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EXTRATERRITORIAL ENFORCEMENT OF ANTI-BRIBERY LAWS: PATTERNS, EFFECTS AND GLOBAL COMPETITION

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CONTENTS

INTRODUCTION[1]

Increasing appearance of international institutions governing global phenomena has been for a long time connected with controversies. On the one hand, the creation of new competing global institutions might be viewed as efficient market-like pluralism helping to

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spread values such as human rights, environmental protection or anti-corruption.[2] On the other hand, the continuing fragmentation of international law is usually activated by regulatory leadership of several "big players" who impose their moral standards on smaller players. These evolvements might be connected with issues of overlapping jurisdictions, preservation of dominance and enforcement opportunism which might ultimately create high transactional costs.[3] The question is then whether in a given context positive effects of these developments outweigh negative effects and how international law can make these evolvements more effective and efficient.

Recently, this problem has also featured in discussions of bribery of foreign public officials. The anti-bribery regime is based on the Anti – Bribery Convention (the Convention) of the Organisation for Economic Cooperation and Development (OECD) which obliges its signatory states to prohibit subjected firms from bribing foreign government officials in international business transactions.[4] The fragmentation of anti-bribery laws can be modelled by two interconnected problems. On the one hand, in many emerging countries, bribery of foreign public officials is under-regulated and often not criminalized at all. This raises concerns connected with a free-rider problem because for some firms it is still legal to bribe. On the other hand, the OECD anti-bribery system might be undermined by partial over-regulation because of issues of overlapping jurisdictions and lack of enforcement coordination between OECD national enforcement authorities.

This article faces these problems from the perspective of an international lawyer. However, the structure of underlying problems and identification of more effective solutions for functioning of law in a global economy cannot be limited just by classical knowledge and methods of public international law. The form and structure of international regulatory measures and their legality is shaped by dynamic interactions between normative (legal) powers and rational self-interests of relevant subjects. In this context, fair normative conclusion about "how" the law in global economy should look like cannot be drawn within one discipline. Therefore, it is beneficial at the first stage to address the question "how" the

[2] Koskenniemi, M., & Leino, P, Fragmentation of International Law? Postmodern Anxieties (2002) *Leiden Journal of International Law, 15,* 3, 553-579.

[3] See for instance E. Downs G. W. Benvenisti, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 STANFORD LAW REVIEW 595;, 'Developments in the law extraterritoriality' (2011) 124 Harv Law Rev Harvard Law Review 1226; A. L. Parrish, 'Reclaiming international law from extraterritoriality' (2009) 93 Minn Law Rev Minnesota Law Review 815.

[4] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (came into force on 15 February 1999 and as of April 1, 2014, has been adopted by 40 countries).

law should look like by questions "why" to regulate certain phenomenon, "what" motivates relevant actors to regulate it and ultimately "how" to act in order to be more effective and efficient. These questions are typical for studies in the intersection of political economy and international relations.

Firstly, this paper aims to analyse academic discussion on effectiveness and efficiency of current anti-bribery enforcement. Secondly, it uses insights from theories of state behaviour in order to determine motivations and leading policy goals of anti-bribery enforcement (patterns of enforcement). The main argument is that the enforcement motivations should be further examined in the context of new enforcement dynamics characterised by assertion of broad extraterritorial jurisdiction. It is argued that political – economy and international relations might help in modelling the effectiveness of an international regime; however, they do not reflect specific features of existing legal institutions. The work discusses how a legal researcher might use these frameworks and fill them with normative findings on procedural and substantive content of relevant legal institutions.

1. REGULATION OF FOREIGN BRIBERY IN HISTORICAL CONTEXT

Chapter 1 settles the institutionalization of transnational bribery into a historical context. It describes the development of the fight against transnational bribery and analyses the change in the anti-bribery enforcement dynamics.

1.1. Foreign Bribery and Adoption of FCPA

Until the adoption of the U.S. Foreign Corrupt Practices Act (FCPA)[5] in 1977, there hadn't been any domestic or international legal instrument regulating foreign bribery.[6] This stood in a sharp contrast to solid set of norms criminalizing domestic bribery which had been for a long time regulated by most of the countries.[7] Political contributions, gift giving and similar advantages provided to foreign public officials in the context of foreign business

[5] The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq.

