (Arno Press 1977) (1938).

54. Richard T. Ely, *Industrial Liberty*, in PUBLICATIONS OF THE AMERICAN ECONOMIC ASSOCIATION 59 (1902), reprinted in RICHARD T. ELY, *STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY* 398–425 (1903).

55. Ingram, *supra* note 51, at 793.

56. *Id.* at 795–97.

a commitment to reducing corruption in business and government. The “muckrakers”—a term that Theodore Roosevelt coined to describe a new breed of journalists—exposed business and government corruption in the new national magazines, leading to a number of federal reforms.⁵⁷ One such series of articles criticized the monopoly of John D. Rockefeller’s Standard Oil Company and contributed meaningfully to the enforcement of antitrust laws.⁵⁸ In the same vein, a series of articles entitled “The Treason of the Senate” exposed corruption in the U.S. Senate,⁵⁹ contributing significantly to the ratification of the Seventeenth Amendment instituting the direct election of U.S. senators.⁶⁰ The Prohibition movement, which produced the Eighteenth Amendment,⁶¹ similarly reflects the anticorruption impulse.

A second theme was a commitment to promoting democracy and individual rights, particularly the rights of women and the poor. In establishing the direct election of U.S. senators, supporters of the Seventeenth Amendment sought to curb the abuses of state-appointed senators and to make the office more democratically accountable.⁶² The Nineteenth Amendment granted women the

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57. See THE MUCKRAKERS: EVANGELICAL CRUSADERS (Robert Miraldi ed., 2000); Harry H. Stein, *American Muckrakers and Muckraking: The 50-Year Scholarship*, JOURNALISM Q., Spring 1979, at 9–17.
58. See IDA TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904) (giving a detailed explanation of the structure and creation of the Standard Oil Trust and the various illegal means it employed to control its monopoly).
59. David Graham Philips, *The Treason of the Senate: Aldrich, the Head of It All*, COSMOPOLITAN MAG., Mar. 1906, <http://www.starkman.com/hippo/history/aldrich/phillips.html>.
60. U.S. CONST. amend. XVII; see also Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 505–06 (1997) (evaluating the debates surrounding the passage of the amendment and discussing the impact of the direct election of senators today); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671 (1999) (analyzing how the amendment impacted the states and, later, Supreme Court interpretation); Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 168, 184 (1997) (characterizing election of state legislators as corrupted, examining the political climate leading up to the amendment’s passage, and offering explanations for its passage as well as its implications today).
61. U.S. CONST. amend. XVIII; see also RUTH DUPRÉ, THE PROHIBITION OF ALCOHOL REVISITED: THE US CASE IN INTERNATIONAL PERSPECTIVE (2004), *available at* http://www.hec.ca/iea/cahiers/2004/iea0411_rd.pdf; Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1 (2006) (taking a detailed look at the Supreme Court cases regarding Prohibition up until its repeal by the Twenty-First Amendment).
62. See Bybee, *supra* note 60, at 544 (stating that the Seventeenth Amendment was enacted, in part, so that senators would be responsible to the people); Zywicki, *supra* note 60, at 184 (viewing the passage of the Seventeenth Amendment as a response to the “perceived inability of state legislatures to perform their electoral function”).

right to vote in federal elections.⁶³ The concern with protecting the votes and political influence of the economically disadvantaged similarly motivated the push to establish the initiative, referendum, and recall at the state level.⁶⁴ The Progressive Era has been rightly criticized for failing to address issues of racial or ethnic inequality—or, worse, reinforcing and exacerbating these inequalities.⁶⁵ But, as with the Founding Era, the conflicts and hypocrisies that characterized certain of the Progressive Era's leading figures have not displaced the legacy of their better ideas.

A third major development of the Progressive Era, one which applies most forcefully to corporations today in their extraterritorial activity and which reflects an intellectual repudiation of laissez-faire economics, is the establishment of federal income tax with the ratification of the Sixteenth Amendment. Called “the quintessential progressive reform,”⁶⁶ the tax was not merely a means of increasing government revenue, but represented a revolt against the “classical nineteenth-century emphasis on negative individual liberties toward a more progressive and revitalized conception that stressed an active role for the positive state.”⁶⁷ It supplanted the conception of the state as a passive protector of private property and established “an active role for the positive state in the

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63. U.S. CONST. amend. XIX; see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1045 (2002) (analyzing the suffrage debates leading up to the amendment's enactment and the history of the amendment since); Jennifer K. Brown, Note, *The Nineteenth Amendment and Woman's Equality*, 102 YALE L.J. 2175, 2204 (1993) (detailing the suffrage movement and affirming the amendment's purpose of recognizing women's constitutional equality).
64. See John Dinan, *The Original Intent and Current Operation of Direct Democratic Institutions*, 70 ALB. L. REV. 1035, 1043 (2007) (arguing that direct democracy has changed from the wants of the popular will to a vehicle for special interests); K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007) (providing a brief history of direct democracy and a brief look at recent court decisions involving direct democracy); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POLY REV. 11, 40 (1997) (exploring the conditions that gave rise to direct democracy in the American West).
65. See, e.g., Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 45, 78 (1996) (describing the Progressive Era as “the heyday of racism,” using the failure to pass antilynching legislation as an example); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 945 (1998) (concluding, after analyzing four Progressive Era Supreme Court cases, that the decisions had little impact on racial practices such as lynching, black disenfranchisement, etc.).
66. JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920*, at 355 (1986).
67. Ajay K. Mehotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793, 1799 (2005).

distribution of fiscal burdens.”⁶⁸ Through the Sixteenth Amendment, the U.S. system of public finance “underwent a dramatic, structural transformation” in which fiscal policy came to be “guided not simply by the functional and structural need for government revenue, but by concerns for equity and economic and social justice.”⁶⁹

The legacy of this movement, and not the doctrine of laissez-faire economics, best explains the corpus of U.S. federal business law that today governs extraterritorial business conduct. But the line between the Progressive Era and twenty-first century business law has a substantial connecting dot: the 1960s and 1970s, when the paradigm that I now call progressive capitalism truly took shape.

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

In the 1960s, two major political movements culminated in federal law that would eventually reshape the U.S. international business regime. Title VII of the Civil Rights Act of 1964 created prohibitions against employment discrimination that Congress would amend in 1991 to apply extraterritorially.⁷⁰ The U.S. income tax code—which redistributed wealth through the financing of federal social programs—was amended in Subpart F to apply more vigorously to overseas corporate profits.⁷¹

But the biggest, and greatly underappreciated, era of international business law reforms was the late 1970s under the presidency of Jimmy Carter. Between 1976 and 1980, the paradigm of U.S. international business law that we can now call progressive capitalism crystallized in three distinct ways. First, the Carter administration pushed for the enactment of new legislation: The FCPA, enacted in 1977, was the first law anywhere in the world that specifically prohibited the bribing of overseas government officials for business purposes.⁷² Second, the Carter administration fundamentally redefined an existing legal regime in pursuit of a new set of social goals. Economic sanctions, previously a component of military strategy that was framed by the two World Wars and the

68. *Id.* at 1798–99.

69. *Id.* at 1795.

70. Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000(e) (2006)), *amended by* Civil Rights Act of 1991, Pub. L. No. 102-66, § 109, 105 Stat. 1071 (1991).

71. 26 U.S.C. §§ 951–964 (2006).

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

Cold War, became an instrument for promoting human rights in developing countries.⁷³ In the wake of these paradigm-changing events, human rights attorneys prevailed upon the judicial branch to effect the third major change. The Alien Tort Statute, a once obscure provision of the Judiciary Act of 1789 that had laid largely dormant for nearly two centuries,⁷⁴ was suddenly and dramatically refashioned into a means of holding persons liable for overseas human rights abuses.⁷⁵ These three planks—anticorruption, democracy and individual rights, and the progressive redistribution of wealth through the federal income tax—best explain the federal laws that today constitute U.S. international business law. Each area of law involves a knowing restraint on economic freedom to advance social and political goals. They are examples not of laissez-faire, but rather of the Progressive Era's deliberate rejection of that doctrine.

A. Combating Corruption: The Foreign Corrupt Practices Act

The FCPA prohibits the bribing of overseas officials for business purposes.⁷⁶ Congress originally enacted the prohibition in 1977, and it became an important component of the Carter administration's push toward using business conduct to promote liberal democratic values. It was at first just a symbolic component and was scarcely enforced for the first twenty years of its existence. Then approximately ten years ago, owing to a combination of factors that scholars still only partially understand, the U.S. Department of Justice and the Securities and Exchange Commission (SEC) initiated an extraordinarily dramatic surge in enforcement.⁷⁷ Today, it is widely regarded as among the most important and fearsome statutes in international business, with fines routinely reaching in the tens or hundreds of millions of dollars.⁷⁸ Some have heralded the FCPA for effectuating a worldwide sea change in attitudes toward

73. GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & BARBARA OEGG, *ECONOMIC SANCTIONS RECONSIDERED* 10–13 (3d ed. 2007).

74. Alien Tort Statute (codified at 28 U.S.C. § 1350 (2006)).

75. *See infra* Part II.B.1.

76. 91 Stat. 1494.

77. David Stern, *FCPA Enforcement and Compliance Strategies Overview*, WINSTON & STRAWN, Nov. 17, 2009, <http://www.acc.com/chapters/social/upload/11-17-09-fcpa.pdf>.

78. *The FCPA Explained*, FCPA ENFORCEMENT, <http://www.fcpaenforcement.com/explained/explained.asp> (last visited Dec. 9, 2011).

bribery.⁷⁹ Others have decried its supposed cultural imperialism.⁸⁰ However, none have characterized it as an instrument of laissez-faire economics. The statute emerged from two distinct corruption scandals of the 1970s that were replete with symbolic implications for international business and Western capitalism more generally. In 1971, Congress provided the Lockheed Corporation, then a major manufacturer of civilian and military aircraft, with a \$250 million federal loan guarantee to prevent bankruptcy. Soon afterwards, regulators discovered that Lockheed had bribed several foreign governments to obtain contracts. Lockheed ultimately disclosed several multimillion dollar bribes to various countries, particularly the Netherlands, Japan, and Italy. These revelations caused scandals that were embarrassing both to those countries and to the United States.⁸¹ The second scandal was Watergate, which exposed the illegal payments of various U.S. companies to domestic political campaigns.⁸² The SEC responded in 1974 by conducting an investigation and found that U.S. corporations had made covert payments not only to U.S. political campaigns, but also to overseas government officials, and were typically accounted for through “slush funds.” As part of the post-Watergate reforms, Congress sought to supplement existing domestic antibribery legislation with comparable legislation that would prohibit payments to overseas officials and require more accurate accounting.⁸³

The legislative history from 1977 reflects a widespread willingness to forego economic advantages for the sake of promoting an anticorruption agenda that was understood fundamentally in social or moral, rather than economic, terms. Although the record reflects the substantial concern that the statute would put the United States at an economic disadvantage in international business, Congress nonetheless enacted the statute. Robert S. Ingersoll, then-Deputy

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

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

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

82. Spalding, *supra* note 11, at 359.

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

Secretary of State, stated, "It is tempting to try to deal with the situation unilaterally, but there are serious risks for the United States in such an approach. There is widespread recognition in the Congress that such unilateral action would put U.S. companies at a serious disadvantage in the export trade."⁸⁴ The International Chamber of Commerce similarly testified that unless prohibitions on overseas bribery were internationalized, it "could, and in some cases would, mitigate severely against U.S. business and prevent it from being able to compete effectively in quite substantial markets of the world."⁸⁵ One senator stated:

What disturbed me as I traveled around the world was the realization that American business was being internationally blamed for activities which are very obvious to me were a very common practice throughout the entire world. Not only the countries of the West—Western Europe, Japan, and the United States—but certainly through Africa, the Middle East, and Asia.⁸⁶

Another senator predicted that under unilateral legislation, "the American companies, who should be making payoffs then would be barred from making payoffs, the business that they should be getting would be going to foreign competitors who were undertaking the same practices."⁸⁷

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

The Democrat George Ball expressed this view most forcefully:

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

84. *Abuses of Corporate Power: Hearing Before the Subcomm. on Priorities & Economy in Gov't of the Joint Econ. Comm.*, 94th Cong. 153, 154 (1976).