[6] See John Thomas Noonan, *Bribes* (Macmillan 1984), providing extensive analysis on the historical development of domestic anti-corruption laws

[7] Ibid.

might have been considered by some countries as unethical but prosecution of such activities was indirect at the most. Such an approach however proved to be highly ineffective.[8]

The problem of foreign bribery was for the first time addressed by the U.S. where the increasing anti-corruption initiatives culminated after the Watergate scandal which helped to focus the attention on bribery of foreign officials.[9] These processes led to the adoption of the FCPA which for the first time in history introduced a comprehensive set of norms on transnational bribery.

The FCPA makes it a criminal offence to pay[10] anything of value to a foreign official for purposes of securing any improper advantage in order to assist the briber in obtaining or retaining business.[11] Thus, differently from the previous legislation which covered foreign bribes just indirectly, the FCPA directly prohibits all such foreign bribery payments in a systematic way with a specific and very narrow focus. Most importantly, the definition exclusively concentrates on bribe givers and does not address foreign public officials who are accepting the bribes; i.e. it criminalizes a supply side of the bribery transaction. The FCPA have wide reach and apply to 'issuers'[12], 'domestic concerns'[13] and 'any persons other than issuer or domestic concern' ('[extra] territorial jurisdiction').[14]

1.2. Towards the OECD Convention

The period after the adoption of the FCPA was characterized by a discussion on the unilateral character of the U.S. anti-bribery approach. The FCPA was said to place U.S. firms at a competitive disadvantage over they foreign competitors because foreign firms were still

[8] Josh Goodman, 'The Anti-Corruption and Antitrust Connection ' (2013) TheAntitrustSource <http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_goodman.authcheckdam.pdf>, pp. 676 – 680;_See also Daniel Pines, 'AMENDING THE FOREIGN CORRUPT PRACTICES ACT TO INCLUDE A PRIVATE RIGHT OF ACTION' (1994) 82 California law review 185Noonan, *Bribes*, pp. 187-188; Henry H. Young Tracy W. Rossbacher, 'The Foreign Corrupt Practices Act within the American response to domestic corruption' (1997) 15 Dickinson journal of international law Dickinson journal of international law 509, pp. 517-518.

[9] Among many others see references in Rossbacher, 'The Foreign Corrupt Practices Act within the American response to domestic corruption'; Fabio Costa Morosini Luciano Vaz Ferreira, 'THE IMPLEMENTATION OF INTERNATIONAL ANTI-CORRUPTION LAW IN BUSINESS: LEGAL CONTROL OF CORRUPTION DIRECTED TO TRANSNATIONAL CORPORATIONS' (2013) v.2, n.3, Jan-Jun 2013 | p.241-260 Austral: Brazilian Journal of Strategy & International Relations Pines, 'AMENDING THE FOREIGN CORRUPT PRACTICES ACT TO INCLUDE A PRIVATE RIGHT OF ACTION'

[10] Author's note: it includes an offer, payment, promise to pay, or authorization of the payment.

[11] 1 5 U.S.C. §§ 78 dd-1 a), 78 dd-2 a), 78 dd-3 a); See also Department of Justice Criminal Division United States, A resource guide to the U.S. Foreign Corrupt Practices Act (2012), p. 10.

[12] 15 U.S.C. § 78dd-1.

[13] 15 U.S.C. § 78 dd-2 h).

[14] 15 U.S.C. § 78 dd-3.

free to bribe without being subject to criminal or administrative responsibility.[15] Therefore, the U.S. made an enormous effort to persuade a significant part of the international community to adopt similar anti-bribery standards. Consequently, the decision was made to settle the discussion within the OECD which was requested to initiate work on an instrument of international law combating bribery of foreign public officials.[16] This process was finalised by adoption of the OECD Anti-Bribery Convention.

To sum up, what can be observed is the shift from markets where foreign bribery was not regulated at all (before 1977), through one where only the United States formally prohibited foreign bribery (1977-1998), to today's situation when 40 countries have adopted the OECD Convention.[17] Moreover these processes has also generated new anti-bribery instruments such as various monitoring efforts, compliance consultancies and internal compliance mechanisms which should help firms to do ethical business and comply with the OECD-based anti-bribery laws.

The OECD Anti-Bribery Convention was and still is the only legally binding instrument which commits the world´s leading exporting countries to make it a crime to bribe foreign public officials in international business transactions.[18] Throughout the years, the Convention has proved to successfully further joint action and multilateral anti-corruption cooperation between countries, international organisations, businesses and civil society.[19] However, many challenges prevail.