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

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

87. *Id.* at 1 (statement of Sen. Abraham Ribicoff).

myth—already widely believed in Third World countries—that capitalism is fundamentally corrupt.⁸⁸

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

B. Promoting Democracy and Human Rights

U.S. corporations doing extraterritorial business are subject to substantial and multifaceted legal obligations to promote individual rights, regardless of any detrimental impact on profits. These include: the ATS; economic sanctions for human rights abuses; and laws prohibiting discrimination in employment, particularly, but not limited to, Title VII.

1. The Alien Tort Statute

The ATS, a once obscure provision of the Judiciary Act of 1789, provides simply that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁸⁹ From its enactment until 1980, the law was invoked only twenty-one times,⁹⁰ and only two courts had ever upheld jurisdiction under the statute.⁹¹ With the watershed case of *Filartiga v. Pena-Irala* in 1980, the statute found new life and perhaps even assumed a new identity: an instrument for holding persons liable for overseas human rights abuses. But the statute would not be used against corporate defendants until 1997,⁹² when it became, quite suddenly, among the most controversial and high profile statutes in international business law. Since 1997, approximately 150 cases have been filed against corporations. They have been filed in twenty-five different federal districts, with many in New York and California. Plaintiffs’ judgments have ranged from \$1.5 million to \$80 million, and settlements from \$15.5 million to, reportedly,

88. 1976 Senate Banking Hearings, *supra* note 85, at 41–42 (statement of George Ball, Lehman Bros.).

89. 28 U.S.C. § 1350 (2006).

90. Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4 n.15 (1985).

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

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

\$30 million. Roughly one-third of these cases are presently pending in federal courts.⁹³ Under the ATS, conduct construed to violate the “law of nations” has included arbitrary detention, the right to peaceful assembly, forced labor, racial discrimination, environmental harms, and breach of a duty to treat with dignity.⁹⁴ They generally involve labor-related issues, issues related to the provision of support to repressive political regimes, acts by foreign security forces, or environmental damage.⁹⁵

The statute is today celebrated by a chorus of scholars for its impact on promoting human rights, while claims of its adverse impact on corporate profits are largely unheeded. Though the U.S. Chamber of Commerce and scholars sympathetic to the business community's concerns have called for amending or even abolishing the ATS,⁹⁶ Congress has declined to stem the tide of human rights litigation against corporations. Indeed, academics have praised ATS litigation for its impact on promoting social or political values that are not closely connected to preserving or promoting the free market—namely, its influence in shaping the domestic legal regimes of developing countries. One writes that the ATS has played an “important role in the recent overall global development of enforceable human rights norms;”⁹⁷ that it has “been heralded by foreign governments, international organizations, and U.N. agencies as a significant mechanism for enforcing international human rights norms;”⁹⁸ and that it has continued the work of the Nuremberg Trials to “define and clarify the appropriate standard for corporate complicity in fundamental human

93. JONATHAN DRIMMER, THE U.S. CHAMBER INST. FOR LEGAL REFORM, THINK GLOBALLY, SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES 5 (2010), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf>.

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

95. DRIMMER, *supra* note 93.

96. See, e.g., GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 55–56 (2003) (concluding that the solution to the various threats that the Alien Tort Statute (ATS) poses to U.S. commercial and foreign policy interests is to amend the statute to define the causes of action, grant federal courts exclusive jurisdiction, clarify the aiding and abetting and color of law standards to require intent and substantial assistance, create a ten-year statute of limitations, and require the exhaustion of local remedies in the country of origin); see also BARRY E. CARTER ET AL., INTERNATIONAL LAW 639–43 (4th ed. 2003); John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1 (2009).

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

98. *Id.* at 975.

rights violations.”⁹⁹ Harold Koh sees the ATS as part of a broader movement of corporate social responsibility and observes that efforts to revise the ATS “undermine meaningful efforts to promote corporate responsibility abroad.”¹⁰⁰ Others find that corporate liability under the ATS for human rights violations is a key component of the “constructive engagement” agenda, which holds that investment can be an effective means of promoting reforms in developing countries.¹⁰¹ By this position, liability “furthers rather than undermines constructive engagement” by creating the legal conditions in which U.S. companies will “promote democracy and human rights in their interactions with foreign governments and citizens by conveying democratic values and pushing for respect for the rule of law.”¹⁰²

Just as the original purpose of the ATS is largely unknown and shrouded in mystery,¹⁰³ the statute’s current significance is the result of unlikely and partially unknown events. The statute remained largely dormant until the late 1970s, when the daughter of a Paraguayan physician named Joel Filártiga, who had been an outspoken critic of the Paraguayan government and whose son had been tortured and murdered by a high-ranking government official, Américo Norberto Peña Irala, sought the legal advice of the Center for Constitutional Rights (CCR), a nongovernmental organization in New York City.¹⁰⁴ Filártiga, the

99. *Id.* at 979.

100. Koh, *supra* note 8, at 274.

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

102. *Id.*

103. Judge Friendly once called the ATS a “legal Lohengrin” because “no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). The very limited historical record suggests that the two incidents of assault of foreign ambassadors on U.S. soil originally precipitated its passage in 1789. Hufbauer & Mitrokostas, *supra* note 94, at 245; see *Respublica v. De Longchamps*, 1 U.S. 111 (1784). Congress was “evidently anxious to display American leadership in defending international standards of good behavior” and wanted to signal that it “would not tolerate flagrant violations of the ‘law of nations,’” thereby avoiding international conflict given the “fragile peace that followed the end of the American Revolution.” *Id.* at 113–14. Others have argued that it meant to enforce those norms that were widely recognized as among the law of nations in 1789, which included the rights of ambassadors, the right of safe conduct, and prohibitions on piracy. See Kevin R. Carter, Note, *Amending the Alien Tort Claims Act: Protecting Human Rights or Closing Off Corporate Accountability*, 38 CASE W. RES. J. INT’L L. 629, 632 (2007) (citing Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 891 (1999)); see also Yasmine A. Rassam, *Contemporary Forms of Slavery and the Evolution of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT’L L. 330 (1999) (explaining that the law of nations expanded in the late 1800s to include prohibitions in slave trading).

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

physician, had brought a criminal suit against Peña in Paraguay, which proved futile due to the severe harassment of his attorney and unexplained judicial delays. When the daughter discovered that Peña was living in Brooklyn, CCR suggested an “experimental” approach—using a long-dormant and obscure provision of the 1789 Judiciary Act, now referred to as the Alien Tort Statute, to seek civil damages.¹⁰⁵ Interestingly, no one at CCR remembers who originally suggested that the ATS could be used to bring an action in tort by a foreign national against a foreign national. One CCR attorney joked, “It was probably an intern.”¹⁰⁶

CCR accordingly filed suit in the Southern District of New York under wrongful death statutes, the U.N. Charter, the Universal Declaration on Human Rights, the U.N. Declaration Against Torture, the American Declaration of the Rights and Duties of Man, and “other pertinent declarations, documents, and practices constituting the customary international law of human rights and the law of nations,” as well as the ATS.¹⁰⁷ The district court granted the defendant’s motion to dismiss on jurisdictional grounds, holding that the “law of nations” excludes law that governs a state’s treatment of its own citizens.¹⁰⁸ On appeal, the Second Circuit held that “official torture is now prohibited by the law of nations” and that the distinction between official torture of nationals and foreigners—suggested in dicta from intracircuit precedent¹⁰⁹—is “out of tune with the current usage and practice of international law.”¹¹⁰ Addressing the jurisdictional question, the court concluded that the law of nations “has always been part of the federal common law,”¹¹¹ and that although the statute did not grant new rights to aliens, it opened “the federal courts for adjudication of the rights already recognized by international law.”¹¹²

Despite the power of this precedent, plaintiffs seeking relief from state actors faced a number of hurdles, including the Foreign Sovereign Immunities Act of 1976, which creates a presumption of sovereign immunity from U.S. lawsuits unless a specific exception (such as the sponsorship of terrorism or commercial activities) applies. State actor defendants have also invoked various prudential court doctrines, especially the act of state and political question doctrines, to bar

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

106. *Id.* at 19.

107. *Filartiga*, 630 F.2d at 879.

108. *Id.*

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

110. *Filartiga*, 630 F.2d at 884.

111. *Id.* at 885.

112. *Id.* at 887.

suits.¹¹³ Plaintiffs accordingly began seeking relief under the ATS from private parties, including both natural persons and corporations, thus transforming this statute yet again into a de facto law of U.S. international business.

The first ATS case against a corporation would come about twenty years later, when citizens of Burma (Myanmar), again with the support of the CCR, filed a case against the Unocal Corporation alleging, inter alia, that it had aided and abetted the murder, rape, torture, and forced labor of villagers by the government in construction of a gas pipeline.¹¹⁴ The Central District of California granted summary judgment in favor of Unocal, and on appeal, the Ninth Circuit affirmed *Filartiga's* holding that customary international law is part of the federal common law.¹¹⁵ It further assumed, without argument, that if the ATS establishes federal jurisdiction over private parties, that jurisdiction extends to corporations as well.¹¹⁶ As the case law concerning private defendants developed, two categories of cases emerged. Corporations could be sued for their own conduct, or they could be sued for acts committed principally by foreign states. In the latter cases, plaintiffs alleged that the corporations were acting “under color of law” or were “joint actors” with the foreign government.¹¹⁷

Recent litigation has raised, or failed to resolve, two significant legal issues. The first is the U.S. Supreme Court’s first and only opinion on the ATS, *Sosa v. Alvarez-Machain*,¹¹⁸ which addressed what some have called “the most contested issue in U.S. foreign relations law during the last decade:”¹¹⁹ the status of customary international law (CIL) in U.S. courts. Some scholars had argued what

113. HUFBAUER ET AL., *supra* note 73, at 5.

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

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

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

117. HUFBAUER ET AL., *supra* note 73, at 5; see also Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT’L HUM. RTS. 304, 317–26 (2008).

118. 542 U.S. 692 (2004).

119. Bradley et al., *supra* note 8, at 871.

would later be called the “modern position”—that CIL had the status of self-executing federal common law, which the courts could apply without any express authorization from Congress.¹²⁰ “Revisionists,” on the other hand, argued that CIL had the status of federal common law only when the courts had express authorization from the Constitution or the political branches.¹²¹ The *Sosa* Court resolved it in such a manner that both sides claimed victory,¹²² it held that the ATS authorized federal courts to recognize federal common law causes of action for only a “limited number of CIL violations,”¹²³ particularly those that have no “less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”¹²⁴ Thus, despite the Supreme Court weighing in, the status of CIL in federal courts remains very much unresolved.

The second issue is whether liability under the ATS extends to corporate defendants. The Second Circuit recently addressed this issue as a matter of first impression in *Kiobel v. Royal Dutch Petroleum*¹²⁵ and found that customary international law provides not only the underlying causes of action under the ATS, but also the scope of liability.¹²⁶ It found that corporate liability for violations of international law is not itself a rule of customary international law because it is not a “specific, universal, and obligatory norm” and has not attained acceptance among the nations of the world.¹²⁷ The impact of this holding will be limited by the fact that much ATS litigation is filed outside the Second Circuit, and if *Kiobel* were to withstand en banc review, that portion would certainly increase quite dramatically. Accordingly, the ATS remains a viable instrument for holding corporations liable for human rights abuses, irrespective of any alleged competitive disadvantage.

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

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

122. See Bradley et al., *supra* note 8, at 872.

123. *Id.* at 893.

124. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

125. 621 F.3d 111 (2d Cir. 2010).

126. *Id.* at 128.

127. *Id.* at 145.

2. Economic Sanctions for Human Rights Abuses

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

Sanctions would not become a regular tool of modern history until after World War I, and through the first couple of decades following World War II, particularly with the onset of the Cold War, sanctions generally preceded or accompanied major military efforts.¹²⁸ Examples from the United States would include the sanctions against Iran in 1951, North Vietnam in 1954, Laos in 1956, Cuba in 1960, and South Vietnam in 1963.¹²⁹ The social value thrust of sanctions would develop in the 1960s and then fully mature in the 1970s under the leadership of President Carter, as economic sanctions increasingly focused on the promotion of human rights.¹³⁰

Ample commentary attests to the nature of economic sanctions as a restraint on profit-seeking to achieve social goals not narrowly related to the market. As one scholar observed, “the basic purpose of economic sanctions throughout history has always been restricting foreign trade and finance or withholding economic benefits such as state aid from targeted states . . . to accomplish broader security or foreign policy objectives.”¹³¹ They are a form of “economic statecraft” that involves the withdrawal of economic resources to achieve a policy change in the target country.¹³² Sanctions “institute a deliberate programme of action to disrupt or terminate an ongoing economic relationship between the sender and target countries. Since this ongoing relationship is mutually beneficial . . . its interruption will be costly to both parties.”¹³³ In fact, the threat of sanctions, or the sanctions themselves, would have no teeth but for the volume of business activity between the sender and the target. By curtailing that activity and withdrawing financial support, the United States aims to “hamper the target

128. HUFBAUER ET AL., *supra* note 73, at 10.

129. *Id.* at 21–23.

130. *Id.* at 13.

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

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

133. *Id.* at 9.

country's economy and redistribute income, status, and influence among its domestic constituents."¹³⁴

Sanctions for human rights thus represent the policy determination that the sender country cares, for example, more about "human rights or racial equality in China and South Africa respectively than commercial sales to and corporate investments in those countries."¹³⁵ They represent the determination that sender nations "obviously care about matters other than trade and investment. If this were not the case, none would have bothered to threaten or actually undertake sanctions which are precisely intended to use economic leverage to obtain political concessions."¹³⁶ Indeed, the frequency and intensity of sanctions represents the sender's "willingness to suffer substantial economic and political costs to itself for the sake of achieving its declared objective Accordingly, a sender's self-inflicted costs provide an indicator of its seriousness and determination."¹³⁷

The most comprehensive analysis of economic sanctions is the collaborative work of Gary Clyde Hufbauer, Jeffrey Schott, Kimberly Ann Elliott, and Barbara Oegg, *Economic Sanctions Reconsidered*.¹³⁸ Originally published in 1985 and updated in 1990 and then again in 2007, the authors analyze 174 examples of economic sanctions. They define sanctions as the "deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations."¹³⁹ In sanctions jargon, the country applying the sanctions is often called the "sender" and the sanctioned country is the "target." With respect to the senders, sanctions can be unilateral or multilateral, although the latter usually

134. *Id.* at 5.

135. *Id.* at 9.

136. *Id.* at 10.

137. *Id.* at 13.

138. HUFBAUER ET AL., *supra* note 73.

139. *Id.* at 3. An alternative definition holds that any conduct intentionally depriving a people of its "means to an effective economic life" counts as sanctions. GEOFF SIMONS, IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL? 11 (1999). This definition would even treat military conduct that adversely impacted a target's economy as sanctions and is thus significantly broader than any generally accepted usage. Another available definition is "coercive economic measures taken against one or more countries to force a change in politics, or at least to demonstrate a country's opinion about the other's policies." DIANNE E. RENNACK & ROBERT D. SHUEY, ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW 2 (1998), *cited in* HOSSEIN G. ASKARI, JOHN FORRER, HILDY TEEGEN & JIAWEN YANG, ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY 14 (2003). This definition is not preferred because it excludes the possibility that sanctions may be expressive tools and not necessarily designed to "bring about a change in behavior or policies."

involve major powers persuading their smaller allies to join.¹⁴⁰ Sanctions can involve any or all of three types of customary trade or financial relations: limitations on imports, limitations on exports, and restricting the flow of finance.¹⁴¹ The target country need not be the adversary of the sender and, indeed, many of the most successful documented instances of sanctions have involved a friendly target who promptly acquiesced to the sender's demands.¹⁴²

Sanctions may serve either of two purposes. While the most obvious purpose of economic sanctions would be to "coerc[e] target governments into particular avenues of response,"¹⁴³ economists and political scientists have explained that economic sanctions might also be designed to accomplish an entirely different, noninstrumental goal. Under this alternative theory, sanctions are not necessarily designed to effect reforms in the target countries, and their success thus should not necessarily be measured by the extent of any resulting reforms. William Kaempfer and Anton Lowenberg have contrasted the "instrumental" theory of sanctions with the "expressive" purpose.¹⁴⁴ According to this theory, the value of sanctions lies in "taking a moral stance against some other nation's objectionable behavior."¹⁴⁵ When a target country offends the sender state, but the sender's leaders may deem more severe intervention such as military action inappropriate, the sender's leaders may nonetheless feel compelled to "do something."¹⁴⁶ While the costs of military action may be too high, the political costs of doing nothing may be considerable to the extent that it projects weakness.¹⁴⁷ Such domestic political pressure can "persuade the government in the sanctioning nation to respond by imposing sanctions to meet goals other than target compliance."¹⁴⁸ Indeed, the expressive purpose of sanctions sometimes occurs despite its instrumental ineffectiveness, but often

140. HUFBAUER ET AL., *supra* note 73, at 5.

141. *Id.* at 44–45.

142. *See id.* at 60.

143. *Id.* at 5.

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

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

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

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

148. Eland, *supra* note 146, at 29.

the sanctions are “designed deliberately to be ineffectual.”¹⁴⁹ The expressive purpose of sanctions is even further testament to the noneconomic feature of so-called economic sanctions. While these sanctions curtail economic activity, they by and large do so not to effectuate changes in economic conditions, but rather to promote social and political goals.

But even economic sanctions that are instrumental in design are fundamentally noneconomic when imposed in protest of human rights abuses. The term “economic” in “economic sanctions” refers to the means, not the ends. The United States employs economic means to achieve social and political ends. That is, the United States curtails business activity to achieve goals that have little to do with market conditions or profit.

3. The Extraterritorial Application of Employment Discrimination Laws

Title VII of the Civil Rights Act of 1964 is of course the bedrock U.S. statute addressing discrimination in employment.¹⁵⁰ Though its role in domestic antidiscrimination efforts is familiar,¹⁵¹ few appreciate the scope of its application to extraterritorial conduct, and its prominence in the basket of legal obligations that businesses bring with them when conducting business overseas.

Title VII originally contained no language expressly extending coverage to individuals working overseas for corporations owned or controlled by American persons. When faced with the question in 1991, the Supreme Court invoked the nineteenth century presumption against extraterritorial application of U.S. statutes absent express statutory direction, and thus limited Title VII's coverage to practices arising in connection with work performed in the United States.¹⁵² In direct response to this case, Congress inserted a provision into the Civil Rights Act of 1991 that overturned the decision by extending coverage to include U.S. citizens employed in a foreign country.¹⁵³ As a result, corporations

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

150. 42 U.S.C. § 2000e-2(a)(1) (2006).

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

152. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

153. 42 U.S.C. § 2000e(f).

now falling within the Act's statute include not only U.S. corporations, but also foreign corporations controlled by American employers.¹⁵⁴

Moreover, two federal courts have held that the bona fide occupational qualification (BFOQ) must operate in foreign countries just as it does domestically, regardless of the legal or cultural practices of those foreign countries. A U.S. oil company that worked in Latin American countries declined to promote a female employee to vice president of international operations because "Latin American clients would react negatively to a woman vice-president."¹⁵⁵ The Ninth Circuit reversed the district court's holding that gender was a BFOQ in this context and held that just as customer preference cannot be the basis of a BFOQ in a domestic setting, it cannot be the basis in an international setting.¹⁵⁶ It added, "Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country."¹⁵⁷ Similarly, where the Baylor University medical school excluded Jewish physicians from participating in a rotation program that sent doctors to Saudi Arabia due to that country's "apparent hostility to Jews," the Southern District of Texas held that "patronizing, paternalistic 'concerns' of Baylor for the safety of Jews in Saudi Arabia" do not constitute a BFOQ.¹⁵⁸ Interestingly, these cases predate the 1991 extraterritorial amendment and illustrate the inherent force of Title VII to push across national boundaries.

Though Title VII is the predominant employment discrimination statute, it does not stand alone and is accompanied by others that also apply extraterritorially. The Americans with Disabilities Act (ADA) prohibits discrimination based on disabilities in the employment context.¹⁵⁹ The 1991 amendments to the Civil Rights Act that amended Title VII to apply extraterritorially similarly amended the ADA.¹⁶⁰ Additionally, the Age Discrimination in Employment Act (ADEA) forbids age discrimination against persons over forty years old in hiring, firing, promotions, applications, and other "terms, conditions, or

154. *Id.* § 2000e-1(c)(2). Title VII exempts conduct that would cause any U.S. employer to violate the law of the foreign workplace. *Id.* § 2000e-1(b).

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

156. *Id.* at 1277.

157. *Id.*

158. *Abrams v. Baylor Coll. of Med.*, 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd in part and rev'd in part*, 805 F.2d 528 (5th Cir. 1986).

159. Americans With Disabilities Act, 42 U.S.C. § 12101 (2006), *amended* by Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(b)(2)(B), 105 Stat. 1071 [hereinafter ADA].

160. *Id.* § 12112(c)(2)(B).

privileges of employment.”¹⁶¹ Though a statute of lesser impact, the ADEA actually set the precedent that Congress evidently followed in amending Title VII. In 1984, the Third Circuit decided that the ADEA did not apply extraterritorially,¹⁶² and Congress immediately responded by amending the ADEA.¹⁶³ The extraterritorial application of Title VII is now coextensive with the ADEA.

Accordingly, Title VII, the ADA, and the ADEA combine to create a significant set of antidiscrimination laws with which all business must comply when working overseas. Though many have argued that the extraterritorial application of these statutes does not go far enough, and specifically that their coverage should not be limited to U.S. employees,¹⁶⁴ these laws nonetheless figure prominently in understanding the practical and symbolic significance of the U.S. regime of international business law.

C. Income Taxation: The Antideferral Regime for Extraterritorial Corporate Profits

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

As a general rule, the profits of U.S. corporations from their ownership interests in foreign corporations are not taxed until the earnings are repatriated to U.S. shareholders in the form of a dividend or realized by U.S. shareholders

161. Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (2006) [hereinafter ADEA]. One Circuit has held that it also prohibits the creation of an “age-hostile” environment. Crawford v. Medina Gen. Hosp., 96 F.3d 830 (6th Cir. 1996).

162. Cleary v. United States, 728 F.2d 607, 610 (3d Cir. 1984).

163. 29 U.S.C. § 623(h); see also Morelli v. Cedel, 141 F.3d 39 (2d Cir. 1998) (holding that ADEA extends to U.S. branches of foreign employers).