Most importantly, the general normative standpoint which orders to criminalize *'the bribery of foreign public officials in effective and coordinated manner'*[20] needs to be clarified

[15] From 1977 to 1996, the FCPA was the only legislation that prohibited bribery of foreign public officials, see Ala'i Padideh, 'Controlling Corruption in International Business:The International Legal Framework' (2002) Knowledge for Sustainable Development, UNDP/UNESCO, Encylopedia of Life Support Systems (EOLSS) , p. 6; Elizabeth K. Spahn, 'Multijurisdictional Bribery Law Enforcement : The OECD Anti-Bribery Convention' (2012) 53 Virginia journal of international law 1, p. 1.

[16] The OECD began addressing bribery through the Ad Hoc Group on Illicit Payments in 1989; the OECD Working Group on Bribery in International Business Transactions was established in 1994. The WGB is responsible for monitoring the implementation and enforcement and publishes country monitoring reports. See OECD, 'OECD Working Group on Bribery in International Business Transactions' <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm> accessed 15 March 2014.

[17] OECD <http://www.oecd.org.

[18] See OECD, *THIRD ANNUAL HIGH-LEVEL ANTI-CORRUPTION CONFERENCE FOR G20 GOVERNMENTS AND BUSINESS, 25-26 April* (2013)

[19] OECD(2013)OECD, *THIRD ANNUAL HIGH-LEVEL ANTI-CORRUPTION CONFERENCE FOR G20 GOVERNMENTS AND BUSINESS, 25-26 April*; See also OECD, *OECD WORKING GROUP ON BRIBERY: ANNUAL REPORT 2013*, 2013).

[20] OECD Committee on International Investment and Multinational Enterprises, Implementation of the Recommendation on Bribery in International Business Transactions, OECD/GD (96)(83), para. 13:1.

and commonly understood by all relevant actors. This is however very dynamic and time-open process. In order to be successful, the question of effectiveness of anti-bribery measures must be constantly discussed in its complexity because it will be always very much dependent on national policy choices. What is effective for one state might be completely ineffective from the perspective of the other because national anti-bribery policies are far from being fully coordinated.

Thus a relationship between effectiveness and coordination must also entail unifying (moral) frameworks. These processes are creating their own global culture which is however to a certain extent independent to corruption and bribery which should be fought. Then the question is whether the resources which are used in fact influence targeted phenomenon, and what other effects it encompasses.[21]

2. COMPETITIVE DISADVANTAGE?

This chapter discusses whether there is a good reason to regulate foreign bribery. This question is important because recognition that bribery of foreign public official should be regulated is the first important step in order to get closer to level playing field with more potential for economic growth and development of all economies. The chapter at the second stage analyses an academic discussion on efficiency of current anti-bribery enforcement. In particular, it focuses on the on-going discussion on effects of these laws on competitiveness.

2.1. Why Regulate Foreign Bribery?

This paper addresses the role of law in a global economy and in particular the evolving role of national states facing global phenomena. In general terms, multiple institutional and organizational interrelations created by these activities are by some authors addressed as global economic governance.[22] In this context, the question "why" certain phenomenon should be regulated is multidimensional. Besides other perspectives, it might cover economic and moral assumptions that transnational bribery and corruption undermine general goals of efficient international markets, poverty alleviation, economic growth, and legitimacy of

[21] Steven Sampson, 'The anti-corruption industry: from movement to institution' (2010) 11 Global Crime 261, pp, 261–278; See also Sebastian Schmidt-Pfister Diana Wolf, *International anti-corruption regimes in Europe : between corruption, integration, and culture* (Nomos), pp. 18-19.

[22] See for instance Kirton, J. J., & Von, F. G. M., *New directions in global economic governance: Managing globalisation in the twenty-first century*. Aldershot [etc.(2001), Ashgate; See also The Global Economic Governance http://www.globaleconomicgovernance.org/.

institutions.[23] The question is then whether and how national enforcement agencies should engage in extraterritorial enforcement activities against foreign subjects.

The academic discussion was at the time of the adoption of the Convention focused on the question of *"moral imperialism".*[24] This issue is connected with justification of western corruption and bribery perspectives which are increasingly being imposed on regions with different cultural standards. Some authors expected that extraterritorial use of domestic anti-bribery laws would have produced premature appearance of transnational anti-bribery mechanism. However, such a mechanism would have lacked an agreement on many basic questions such as understanding what kind of behaviour is actually prohibited and how to coordinate enforcement. For, instance *Kennedy* argues that: *'The anti-corruption campaign gets all mixed up with a broader program of privatization, deregulation and free trade.'*[25] In this view, anti-corruption movement has more ideological than substantive merits.