164. See, e.g., Paul Frantz, *International Employment: Antidiscrimination Law Should Follow Employees Abroad*, 14 MINN. J. GLOBAL TRADE 227, 229 (2005) (stating that Title VII, the ADA, and the ADEA should apply to lawful permanent residents working for overseas U.S. corporations); Kathy Roberts, *Correcting Culture: Extraterritoriality and U.S. Employment Discrimination Law*, 24 HOFSTRA LAB. & EMP. L.J. 295, 331 (2007) (concluding that Title VII, the ADA, and the ADEA should be extended to non-U.S. employees of U.S. companies working both domestically and abroad); Carson Sprott, Note, *Competitive and Fair: The Case for Exporting Stronger Extraterritorial Labor and Employment Protection*, 33 HASTINGS INT'L & COMP. L. REV. 479, 500 (2010) (stating that U.S. labor law should be applied universally to all employees, including non-U.S. employees working for U.S. corporations overseas).

from the sale of shares.¹⁶⁵ This practice of postponing taxation of profits until repatriation is known as deferral and reflects the longstanding U.S. tax policies that foreign profits of foreign entities should not be taxed and that foreign-chartered corporations are distinct legal entities.¹⁶⁶ When a foreign-chartered corporation is owned by a U.S. corporation, the result is that profits attributable to U.S. shareholders escape U.S. tax as long as they are reinvested in foreign tax jurisdictions; hence the frequent establishment of subsidiaries in low-tax foreign jurisdictions. Such has been the tax policy of the United States since the original enactment of the federal income tax with the Sixteenth Amendment in 1913. From that date through the 1950s, U.S. multinational corporations could operate in complete freedom from current U.S. income taxation as long as they conducted their business through foreign subsidiaries.¹⁶⁷ These policies were essentially abused through manipulating income by shifting mobile forms of income to foreign low-tax jurisdictions, especially through establishing foreign holding companies (companies formed to earn mobile passive income) or base companies (companies in low-tax jurisdictions that serve as conduits for the overseas sales of U.S.-manufactured goods).¹⁶⁸ As early as 1937, Congress recognized the need to impose limits on the privilege of deferral to preserve the U.S. tax base, but business interests successfully resisted.

The movement to subject extraterritorial profits to an income tax regime would gain sufficient momentum in the 1960s as the United States was running a large budget deficit and the ease with which U.S. corporations could defer income taxation was increasingly perceived as a contributing factor. The Kennedy administration thus introduced radical new international taxation legislation that was based upon a policy of global tax neutrality—that the business activity of foreign subsidiaries would be taxed at the same rate as wholly domestic U.S. corporations.¹⁶⁹ The business community gave significant pushback on the grounds that global tax neutrality would put U.S. corporations at a competitive disadvantage.¹⁷⁰ The two sides achieved a compromise in 1962 with enactment of the first significant constraint on deferral. The result, Subpart F, currently

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

166. *Id.*

167. Keith Engel, *Tax Neutrality to the Left, International Competitiveness to the Right, Stuck in the Middle With Subpart F*, 79 TEX. L. REV. 1525, 1527 (2001).

168. GRAETZ, *supra* note 165, at 217–18.

169. Engel, *supra* note 167.

170. *Id.*

taxes—that is, does not permit tax deferral of—certain types of income,¹⁷¹ and only by a “controlled foreign corporation” (CFC). A CFC is generally a foreign corporation that is majority owned by U.S. persons (counting only the shareholders who own at least 10 percent of the stock).¹⁷² Subpart F identifies several types of CFC income that are subject to current taxation based on the ease with which they can be shifted to low-tax jurisdictions.¹⁷³ Disfavored income generally includes income from passive investments, especially income generated by stocks and bonds.¹⁷⁴

Since the original enactment of Subpart F, the United States has enacted a “series of extremely complex and somewhat overlapping anti-deferral regimes” to complement, or complicate, Subpart F.¹⁷⁵ Many scholars argue that the provisions that apply to extraterritorial corporate profit are not as progressive as they should be.¹⁷⁶ Nonetheless, it remains true that the U.S. antideferral rules of Subpart F are “harsher” than the rules of other developed countries, indicating, in the words of one scholar, not that the United States should join a “race to the bottom,” but rather to the contrary, that “the rest of the developed world has not joined the United States in a ‘race to the top.’”¹⁷⁷ “The United States has tried to lead and, while many have followed, none has followed quite as far as the United States has gone.”¹⁷⁸ The U.S. system, while not the most severe in every single instance, is generally “almost always the harshest, sometimes by a wide margin.”¹⁷⁹

The antideferral regime thus rounds out the model of progressive capitalism that the United States imposes on corporations in their extraterritorial conduct. The following Part contrasts this model with its Chinese counterpart. It shows that China does not impose any of the legal constraints on business conduct included in this study: It has deliberately refused to enact anticorruption laws, despite substantial worldwide lobbying; it does not hold its corporations

171. *Id.* at 1528.

172. GRAETZ, *supra* note 165, at 218.

173. *Id.*

174. Engel, *supra* note 167, at 1528.

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

176. *Id.* at 1010–11.

177. NAT'L FOREIGN TRADE COUNCIL, INC., THE NFTC FOREIGN INCOME PROJECT: INTERNATIONAL TAX POLICY FOR THE 21ST CENTURY 24 (2001), available at [http://www.nftc.org/default/tax/fip/NFTC1a%20Volume2\(1\).pdf](http://www.nftc.org/default/tax/fip/NFTC1a%20Volume2(1).pdf).

178. *Id.*

179. *Id.*

liable for complicity in human rights abuses; it very rarely imposes economic sanctions, and never for human rights abuses; and it does not have effective laws prohibiting discrimination in employment. As such, with respect to the kinds of social values that these laws are designed to promote and despite its practice of owning or subsidizing corporations, China's legal regime is substantially *laissez-faire*.

III. CHINA'S NEW LAISSEZ-FAIRE

The existing scholarship on Chinese international business law draws on two unvarying themes. The first is the relative heaviness of the Chinese state vis-à-vis Western liberalism. This literature has developed terms such as "state capitalism"¹⁸⁰ or "socialist market economy"¹⁸¹ to capture China's supposedly heavy-handed curtailment of individual freedoms generally, while only reluctantly and incrementally implementing liberal market reforms. Scholarship focusing specifically on China's international business regime develops a second theme, emphasizing the increasingly aggressive role of Chinese business, encouraged and subsidized by the state, in investing in developing countries. This literature focuses, accurately, on the Chinese government's recognized need to obtain natural resources, create markets for its products, and build political alliances to increase its international influence. However, scarcely understood is the legal regime that directs this extraterritorial conduct. Terms such as "state capitalism" accurately capture the Chinese government's approaches to areas such as industrial policy or financial regulation, where the state's hand is indeed heavier than most Western counterparts. However, these terms do not capture China's distinctive approach with respect to the values that are the subject of this Article. When focusing on such areas as combating corruption and promoting human rights, the Chinese regime of international business is striking not for the heaviness of the state's hand, but for its lightness—that is, the absence of laws curtailing profit-seeking to achieve other goals. Put another way, profit-seeking, or economic development, is itself the predominant political goal. By seeking profits, Chinese businesses are thought to advance the economic growth that will secure allegiance to the state and preclude widespread social resistance. In this sense, the Chinese regime is more accurately understood as substantially *laissez-faire*.

180. HALPER, *supra* note 23, at 30–31.

181. XING, *supra* note 25, at 5.

A. The Political Purposes of Chinese Business

Shortly after the founding of the People's Republic of China in 1949, the Communist government under Mao Zedong confiscated the preexisting private companies and converted them into state-owned enterprises (SOEs).¹⁸² In the ensuing years, initially under the first Five Year Plan of 1953–57, the government further nationalized industry by placing SOEs under the control of local government bodies for the purpose of developing a Soviet-style command economy.¹⁸³ The government took control over such fundamental SOE operations as labor recruitment, finance, materials, production, supply, and marketing.¹⁸⁴

After Mao's death in 1978, a new coalition of conservative leadership, led by Deng Xiaoping, took control of the government. These leaders' principal focus was lifting China out of poverty; they believed that doing so required reformation of China's economic structure.¹⁸⁵ Accordingly, Deng implemented a series of liberalizing reforms to make SOEs more productive. These early reforms set in motion a process whereby business would continue to serve the political purpose of preserving the Communist Party's power and its role as exclusive custodian of the common good. But the means of achieving this objective would change fundamentally. Rather than collectivization, the means of promoting the common good became profit. Deng's vision was that economic prosperity would stabilize society and preserve the state's power. Economic growth, then, became the political purpose of business.

In the early 1990s, the party accelerated its reforms of the ownership structure of SOEs and instituted more standardized corporate governance, passing the Company Law in 1993.¹⁸⁶ Radical reforms continued through the late 1990s as the government formulated a new strategy: "grasping the large and letting the small go."¹⁸⁷ This referred to cultivating large SOEs that were strong and competitive and eventually developing them into multinational companies,

182. Neal Stevens, Comment, *Confronting the Crisis of Insolvency in China's State-Owned Enterprises: Can the Proposed Bankruptcy Law Erase the Red Ink?*, 16 WIS. INT'L L.J. 551, 553 n.13 (1998) (citing JIANFU CHEN, FROM ADMINISTRATIVE AUTHORISATION TO PRIVATE LAW, A COMPARATIVE PERSPECTIVE OF THE DEVELOPING CIVIL LAW IN THE PEOPLE'S REPUBLIC OF CHINA 75 (1995)).

183. *Id.* at 553 n.15.

184. *Id.* at 553–54; see also CHEN, *supra* note 182.

185. Stevens, *supra* note 182, at 555–56.

186. *Id.* at 557.

187. XING, *supra* note 25, at 11.

while giving up control of smaller and less strategic enterprises. The ultimate goal of these reforms was to allow the state to retreat from select sectors through privatization, while continuing to dominate a few strategic industries.¹⁸⁸ The government implemented recapitalization reforms to make the large, strategic SOEs more efficient by converting state loans to equities, authorizing state banks to write off bad loans, selectively listing firms in stock markets, and allowing the firms to form joint ventures with foreign investors.¹⁸⁹ Today, SOEs are not monopolies; rather, they are subjected to competition both domestically and internationally.¹⁹⁰ They also are allowed to raise large amounts of private capital; all of the twelve biggest initial public offerings on the Shanghai Stock Exchange in 2007 were state enterprises.¹⁹¹ SOEs have access to banks as well as the stock market, and some scholars estimate that up to 99 percent of bank loans to Chinese companies go to these firms.¹⁹² The cost of capital is low and the banks are lenient in enforcing the terms of repayment for SOEs, while the private sector struggles comparatively to raise capital.¹⁹³ Because privatization has ultimately meant subjecting state-owned companies to private competition and private markets, the firms are thus hybrids that have characteristics of both public and private companies.¹⁹⁴ Unlike other transitional economies such as the Russian Federation, China has never aspired to complete privatization.¹⁹⁵

The statistics confirm that as a result of these reforms, SOEs became smaller in number but larger in assets and profitability. From 1998 to 2007, the number of state-owned firms shrank from 64,737 to 20,680, and the percentage of the labor force from 60.5 percent to 22.1 percent. However, total assets more than doubled from 7.5 trillion yuan to 15.8 trillion, and profits from 52 billion to 1.1 trillion.¹⁹⁶

188. *Id.*

189. *Id.*

190. JACQUES, *supra* note 26, at 184.

191. *Id.*

192. Gordon Redding & Michael A. Witt, *Post-Transition China* 8 (INSEAD, Working Paper No. 2010/25/EPS/EFE, 2010), available at <http://ssrn.com/abstract=1590267> (citing K.S. TSAI, CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA (2007)).

193. *Id.*

194. JACQUES, *supra* note 26.

195. XING, *supra* note 25, at 12.

196. *Id.*

These reforms were imbued with a profound political purpose: to promote economic growth and social harmony and preserve the power of the Communist Party. The large SOEs represent “state tools toward driving economic development and a Chinese presence in [strategic] industries.”¹⁹⁷ Business, therefore, is directed to meet the “state’s development goals,” not just serve the financial interests of the business sector.¹⁹⁸ Sectors such as retail, agriculture, and service industries (other than banking) are now substantially private, while large strategic sectors like steel, aluminum, energy, transportation, communications, and banking remain government-owned.¹⁹⁹ Government policy is to retain state control in these strategic industries as a means of maintaining socialist characteristics within a market economy—the so-called “socialist market economy.”²⁰⁰ The state “acts as the dominant economic player and uses markets primarily for political gain.”²⁰¹ The ultimate motive is “maximizing the state’s power and the leadership’s chances of survival.”²⁰²

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

B. China’s Alternative to Progressive Capitalism

The political regime that governs China’s business activity—both domestic and international—stands in stark contrast to the progressive capitalist regime of U.S. international business law. Given the narrow focus of Chinese business regulation on promoting economic growth, China’s legal regime generally includes a “proclivity for corruption . . . and human rights violations.”²⁰³ Accordingly, in the areas of this study, particularly corruption and human rights, Chinese business law is substantially silent.

197. Redding & Witt, *supra* note 192.

198. BREMMER, *supra* note 24, at 134.

199. Redding & Witt, *supra* note 192, at 9–10.

200. XING, *supra* note 25, at 5; *see also* BREMMER, *supra* note 24, at 135.

201. BREMMER, *supra* note 24, at 5.

202. *Id.* at 4.

203. HALPER, *supra* note 23, at 170.

1. Corruption

Ample scholarship exists on the nature and magnitude of corruption in Chinese society. Scholars have identified various causes of Chinese corruption. One scholar holds that the development of a market economy after 1978 led to an increase in corruption, as foreign investors arrived who were willing and able to pay higher prices to obtain favorable treatment.²⁰⁴ Another study finds a link between the relative stagnation of the salaries of public officials' incomes in relation to the managers of state-owned and private enterprises.²⁰⁵ Yet another study looks at the lack of control and centralization in China's vast bureaucracy, which led to factional conflict at the top and at the bottom, resulting in an increase in autonomy and a decrease in accountability.²⁰⁶ Still other studies include several other factors: the lack of effective checks and balances in the national government, the lack of independence in anticorruption agencies,²⁰⁷ and the deeply-rooted Chinese cultural norms of gift giving and sustaining personal relationships.²⁰⁸

Like virtually every country, China has domestic anticorruption laws on the books. And on the face of these laws, it would appear that they have some teeth. The key sections of the revised criminal law dealing with political corruption are graft and bribery offenses,²⁰⁹ dereliction of duty,²¹⁰ and offenses

204. Kin-man Chan, *Corruption in China: A Principle-Agent Perspective*, in HANDBOOK OF COMPARATIVE PUBLIC ADMINISTRATION IN THE ASIA-PACIFIC BASIN 308 (Hoi-kwok Wong & Hon S. Chan eds., 1999); see also XIAOBO LU, CADRES AND CORRUPTION, THE ORGANIZATIONAL INVOLUTION OF THE CHINESE COMMUNIST PARTY 18 (2000); Zengke He, *Corruption and Anti-Corruption in Reform China*, 33 COMMUNIST & POST-COMMUNIST STUD. 243, 248-51 (2000).

205. LU, *supra* note 204, at 190; He, *supra* note 204, at 251.

206. Chan, *supra* note 204, at 311-14; He, *supra* note 204, at 251-53. As one scholar famously put it, "corruption = monopoly + discretion - accountability." ROBERT KLITGAARD, CONTROLLING CORRUPTION 75 (1988). For a broader discussion of bureaucratic and legal reforms to prevent corruption, see Sahr J. Kpundeh & Irene Hors, *Overview*, in CORRUPTION & INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 7-12 (United Nations Dev. Programme & OECD Dev. Centre eds., 1998), available at <http://mirror.undp.org/magnet/Docs/efa/corruption.htm#Overview>.

207. LU, *supra* note 204, at 156-57; He, *supra* note 204, at 253-54.

208. He, *supra* note 204, at 255-56.

209. See WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH ENGLISH TRANSLATION AND INTRODUCTION 197-203, art. 382-96 (1998), available at <http://www.colaw.cn/findlaw/crime/criminalaw3.html>.

210. *Id.* at 205-12, art. 397-419.

against company and enterprise management.²¹¹ Bribery is defined in careful detail,²¹² and the offense is defined broadly. It may be committed by anyone who is a state functionary regardless of rank or position and covers anyone performing public duties, not just government officials.²¹³ It covers both active demand and passive receipt of illegal consideration.²¹⁴ It encompasses grease payments for routine or ministerial government action.²¹⁵ Receiving gifts of substantial value from foreign interests is specifically prohibited.²¹⁶ Chinese anti-corruption efforts have generally been limited to the prosecution of high-profile cases involving high-profile officials.²¹⁷ While various Chinese companies have been prosecuted for overseas business bribery under the laws of other jurisdictions, particularly the United States,²¹⁸ and Chinese officials have been selectively prosecuted for receiving bribes from foreign companies,²¹⁹ and even foreign

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211. *Id.* at 94–99, art. 158–69 (which apply, inter alia, to management of state-owned enterprises (SOEs)).
 212. *Id.* at 199–200, art. 385, 387 (solicitation and/or receipt of bribes by state functionaries); *id.* at 201, art. 391 (offering of bribes to seek illegitimate gain).
 213. *Id.* at 197, art. 382; see also *Official Reply of Supreme People's Procuratorate Regarding Criminal Responsibility of Civilian Employees at Prison Facilities*, in FALÜ QUANSHU ZENGBIANBEN 71 (1994).
 214. CHINESE CRIMINAL LAW 650, 652–53 (Jia Yu & You Wei eds., 1997).
 215. See Hilary K. Josephs, *The Upright and the Low-Down: An Examination of Official Corruption in the United States and the People's Republic of China*, 27 SYRACUSE J. INT'L L. & COM. 269, 297–98 (2000).
 216. LUO, *supra* note 209, at 202, art. 394.
 217. For an in-depth study of the modern history of China's corruption prosecutions and public relations efforts and their failure to effect widespread corruption reduction, see Benjamin van Rooij, *China's War on Graft: Politico-Legal Campaigns Against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S.*, 14 PAC. RIM L. & POL'Y J. 289, 298–308 (2005).
 218. For example, in 2009, the U.S. Department of Justice alleged that in 2005 a subsidiary of China Communication Construction paid bribes amounting to U.S. \$1.76 million to the son of a former Bangladesh prime minister in connection with a Bangladesh port project. Press Release, U.S. Dep't of Justice, Department of Justice Seeks to Recover Approximately \$3 Million in Illegal Proceeds From Foreign Bribe Payments (Jan. 9, 2009), available at <http://www.justice.gov/opa/pr/2009/January/09-crm-020.html>. In November 2009, the accused Bangladeshi party in that case was charged with money laundering in connection with the alleged bribes. Chaitanya Chandra Halder, *Koko Charged With Money Laundering*, DAILY STAR, Nov. 13, 2009, <http://www.thedailystar.net/newDesign/news-details.php?nid=113862>; see also FRITZ HEIMANN & GILLIAN DELL, PROGRESS REPORT 2010: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION ON COMBATING BRIBERY OF FOREIGN OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 66–67 (2010), available at http://www.transparency.cz/doc/2010Progress_Report_2nd_edition_10.9.10.pdf.
 219. For example, the companies IBM, NCR, and Hitachi were named in a 2006 court verdict against the former president of the China Construction Bank, who was sentenced to fifteen years in jail for receiving over U.S. \$500,000 in bribes. David Barboza, *IBM, NCR and Hitachi Named in*

companies or officers have been prosecuted for paying bribes,²²⁰ studies show that these scattered enforcement actions have not led to a decrease in perceived corruption in China.²²¹

Similarly, China now has on the books two laws prohibiting overseas commercial bribery. First, China has ratified the United Nations Convention Against Corruption (UNCAC).²²² While UNCAC is an important symbolic gesture, the convention has not yet impacted international corporate conduct to a meaningful degree due to lack of enforcement.²²³ Secondly, China has very recently adopted its own FCPA-type law. On February 25, 2011, China amended the above-mentioned criminal statutes to specifically prohibit the bribing of overseas government officials for business purposes.²²⁴ The most important amendment prohibits the giving of “property” to “any foreign public official or official of an international public organization” for “the purpose of seeking illegitimate commercial benefit.”²²⁵ Its jurisdiction, much like the FCPA, extends to all citizens wherever located, all natural persons within the territory of China, and all companies organized under Chinese law.²²⁶ However, the list of countries with

China Bribe Verdict, N.Y. TIMES, Oct. 30, 2006, <http://www.nytimes.com/2006/11/30/business/worldbusiness/30iht-bank.3731302.html>.

220. In the Rio Tinto case, four employees of that British–Australian mining firm were convicted of taking bribes of RMB 92,180,000 and stealing commercial secrets. Their sentences ranged from seven to fourteen years in prison, substantial personal fines, and confiscation of personal assets. ECONOMIC OBSERVER, May 18, 2010, http://www.eeo.com.cn/industry/energy_chem_materials/2010/05/18/170289.shtml.
221. van Rooij, *supra* note 217, at 293.
222. Convention Against Corruption, G.A. Res. 58/4, arts. 15–16, U.N. Doc. A/58/4 (Oct. 31, 2003), *reprinted in* 43 I.L.M. 37 (2004) [hereinafter UNCAC]. For a complete list of countries that have ratified the UNCAC, see *United Nations Convention Against Corruption*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Oct. 17, 2011). For background information on the UNCAC, see *United Nations Convention Against Corruption: Background of the United Nations Convention Against Corruption*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/> (last visited Oct. 17, 2011).
223. Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT’L ECON. L. 191, 224, 228–29 (2005) (stating that lack of robust monitoring for the UNCAC means that enforcement will be low and it remains to be seen whether the UNCAC is anymore than rhetoric).
224. Covington & Burling LLP, *China Amends Criminal Law to Cover Foreign Bribery* (Mar. 1, 2011), <http://www.cov.com/files/Publication/42670cdc-69c5-449f-8cca-de977578b090/Presentation/PublicationAttachment/cce56508-172d-445a-9a57-e5552dedb517/China%20Amends%20Criminal%20Law%20to%20Cover%20Foreign%20Bribery.pdf>.
225. LUO, *supra* note 209, at 97, art. 164.
226. Covington & Burling LLP, *supra* note 224.

such laws on the books, but without meaningful enforcement, is quite long.²²⁷ Indeed, China has an interest in enforcing domestic prohibitions to project a more favorable image and attract foreign direct investment (FDI), while China's lack of meaningful overseas bribery prohibitions gives it a great competitive advantage. Accordingly, despite China's symbolic efforts, there is little reason to doubt that Chinese companies will continue to pay bribes in developing countries without fear of penalty.

2. Human Rights

China's stance on human rights is, of course, well documented and widely recognized.²²⁸ It is no surprise, then, that China does not obligate its corporations to promote human rights norms in their extraterritorial conduct. That China has no analogue to the Alien Tort Statute is unremarkable; the ATS is unique to the United States. Less unique to the United States is the practice of imposing economic sanctions; there, China has a history, but it is brief and devoid of a human rights theme. Although China has imposed economic sanctions a few times since 1949, they have been few and far between, and none were related to human rights. Indeed, since the 1970s China has unilaterally imposed sanctions three times: in 1978, against Albania in retaliation for anti-Chinese rhetoric; again in 1978, against Vietnam to coerce that country to withdraw its troops from Kampuchea; and in 1992, against France to protest France's arms sales to Taiwan.²²⁹ None were for human rights causes or any other social norms unrelated to national security.

As with Chinese corruption law, various Chinese statutes and constitutional provisions purport to prohibit employment discrimination.²³⁰ Recently, in 2007, China passed its most rigorous and employee-friendly statute, the China Employment Promotion Law, which prohibits discrimination on the basis of

227. OECD, *Working Group on Bribery: 2010 Data on Enforcement of the Anti-Bribery Convention*, Apr. 2011, <http://www.oecd.org/dataoecd/47/39/47637707.pdf>.