The critique also focuses on some of influential quantitative approaches to corruption and bribery. That is because bribery and corruption have been mainly researched in the light of global measurement criteria which led to disproportional generalisations. For instance, Corruption Perception Index[26] has been accused to *"distort and shape reality"* because its data are perceived by some authors to be based on perceptual biases leading to inappropriate reliance on the country risk assessment.[27]

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[23] Rose-Ackerman, Susan, Anti-Corruption Policy: Can International Actors Play a Constructive Role? (September 13, 2011). Yale Law & Economics Research Paper No. 440. Available at SSRN: http://ssrn.com/abstract=1926852.

[24] Author's note: intensive discussion concerning legitimisation of extraterritorial reach of the Foreign Corrupt Practices Act (FCPA) culminated at the turn of the millennium. See Nichols, P. M. (2000). SYMPOSIUM - Fighting International Corruption & Bribery in the 21st Century - The Myth of Anti-Bribery Laws as Transnational Intrusion, *Cornell International Law Journal,* 33 (3), who claims that there are no reasonable grounds for critique of the extraterritorial application of OECD-based anti-bribery laws. On the other hand *Salbu*, a protagonist of the critical legal studies argued that the debate about the culture and corruption as a global issue produced transnational mechanism to fight transnational corruption. However, it according to *Salbu* happened prematurely because the basic questions concerning a form and basic components of such a mechanism were not settled. See Salbu, S. R. (1998). Extraterritorial restriction of bribery: a premature evocation of the normative global village, *The Yale Journal of International Law*, 24 (1). See also Kennedy D. (1999). The International Anti-Corruption Campaign, *Connecticut Journal of International Law, 14*; Spahn, E. (2009). International Bribery: the Moral Imperialism Critiques, *Minnesota Journal of International Law: a Journal Dedicated to the Study of International Law and* Policy, 18 (1).

[25] Kennedy (1999) supra note 24, p. 461.

[26] See Transparency International (2012). The 2012 Corruption Perceptions Index <http://cpi.transparency.org/cpi2012/> accessed 10 March 2014.

[27] Campbell, S. V. (2013). How the CPI Distorts and Shapes Reality, *The FCPA Blog* <http://www.fcpablog.com/blog/2013/ 2/5/how-the-cpi-distorts-and-shapes-reality.html> accessed 10 March 2014.

Nevertheless, as the U.S. "moral anti-bribery project" has started to become an active anti-bribery initiative which is even formally institutionalised by the international treaty[28], the issue of *"moral imperialism"* is not the leading topic anymore. In this context, *Spahn*[29] holds an opinion that corruption and bribery are not in so much a problem of differences between cultures because in its essence they are problem of class. Most importantly, the relationships between elites of Northern multinational corporations (MNCs) and governments from the South needs to be further researched and better understood. Moreover, long-lasting relationship between elites of North and South cannot be eliminated merely by soft approaches. It is ethically required to limit MNCs by hard law instruments as it is at the same time also required to critically evaluate their effectiveness and efficiency.[30]

Thus, despite the ongoing discussions on justification of transnational "moral" activities conducted by national agencies, across the globe, there is recognition that bribery of foreign public official is undesirable. That is both because of its effect on the host country and because of its potential to distort fair and equal competition between foreign firms seeking to do business in the host country. It is meant to represent a significant barrier to economic growth and sustainable development of emerging economies, undermines trust in the rule of law, government and institutions and destroys societal values and fair business.[31]

It can be concluded that despite the fact that successful international anti-bribery regime must be strongly based on moral conviction of bribery; the main objectives which stand behind the criminalisation of foreign bribery (based on the OECD Convention) are economic. This fact is reflected in the economic nature of the OECD itself because it identified as its main goal promotion of economic and social well-being of people through *'helping governments to restore confidence in markets and the institutions and companies that make them function.'*[32] This is connected with the ideal of "competitive neutrality" i.e. a situation where no competitor who operates in a relevant market enjoys any undue competitive advantages or disadvantages.[33] This view is based on an assumption that the ideal of competitive neutrality promotes allocative efficiency. In political terms, the competitive