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

229. HUFBAUER ET AL., *supra* note 73, at 25, 30.

230. Jiefeng Lu, *Employment Discrimination in China: The Current Situation and Principle Challenges*, 32 HAMLINE L. REV. 133, 173-78 (2009); see also KENNETH A. CUTSHAW, MICHAEL E. BURKE & CHRISTOPHER A. WAGNER, 1 CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA § 15:11 (3d ed. 2010).

ethnicity, race, gender, or religious beliefs (although not age).²³¹ It specifically grants victims of discrimination access to courts, thus theoretically overcoming the principal obstacle of all previous antidiscrimination provisions in China—the lack of enforceability.²³² Although a handful of lawsuits have resulted,²³³ it is not widely regarded as a meaningful deterrent to discrimination.²³⁴

China's income tax regime is one area where the differences with the United States may be merely differences of degree, and not of kind. In 1983, the government implemented an income taxation scheme to replace the old profit-delivery system that had allowed an SOE to keep all profits once it met a government set delivery level based on profit, output, quality, variety, and costs. This system levies an income tax on SOEs and divides after-tax profits into funds that SOEs can retain and funds that are remitted to the state.²³⁵

But despite glimpses of change, China's legal regime remains substantially indifferent to the values at the core of the U.S. regime. Meanwhile, China has gradually mounted a highly aggressive campaign of outbound foreign direct investment. The "Go Global" campaign of the late 1990s, also sometimes translated as the "Go Out" campaign, has encouraged enterprises to invest abroad.²³⁶ Chinese SOEs are the major players in the nation's increasing outbound investment activities.²³⁷ Since the launching of the "Go Global" Strategy, Chinese companies' interest in overseas investing has increased substantially, especially among SOEs. Chinese direct foreign investments rose from \$3 billion in 1991 to \$35 billion in 2003.²³⁸ SOEs are deployed in a coordinated manner to maximize the benefits to the domestic and foreign affairs policies of the state.²³⁹ To guide

231. Jian Hang & Dean L. Silverberg, *China to Allow Employees to Bring Discrimination Suits Against Employers*, CLIENT ALERTS (Epstein Becker & Green, New York, N.Y.), Oct. 5, 2007, http://www.ebglaw.com/files/17265_China%20Employment%20Promotion%20Client%20Alert.pdf.

232. Timothy J. Webster, *Ambivalence and Activism: Employment Discrimination in China* (Aug. 2010) (unpublished article) (on file with Yale Law School Legal Scholarship Repository), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1000&context=ylas>.

233. *Id.* at 57–62.

234. *Id.* at 61–62.

235. Stevens, *supra* note 182, at 556.

236. Larry Cata Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3, 100–07 (2010); see also Philip C. Saunders, *China's Global Activism: Strategy, Drivers, and Tools* 13–14 (Inst. for Nat'l Strategic Studies, Occasional Paper No. 4, 2006), available at <http://www.ndu.edu/inss/symposia/pacific2006/saunders.pdf>.

237. Catherine (Xiaoying) Zhang, *Business Negotiation Between Westerners and Chinese State-Owned Enterprises*, 42 INT'L L. 1303, 1305 (2008).

238. Backer, *supra* note 236, at 105.

239. *Id.* at 104.

and assist these companies' investment activities, the Chinese government has been actively providing regulatory, enterprise, and diplomatic support.²⁴⁰ The Chinese Ministry of Commerce implemented this strategy by issuing, among other strategies, the Procedures for the Administration of Overseas Investment, which delicately defines the relationship between the government and companies seeking outbound investments.²⁴¹ The government's push for the development of national industry "champions" is a component of its broader political agenda of economic nationalism focused on issues of energy security, geopolitical positioning, and national competitiveness.²⁴² Investment is calculated to translate into long-term political influence.²⁴³ Nations in which China shows interest have two things in common: natural resources and the potential for new markets.²⁴⁴

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

IV. THE IMPACT OF PROGRESSIVE CAPITALISM IN DEVELOPING COUNTRIES

This Part attempts to develop an understanding of the significance of the contrast between U.S. and China for developing countries. The first Subpart identifies the countries in which U.S. international business law has taken principal effect—for example, countries where the FCPA is enforced, where conduct giving rise to ATS litigation has occurred, or where economic sanctions have been targeted. It concludes that these laws take effect overwhelmingly in

240. *Id.* at 105 n.458.

241. *Id.* at 105.

242. *Id.* at 106.

243. HALPER, *supra* note 23, at 105.

244. *Id.* at 106.

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

JACQUES, *supra* note 26, at 170.

developing countries. U.S. international business law is thus, in effect, U.S. policy toward developing countries. The first Subpart then details the known economic impact of these laws on such countries. Drawing on available empirical research, it demonstrates that each area of law tends, whether by design or by accident, to decrease FDI in developing countries. For economic sanctions, such an outcome is specifically intended and consistent with the laws' clear objectives. For the FCPA, by contrast, whether a decrease in FDI is indeed consistent with the statute's purpose and likely to achieve its aims is a more disputed question. Regardless, the U.S. model of progressive capitalism clearly leads to a reduction in FDI in countries whose laws or practices are inconsistent with specific U.S. political and social values. The question is not whether FDI reduction in developing countries occurs; the question, rather, concerns its impact.

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

A. Empirical Data: The Enforcement Concentration in Developing Countries

The areas of law included in this study fall into two groups. The first category consists of laws that address very specific political and legal conditions in particular countries and thus apply to countries only to the extent that those countries exhibit the conditions that the law is designed to address. They include the FCPA, economic sanctions, and the ATS. Such laws would naturally take effect in countries that egregiously violate human rights or exhibit high levels of corruption, and not in countries that do not exhibit these

characteristics. The second category includes employment discrimination and income tax laws, which are not designed to address particular political conditions overseas and that may ultimately apply to conduct in all countries equally. For example, the income tax provisions apply to business conduct in Germany in exactly the same fashion and to the same extent that they apply to conduct in the Congo, and there is no reason to believe that taxation laws would be enforced any more aggressively or frequently in either country.

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

This analysis uses the World Bank's classifications of countries based on levels of economic development, which divides all 187 member nations into three groups—low, middle, and high income. The World Bank will sometimes refer to low- and middle-income countries collectively as “developing countries,” and this Article follows that example.²⁴⁵ Each area of law that is principally extraterritorial exhibits an overwhelming enforcement focus on developing countries.

The easiest of these to quantify is the Alien Tort Statute, owing to its comparatively recent resurrection. This Article looks only at cases filed against corporations; it disregards cases filed against public officials and private individuals. Plaintiffs have filed against corporations for conduct in the following countries: Argentina,²⁴⁶ Bangladesh,²⁴⁷ Burma,²⁴⁸ China,²⁴⁹ Colombia,²⁵⁰

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

246. *Bauman v. DaimlerChrysler Corp.*, No. 5:04-cv-00194 (N.D. Cal. filed Jan. 1, 2004).

247. *Doe v. Wal-Mart Stores, Inc.*, No. 2:05-cv-07307 (C.D. Cal. filed Oct. 11, 2005).

248. *Doe v. Unocal Corp.*, No. 2:96-cv-06959 (C.D. Cal. filed Oct. 3, 1996).

249. *Zheng v. Yahoo! Inc.*, No. C-08-1068 MMC, 2009 WL 4430297 (N.D. Cal. Dec. 2, 2009); *Xiaoning v. Yahoo! Inc.*, No. 4:07-cv-02151-CW (N.D. Cal. filed Apr. 18, 2007); *Wal-Mart Stores, Inc.*, No. 2:05-cv-07307; *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

250. *Baloco v. Drummond Co., Inc.*, No. 09-CV-00557 (N.D. Ala. filed Mar. 20, 2009); *In re Chiquita Brands Int'l, Inc.*, 08-MD-01916 (S.D. Fla. filed Feb. 20, 2008); *Shiguago v. Occidental Petroleum Corp.*, No. 06-04982 (C.D. Cal. filed Aug. 10, 2006); *Romero v. Drummond Co., Inc.*, No. 03-CV-00575 (N.D. Ala. Filed Apr. 19, 2006), *appeal filed*, No. 07-14090 (11th Cir. 2007); *Suaraz v. Drummond Co., Inc.*, No. 03-CV-1788 (N.D. Ala. filed July 11, 2003); *Mujica v. Occidental Petroleum Corp.*, No. 03-CV-02860 (C.D. Cal. filed Apr. 24, 2003); *Estate of Rodriguez v. Drummond Co., Inc.*, No. 02-CV-0665 (N.D. Ala. filed Mar. 14, 2002); *Sinaltrainal*

Egypt,²⁵¹ Guatemala,²⁵² India,²⁵³ Indonesia,²⁵⁴ Liberia,²⁵⁵ Mali,²⁵⁶ Nicaragua,²⁵⁷ Nigeria,²⁵⁸ the Pacific Island of Saipan,²⁵⁹ Papua New Guinea,²⁶⁰ Peru,²⁶¹ South Africa,²⁶² Swaziland,²⁶³ Turkey,²⁶⁴ and Vietnam.²⁶⁵ Each of these countries is low- or middle-income. That is, 100 percent of the cases alleging corporate violations of the ATS have occurred in developing countries.

The calculation of the impact of economic sanctions requires some minor methodological distinctions but yields the same result. As discussed above, the use of sanctions by the United States dates back to 1917 but began to focus on human rights in the 1970s. This Article includes only those sanctions whose declared purpose, as identified by Hufbauer and his colleagues,²⁶⁶ was to protest human rights abuses. The United States has imposed such sanctions against the following countries: Argentina (1977), Belarus (2006), Bolivia (1979), Brazil (1977), Burma (1988), Cameroon (1992), Chile (1975), China (1989), Colombia (1996), Ecuador (2000), El Salvador (1977, 1990), Ethiopia (1977), Fiji (2006), Guatemala (1977), Guinea (2002), Haiti (1987, 1991, 2001), Ivory Coast (1999), Kenya (1990), Malawi (1992), Nicaragua (1977, 1992), Niger (1996), Nigeria (1993), Pakistan (1999), Paraguay (1977), Peru (1991),

v. Coca-Cola Co., No. 01-CV-3208 (S.D. Fla. filed July 20, 2001); *Carijano v. Occidental Corp.*, No. BC370828 (Cal. App. Dep't Super. Ct. filed May 10, 2007).

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

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

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

254. *Wal-Mart Stores, Inc.*, No. 05-CV-07307; *Doe I v. Exxon Mobil Corp.*, No. 01-CV-01357 (D.D.C. filed June 19, 2001); *Kasky*, 45 P.3d 243.

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

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

257. *Wal-Mart Stores, Inc.*, No. 05-CV-07307.

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

259. *Doe v. Target Corp.*, No. 02-CV-80049 (9th Cir. 2009); *Does v. Levi Strauss & Co.*, No. 03-CV-15252 (9th Cir. Feb. 12, 2003); *Does v. Advanced Textile*, No. 99-CV-16713 (9th Cir. July 28, 1999); *Doe v. Brylane, L.P.*, No. 00-CV-00229 (D. Haw. filed Mar. 28, 2000); *Doe I v. Gap, Inc.*, No. 99-CV-00717 (D. Haw. filed Oct. 15, 1999); *Doe I v. Gap Inc.*, No. 99-CV-00329 (C.D. Cal. filed Jan. 13, 1999).

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

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

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

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

264. *Turedi v. Coca-Cola Co.*, No. 05-CV-09635 (S.D.N.Y. filed Nov. 15, 2005).

265. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. filed Apr. 20, 1998).

266. This Article relies on the characterizations of the purposes of each set of sanctions as summarized by HUFBAUER ET AL., *supra* note 73, at 20–33.

Poland (1981), Romania (1983), Somalia (1988), South Africa (1962, 1985), South Korea (1973), South Vietnam (1963), Sudan (1989, 2010), Thailand (1991), Uganda (1972), Uruguay (1976), Uzbekistan (2005), Zaire (1990), Zambia (1996), and Zimbabwe (2002).²⁶⁷

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

Finally, calculating the number of FCPA violations that relate to conduct in developing countries is substantially more difficult and requires the following analysis. In my previous article, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*,²⁶⁸ I compiled a list of countries in which alleged acts of bribery formed the basis of either a finding of liability in a civil action, a conviction in a criminal action, or a settlement of either.²⁶⁹ Because these actions are frequently resolved through pleas, deferred prosecution agreements, or civil settlements,²⁷⁰ these instances of alleged bribery are not proven. Because the defendant will sometimes settle without admitting guilt, these actions are not even admitted violations.²⁷¹ Rather, these actions are allegations of bribery that ultimately formed the basis of the resolution of a legal action that fined or penalized the defendant. I will refer to them here as “alleged violations.”

267. For sanctions through 1999, see *id.* For sanctions from 2007 to the present, see *Sanctions Programs*, U.S. DEPT OF TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last visited Mar. 5, 2011). This index does not include cases from the last several years in which only certain individuals and organizations of a given country are sanctioned, such as Burma or Somalia.

268. Spalding, *supra* note 11.

269. *Id.* at 410–27.

270. See STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 4 (2d ed. 2005); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1–3 (2006).

271. See *Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, FCPA DIGEST (Shearman & Sterling LLP), Oct. 1, 2009, at 11–218, available at http://www.shearman.com/files/upload/FCPA_Digest.pdf, for a breakdown of bribery-related FCPA cases by criminal action, civil action brought by the Department of Justice, and civil action brought by the SEC. Bribery-related charges might ultimately be settled either under the bribery provisions or the books and records provisions of the FCPA. *See id.*

I categorized each country in which an alleged violation occurred over a thirty-year period as developing (low- and middle-income) or developed (high income).²⁷² In total, 125 alleged violations occurred—that is, 125 separate instances in which a defendant (or group of defendants) became liable for one or more illicit payments in a particular country related to a single commercial transaction or a set of closely related transactions. Of these 125 instances, only nine, or 7 percent of the total, occurred in developed countries. Of those nine, only five occurred since ratification of the Organisation for Economic Co-operation and Development (OECD) Convention in 1997. Not surprisingly, very little FCPA enforcement activity occurs in developed countries. However, 93 percent of the alleged violations have occurred in developing countries. FCPA enforcement has concentrated in developing countries only marginally less than the ATS and economic sanctions. Accordingly, these areas of international business law have an exclusive, or near-exclusive, focus on developing countries.

Intuitively, one would expect the existence of laws attaching severe penalties to participating in certain proscribed practices to lead to a reduction in investment in countries where those practices are relatively common. Empirical research has since confirmed this result for most of the progressive capitalism paradigm. Most obvious and foreseeable is the impact of economic sanctions. Perhaps less dramatic, but still foreseeable and indeed confirmed by empirical studies, is the impact of the FCPA on investment in countries where corruption is more prevalent. The ATS has yet to yield sufficient data for such studies, though its impact has been the subject of some scholarly predictions.

The impact that economic sanctions have had to date on target countries is perhaps the most easily quantified and least contested. After years of sporadic sanctioning, the net costs increased dramatically starting in 1975. That year, the total annual costs of sanctions to all target countries was \$2.4 billion. Five years later, as the Carter administration escalated the use of sanctions, particularly for human rights abuses, total annual costs became \$6.8 billion. The costs of sanctions reached a zenith in the 1990s when annual costs were in 1990, \$28.9 billion, in 1995, \$30.8 billion, and in 2000, \$27 billion.²⁷³ These numbers do not differentiate between sanctions for human rights abuses and sanctions for other purposes, but nonetheless they give a general sense of the

272. See Spalding, *supra* note 11. The categorizations of various countries, and the number of alleged violations that occurred in each, are provided in the appendix of my 2010 article.

273. HUFBAUER ET AL., *supra* note 73, at 18.

economic effects of sanctions. This data is unsurprising: An economic sanction, by design, is a substantial withdrawal of investment from a targeted country.

Not so with the FCPA, where the potentially negative impact on FDI is not self-evident, but has been the subject of two principal empirical studies. In 1995, not quite twenty years after enactment of the FCPA and three years prior to the OECD treaty ratification, James Hines of the John F. Kennedy School of Government offered the first major contribution to the theory that antibribery legislation deterred investment in countries where bribery is perceived to be relatively prevalent.²⁷⁴ Hines analyzed the impact of the FCPA on U.S. investment by looking at three indicators of U.S. business activity: foreign direct investment,²⁷⁵ capital-to-labor ratios,²⁷⁶ and levels of joint-venture activity post-1977.²⁷⁷ Although prior studies had suggested that the FCPA had no measurable impact on foreign investment,²⁷⁹ Hines moved beyond prior scholarship by distinguishing the impact of the FCPA from other unrelated factors. He found that by each of these measures, U.S. business activity in corrupt countries showed "unusual declines" after 1977.²⁸⁰ FDI grew substantially more rapidly after 1977 in less corrupt countries than in more corrupt countries, after controlling for GDP growth and total FDI.²⁸¹ Similarly, the median capital-to-labor ratio for corrupt high-growth countries fell slightly in the years after the FCPA, whereas it rose in less corrupt countries.²⁸² With respect to aircraft exports, while the U.S. share of the world's exports declined in the years following the

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

275. *Id.* at 6 (reasoning that because the threatened penalties of the FCPA raise the costs of doing business in higher risk countries, one possible impact of the FCPA would be a reduction in such business).

276. *Id.* at 11 (contending that capital-to-labor ratios could be reduced as a result of the FCPA if firms conclude that an equally effective alternative to bribing local politicians would be to hire larger numbers of their constituents).

277. *Id.* at 14.

278. See, e.g., Paul J. Beck, Michael W. Maher & Adrian E. Tschoegl, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 *MANAGERIAL & DECISION ECON.* 295, 301 (1991); John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 *J. INT'L BUS. STUD.* 107, 107-18 (1984). For Hines's critique of the previous methodologies, see Hines, *supra* note 274, at 19 n.23.

279. Hines, *supra* note 274, at 2.

280. *Id.* at 1.

281. *Id.* at 10.

282. *Id.* at 12.

FCPA, it declined much more significantly, almost four times as much as the U.S. share, in corrupt countries relative to less corrupt countries.²⁸³

Hines's analysis of the impact of antibribery legislation on investor countries was limited to the United States for the obvious reason that it was the only country with such legislation at the time of his study. Once that changed with ratification of the OECD convention, a new data set became available, and Alvaro Cuervo-Cazurra, an M.I.T.-trained economist at the Darla Moore School of Business at the University of South Carolina, analyzed this data for similar trends. In his first article on the subject, Cuervo-Cazurra essentially confirmed and expanded upon Hines's thesis.²⁸⁴ His study was narrower than Hines's in that he focused exclusively on FDI, but broader in using data on bilateral FDI inflows from 183 home economies to 106 host economies with varying quantified corruption levels.²⁸⁵

Cuervo-Cazurra found that the phenomenon of businesses from countries with antibribery legislation investing less in highly corrupt countries was not limited to the United States. Rather, high levels of corruption in a host country generally resulted in less FDI from signatories to the OECD convention.²⁸⁶ The same phenomenon that Hines identified with respect to the United States thus became more widespread as a result of the OECD convention. The underside of the phenomenon that Hines first identified—countries that are not bound by antibribery legislation continue to invest in corrupt countries—was likewise confirmed by Cuervo-Cazurra. After OECD, as signatory countries invested less in corrupt countries, countries with higher levels of corruption received relatively more FDI from countries with similarly higher corruption levels.²⁸⁷ The result of these trends is that as antibribery legislation became more widespread, corrupt countries received less of their FDI from less corrupt countries and more of their FDI from more corrupt countries.²⁸⁸

283. *Id.* at 17.

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

285. Cuervo-Cazurra, *supra* note 284, at 811.

286. *Id.* at 807–08.

287. *Id.* at 808.

288. *Id.*

Cuervo-Cazurra further expanded this analysis in a follow-up article published in 2008,²⁸⁹ which had two major conclusions concerning the impact of antibribery legislation on levels of FDI in relatively corrupt markets. First, he was able to verify and restate the conclusion of his previous article—that countries that implemented the OECD convention had become “more sensitive” to corruption and had reduced their FDI in more corrupt countries.²⁹⁰ Second, he proposed a modification of Hines’s original thesis. He concluded that prior to the OECD convention, U.S. investors were not investing less in corrupt countries; U.S. investors began investing less after the ratification of the OECD.²⁹¹ In other words, the FCPA standing alone did not induce U.S. investors to invest less in corrupt countries, but rather, the OECD induced both U.S. and other OECD signatories to invest less.

This Article needs not consider whether Cuervo-Cazurra’s methodology is more reliable than Hines’s in evaluating the impact of the FCPA prior to the OECD convention. The relevant conclusion from these studies is that the latest empirical data suggests that antibribery legislation has a deterrent effect on investment in countries where bribery is perceived to be more prevalent. Moreover, countries that are more tolerant of corruption fill the FDI void.

The impact of the ATS is perhaps the least certain, as no empirical data exists on the impact it may have had since its relatively recent rebirth. However, one study has estimated its likely impact. The study found that more than 180,000 export-related jobs are at risk, reflecting the possible loss of U.S. exports. Looking at the impact on U.S. trade and foreign direct investment, it estimated a loss of as much as \$23 billion in U.S. exports. As much as 25 percent of all U.S. oil and mineral imports, amounting to \$37 billion, could be disrupted, and U.S. foreign direct investment stocks could decline by over \$50 billion. The countries in which ATS cases have occurred or are likely to occur could lose \$270 billion of FDI, putting nearly two million jobs at risk, reducing commerce by \$20 billion, and reducing GDP by more than \$50 billion.²⁹² These numbers are, of course, disputed; Koh recommends a much more

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

290. *Id.* at 644.

291. *Id.* at 645.

292. HUFBAUER ET AL., *supra* note 73, at 38–39.

conservative attitude (although does not propose an alternative methodology) for estimating ATS impact.²⁹³

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

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

Constructive engagement theory, also known as the developmental model, holds that foreign direct investment in developing countries stimulates reform.²⁹⁴ Such reforms can occur in any or all of several ways. The first is educative; as Western companies interact with foreign government officials, private companies, and even their own foreign employees, impart liberal values and, in reverse, help to integrate those regimes into the global community.²⁹⁵ Companies will also push more forcefully for reforms that at the very least create a more favorable business environment, and these tend to also promote other related social values.²⁹⁶ The second is reputational; as companies find that their economic development hinges on FDI, which in turn hinges on their reputations as reliable and profitable investment destinations, they will implement

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

294. Herz, *supra* note 101, at 209.

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

296. Herz, *supra* note 101, at 221; see also David L. Richards et al., *Money With a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries*, 45 *INT'L STUD. Q.* 219, 222, 235 (2001).

appropriate reforms that generally include political liberalization.²⁹⁷ Third, foreign investment can stimulate the growth of a middle class that will agitate for political freedoms.²⁹⁸

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

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

Economic sanctions, a subject of abundant political science and economics scholarship, have historically often failed due to the phenomenon of the black knight.²⁹⁹ These are powerful wealthy allies of the target country that move in to fill the void that the sanctions create. This dynamic plays out most powerfully when large powers are engaged in ideological struggles and are competing for influence in transitional countries, as illustrated in U.S. sanctions against Cuba and Nicaragua in which the Soviet Union played the black knight, or in Soviet sanctions against Yugoslavia and Albania, in which the United States played the black knight.³⁰⁰ In the post-Cold War world, black knights—led by China—have opposed U.S. sanctions efforts with significant effect in Iran and

297. Herz, *supra* note 101, at 220–21; *see also* WESLEY T. MILNER, ECONOMIC GLOBALIZATION AND RIGHTS: AN EMPIRICAL ANALYSIS, *in* GLOBALIZATION AND HUMAN RIGHTS 77, 80, 88 (Alison Brysk ed., 2002).