[28] See The OECD Convention supra note 4.
[29] Spahn (2009) supra note 24.
[30] Ibid, pp. 209-222.
[31] See Preamble of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Adopted by the Negotiating Conference on 21 November 1997; OECD, *THIRD ANNUAL HIGH-LEVEL ANTI-CORRUPTION CONFERENCE FOR G20 GOVERNMENTS AND BUSINESS, 25-26 April* (2013) See also OECD, *OECD WORKING GROUP ON BRIBERY: ANNUAL REPORT 2013*, 2013), pp. 1-8.
[32] OECD, the OECD at 50 and Beyond < http://www.oecd.org/about/47747755.pdf> accessed 20 March 2014.
[33] Competitive Neutrality MAINTAINING A LEVEL PLAYING FIELD BETWEEN PUBLIC AND PRIVATE BUSINESS, p. 3.

neutrality reflects an expectation that governments should establish a level playing field.[34] These policy objectives shall be understood as the leading rationales of the Convention and the related documents.

2.2. Discussion on Efficiency

Once part of the international community recognized necessity to regulate bribery of foreign public officials, the crucial question arises: how formal and informal institutions should be designed in order to effectively and efficiently ensure collective anti-bribery action, level playing field and coordination of enforcement?

The main problem is that the adoption and active enforcement of anti-bribery laws leads to new challenges. The playing field has been fragmented with a long term vision of "competitive neutrality", cleared from the costs of bribery. The scope of this fragmentation and resulting competitive dis(advantage) of certain subjects is closely connected with question how foreign bribery should be regulated. Over the last few years, the academic literature has increasingly focuses on the efficiency of OECD-based anti-bribery laws. However, criteria of efficiency in these works often differ. Thus, it needs to be analysed in what context each particular author makes an analysis. For the purposes of this work, two main approaches will be discussed: *"altruistic"*[35] and *"long-term efficiency based"*[36].

The altruistic group of authors, sometimes referred to as "pro-business bent approach"[37], claims that current enforcement practice is too aggressive and unpredictable. The corporations coming from the OECD Convention signatories have significant problems to

[34] Competitive Neutrality MAINTAINING A LEVEL PLAYING FIELD BETWEEN PUBLIC AND PRIVATE BUSINESS, p. 3.

[35] Bean, B. W. & MacGuidwin, E. H. (2012) Expansive Reach – Useless Guidance: An Introduction to the U. K. Bribery Act 2010, *ILSA Journal of International & Comparative Law*; Demas, R. R. (2010). Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anticorruption Initiatives, *American University International Law Review,* 26; Koehler, M. (2010). The Facade of FCPA Enforcement, *Georgetown Journal of International Law, 41 (4);* Spalding, A. B. (2010). Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets, *Florida Law Review*. 62 (2); Dalton, M. M. (2006). Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act, *New York University Journal of Law and Business*, Vol. 2; Westbrook A. D. (2011). Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act. *Georgia Law Review, 45 (2).*

[36] Rose-Ackerman & Hunt (2012) supra note 28; Nichols P.M. (2012). The Business Case for Complying with Bribery Laws, *American Business Law Journal*, 49 (2), pp. 325-368; Chow D. (2012). China Under The Foreign Corrupt Practices Act, *Wisconsin Law Review, 2;* Stevenson, D. D., & Wagoner, N. J. (2011). FCPA sanctions: Too big to debar? *Fordham Law Review, 80 (2)*, 775-820.

[37] The expression pro-business bent is used in the work of Turk, M. C. (2013). A Political Economy Approach to reforming the Foreign Corrupt Practices Act, *Northwestern Journal of International Law & Business, 33 (2)*, 328.

invest in emerging markets where their competitors are still allowed to bribe without being subject to criminal or administrative responsibility.[38] This is because anti-bribery laws are primarily based on Western moral standards and do not arise from economic principles.[39] Thus, anti-bribery regulation is meant to cause unintended economic consequences for both OECD firms and developing countries. Former are at a competitive disadvantage as compared to companies that are not subjected to OECD-based anti-bribery laws, latter are losing inflow of foreign direct investments from OECD countries.[40] Altruistic authors propose that current anti-bribery legislation should adopt safe harbour provisions or *de minimis* exceptions to make current enforcement practices softer.