298. Herz, *supra* note 101, at 221; *see also* Forcese, *supra* note 295, at 10–17.

299. *See* HUFBAUER ET AL., *supra* note 73, at 8.

300. *Id.*

Burma.³⁰¹ An example with very different ideological fault lines is the Arab boycott of Israel, in which the United States was the black knight.³⁰² For the target of sanctions, accepting the support of a black knight is frequently the relatively easier and more economical way to avoid the harmful effects of the sanctions.³⁰³ The black knight phenomenon has proven historically to be less effective when the sanctioning countries already have something of a political alliance with each other, whereas the effect is especially pronounced when the sender lacks a strong relationship with the target.³⁰⁴ The duration of a sanctions episode also correlates with the presence of black knights. When such countries intervene, the sanctions are of course less effective and the sender country will therefore extend the sanctions far longer than if no black knights existed. Historically, sanctions with black knights have lasted roughly twice as long as sanctions without them.³⁰⁵ The assistance of black knights “erodes the chances of success and, given the reluctance of most senders to admit failure and lift sanctions, contributes to episodes that drag on indefinitely.”³⁰⁶ Put another way, “too many cooks opposing sanctions can spoil the sender’s broth.”³⁰⁷ Moreover, the presence of black knights tends to “bolster the target government’s standing at home and abroad.”³⁰⁸

This black knight phenomenon is likewise visible, with alarming intensity, in the anticorruption context. Hines noted that while U.S. commercial engagement in corrupt countries dropped significantly as a result of the FCPA, no evidence exists to suggest that total foreign business activity in such countries dropped; other firms that were not constrained by antibribery legislation apparently took the place once occupied by U.S. companies.³⁰⁹ He noted that the principal effect of the statute was to divert U.S. investments to less corrupt countries, and in more corrupt countries, to effectively “encourag[e] ownership substitution between [U.S.] and foreign investors.”³¹⁰ Cuervo-Cazurra predicted that corruption-prone countries would increasingly turn to companies from

301. *Id.* at 175.

302. *Id.* at 8.

303. *Id.* at 47.

304. *Id.* at 163.

305. *Id.* at 172.

306. *Id.*

307. *Id.* at 175.

308. *Id.*

309. *Id.* at 38–39.

310. Hines, *supra* note 274, at 19.

countries without effective anticorruption measures to replace the capital that the United States and its allies become uncomfortable providing.

As noted above, the OECD³¹¹ has adopted a convention³¹² that calls on member nations to enact legislation that very closely resembles the FCPA.³¹³ All OECD member states, and several other nations, have enacted such legislation. While supporters of the convention hail it as the solution to global corruption,³¹⁴ two reasons counsel caution, one of which is temporary and the other which is potentially permanent. The temporary reason is that no other OECD nation has come even remotely close to enforcing its statute to the extent that the United States enforces the FCPA. Statistics on the volume of anticorruption enforcement actions from other countries show that the amount of anticorruption enforcement actions in these countries remains astonishingly low.³¹⁵ To be optimistic, though, countries such as Germany and the United Kingdom are beginning to follow the United States's lead and will likely continue to do so; it may well be simply a matter of time before most of the major capital exporters in the OECD meaningfully enforce their FCPA-type statutes.

But the second, potentially permanent problem will prove trickier. When the OECD adopted its convention in 1997, the convention's ranks included virtually all significant exporters of capital in the world. Since 1997, however, the world has changed in dramatic and irreversible ways. Most notable has been the emergence of the BRIC, an acronym coined by Goldman Sachs to describe the four biggest emerging markets—Brazil, Russia, India, and China.

311. For a brief overview of the OECD, see *About the Organisation for Economic Co-operation and Development (OECD)*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Oct. 17, 2010); see also George et al., *supra* note 79, at 485–86; James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 LAW & CONTEMP. PROBS. 189, 190–217 (2005) (detailing the history and structure of the OECD while also providing several case studies).

312. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43, reprinted in 37 I.L.M. 1 (1998), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

313. The OECD convention resembles the FCPA. See George et al., *supra* note 79, at 501–12. In 1998, the FCPA was amended to more closely resemble the OECD convention. See *The FCPA Explained*, FCPA ENFORCEMENT, <http://www.fcpaenforcement.com/explained/explained.asp> (last visited Oct. 17, 2011).

314. See, e.g., George et al., *supra* note 79, at 523–24; Anne Janet DeAses, Note, *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process*, 34 PUB. CONT. L.J. 553, 570–71 (2005).

315. Press Release, Transparency International, Efforts to Curb Foreign Bribery Remain Inadequate (July 28, 2010), available at http://www.transparency.org/news_room/latest_news/press_releases/2010/2010_07_28_oecd_progress_report.

In 1997 these four countries were not yet described as BRIC and exported little capital; they were instead regarded as promising investment destinations—as importers of capital but not exporters. This has changed as these countries increasingly export capital and otherwise command increasing influence in major global financial institutions.

None of the BRIC nations is a member of the OECD. The organization has nonetheless actively lobbied each of these countries to enact FCPA-type legislation. India has notably declined.³¹⁶ While Brazil,³¹⁷ China,³¹⁸ and Russia³¹⁹ have enacted such laws, the list of countries that have done the same but have taken absolutely no enforcement action is quite lengthy. China thus stands to remain a black knight in international business for the foreseeable future. The following Conclusion begins to wrestle with this difficult fact.

CONCLUSION: AVOIDING A RACE TO THE BOTTOM

On the broad spectrum of economic ideology—a radical commitment to small government and economic liberty lying at one pole, and the dominant state presence of twentieth century communism lying at the other—the United States and China originally occupied either extreme. At their respective revolutions, the United States embodied the principles of natural rights and limited government,³²⁰ while China sought to build a Soviet-style planned economy.³²¹ But for each country, a series of political and economic crises drew it away from the extremes and toward the center. In the United States, the Civil War, the Great Depression, the Civil Rights Movement, Watergate, and the accounting scandals of the 1990s successively enlarged the power of the federal government

316. For OECD activity with these and other countries, see *OECD Enlargement*, OECD, http://www.oecd.org/document/35/0,3343,en_2649_34487_38598698_1_1_1_1,00.html (last visited Oct. 17, 2011).

317. C.C. Law No. 10.467 (Br); C.P. Law No. 9.613 (Br). For more information on the antibribery legislation in Brazil, see *Brazil-OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/document/26/0,3746,en_2649_37447_44571034_1_1_1_1,00.html (last visited Oct. 17, 2011).

318. LUO, *supra* note 209.

319. See *OECD Welcomes Russia Introducing Law to Make Foreign Bribery a Crime*, OECD, http://www.oecd.org/document/36/0,3746,en_21571361_44315115_47769508_1_1_1_1,00.html (last visited Oct. 17, 2011).

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

321. ARIF DIRLIK, *MARXISM IN THE CHINESE REVOLUTION* (2005); COMMUNIST CHINA, 1949–1969: A TWENTY-YEAR APPRAISAL (Frank N. Trager & William Henderson eds., 1970).

and expanded the federal regulation of commercial affairs. On the opposite side of the spectrum, and the globe, China experienced economic stagnation, the failed economic reforms of the Great Leap Forward, the atrocities of the Cultural Revolution, and, finally, the death of Mao.³²² China then promoted economic development by limiting the government's role in economic regulation, while the role of the U.S. federal government was expanding.

Today, in the sphere of international business, these two nations have not just met in the middle of that ideological spectrum; rather, they have passed each other. With respect to the areas of business law described in this Article, the United States now stands for the aggressive use of the state's coercive power to direct corporate conduct toward social goals that are not narrowly related to the market. Meanwhile, China has sought to reduce such restraints in the name of maximizing economic growth to forestall social unrest and to preserve the Communist Party's power. In the United States, the liberal ideals of Adam Smith and Thomas Jefferson³²³ were supplanted by administrations of two Roosevelts³²⁴ and Jimmy Carter,³²⁵ while the revolutionary communalism of Marx, Lenin, and Mao were displaced in China by the pragmatic reforms of Deng Xiaoping³²⁶ and his successors. Hence the irony of international business law: While U.S. law now obligates corporations to pursue the social goals of combating corruption and promoting human rights, the Chinese legal regime permits and even encourages profit-seeking with scant regard for social impact.

322. See, e.g., RODERICK MACFARQUHAR & JOHN K. FAIRBANK, *THE CAMBRIDGE HISTORY OF CHINA, VOL. 15: THE PEOPLE'S REPUBLIC, PART 2: REVOLUTIONS WITHIN THE CHINESE REVOLUTION, 1966–1982* (1991); MAURICE MEISNER, *MAO'S CHINA AND AFTER: A HISTORY OF THE PEOPLE'S REPUBLIC* (3d ed. 1999).

323. See, e.g., DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* (1951); JERRY Z. MULLER, *ADAM SMITH IN HIS TIME AND OURS: DESIGNING THE DECENT SOCIETY* (1993).

324. See, e.g., WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940* (1963); EDMUND MORRIS, *THEODORE REX* (2002); GEORGE E. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* (1946); ERIC RAUCHWAY, *THE GREAT DEPRESSION & THE NEW DEAL* (2008).

325. *THE CARTER PRESIDENCY: POLICY CHOICES IN THE POST-NEW DEAL ERA* (Gary M. Fink & Hugh Davis Graham eds., 1998); David F. Schmitz & Vanessa Walker, *Jimmy Carter and the Foreign Policy of Human Rights: The Development of a Post-Cold War Foreign Policy*, 28 *DIPLOMATIC HIST.* 113 (2004).

326. See, e.g., RICHARD EVANS, *DENG XIAOPING AND THE MAKING OF MODERN CHINA* (1993); *CHINA'S THIRD ECONOMIC TRANSFORMATION: THE RISE OF THE PRIVATE ECONOMY* (Ross Garnaut & Ligang Song eds., 2004); *CHINA'S THREE DECADES OF ECONOMIC REFORMS* (Xiaohui Liu & Wei Zhang eds., 2010); *POLICY REFORM AND CHINESE MARKETS: PROGRESS AND CHALLENGES* (Belton M. Fleisher et al. eds., 2008).

But the irony of international business law has an additional dimension. As Part IV demonstrates,³²⁷ as the United States enforces progressive capitalism with the threat of severe penalty, U.S. companies inevitably invest less in countries whose practices are most inconsistent with progressive values. Sometimes, these companies will consciously accept the risk, move forward with business plans, potentially aspire to push for reforms, and certainly hope to avoid entanglement in prohibited business practices. But as both empirical literature and common sense would confirm, some companies will deem the risk too great and decline to invest. Companies from countries that lack such prohibitions then fill this FDI void. As identified by the theoretical resources of the economics and political science literature discussed above,³²⁸ the emergence of a powerful black knight thus thwarts the constructive engagement enterprise. Accordingly, the over-aggressive enforcement of prohibitions on corruption and of human rights violations can foster the very conditions in which these practices thrive.

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

The solution to the problem outlined in this Article lies in striking the delicate balance between enforcing progressive norms and enabling constructive engagement. The cynic may immediately retort that any talk of “balance”

327. *See supra* Part IV.B.

328. *See supra* Part IV.B.

merely speeds the race to the bottom. Not so. The law must continue to punish bribery and complicity in human rights abuses, but it must do so in a manner that further encourages, rather than deters, investment in developing countries. Conversely, the law can neither let egregious corporate misconduct go unpunished, nor leave developing countries vulnerable to the predatory practices of companies that lie outside U.S. jurisdiction. How this might be achieved is a question that holds extraordinarily rich promise for future theoretical, doctrinal, and empirical research.