Moreover, altruistic approach argues that the enforcement of OECD-based anti-bribery laws should be redesigned because it undermines traditional values connected with rule-of-law and legitimacy of foreign investments. For instance, *Westbrook* argues that nearly all anti-bribery cases are settled by private negotiations with the Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) before going to trial. Therefore, courts have not decided nearly any case. This creates a high degree of uncertainty which business practices are still acceptable because national enforcement authorities provide firms with no clear guidance and do not take into account cultural differences of various international business segments.[41] *Koehler* also adds that current enforcement leads to inefficient over-compliance or just unnecessary withdraw of investment activity in highly corrupted regions.[42]

On the other hand, "long-term efficiency" based authors argue that status quo creates maximum possible incentives for firms to conduct efficient and ethical business activity in emerging markets.[43] *Rose-Ackerman & Hunt* noticed that, indeed, compliance in emerging markets is challenging task however, their analysis of effects of the proposed amendments shows that limitation of current enforcement practice by enactment of safe harbour defences or *de minimis* exceptions would weaken the law.[44] *Rose-Ackerman & Hunt* claim that safe harbour provisions would in fact not motivate companies to accept better internal compliance mechanisms because it would be generally easier to pay bribes and avoid liability.[45] At last

[38] For economics analyses see e.g. In Eicher, S. (2009). Corruption in international business the challenge of cultural and legal diversity. Farnham, England: Gower, pp. 47-60; Cuervo-Cazurra, A. (2006) supra note 37

[39] See e.g. Dalton (2006) supra note 35.

[40] Spalding (2010) supra note 35; Dalton (2006) supra note 35 proposes *de minimis* exception which would take into account cultural differences; Westbrook (2011) supra note 35.

[41] Westbrook (2011) supra note 35, pp. 560-565.

[42] Koehler (2011) supra note 35.

[43] Nichols (2012) supra note 36*;* Rose-Ackerman & Hunt (2012) supra note 36.

[44] Rose-Ackerman & Hunt (2012) supra note 36, pp. 444-461.

[45] Ibid, pp. 466.

but not the least, they argue that in the long-term, ethical investments and acceptance of quality internal anti-corruption compliance mechanisms will improve corporate ethics, reputation and create business advantages for any given firm.[46]

Both of the above mentioned approaches are imperfect. The main problem of the long-term efficiency approach is that it merely stands in opposition to any criticism and does not focus on identifications of regulatory problems – it has taken merely defensive position. On the other hand, the altruistic group in fact criticises the entire anti-bribery system.[47] However, reforms based on various types of *de minimis* notes and safe harbour provision, are only connected with attempts to reduce uncertainty of companies when doing business in emerging markets. Therefore, assigned effects of these "legal solutions" are disproportionately generalised. In fact, within the established anti-bribery regime, *de minimis* notes or safe harbour defences would not solve problems such as under-regulation of bribery, low level of compliance or lack of enforcement coordination. They would probably only contribute to stronger position of businesses and weaker position of enforcement authorities. Therefore, fair critique of the anti-bribery system must have its bases beyond these approaches.

3. PATTERNS OF ANTI-BRIBERY ENFORCEMENT

Despite the relatively long existence of the Convention, its enforcement was sporadic. However, after 2006 the United States has started to actively enforce the FCPA. The U.S. DOJ and the SEC conducted in average 2.4 enforcement actions per year between the years 1998 – 2006. It increased to average 12.6 enforcement actions between the years 2007 – 2012. The U.S. authorities imposed in penalties $87 million in 2007 while in 2010 already $1.8 billion.[48]In reaction to the U.S. enforcement activities,[49] six other OECD members have intensified their enforcement efforts.[50] These developments are in a close connection with

[46] Ibid, pp. 461-463.

[47] Author's note: interestingly, an increasing number of academic works have been adopting the altruistic perspective. One could sometimes even think that some altruistic authors write what some of the businesses would like them to write.

[48] See Choi, S. J., & Davis, K. E. (2012). Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act, *NYU Law and Economics Research No. 12-15*; NYU School of Law, Public Law Research No. 12-35; See also Runnels, M. B., & A. M. Burton (2012). The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical Foreign Direct Investment in China and Other Emerging Economies, *Cardozo Law Review, 34 (1).*

[49] Eight out of 10 largest fines in the history of the FCPA were imposed to foreign companies See Cassin, R. L. (2010). In New Top Ten, Eight Are Foreign, *The FCPA Blog* < http://www.fcpablog.com/blog/2010/11/5/in-new-top-ten-eight-are-foreign.html> accessed 10 February 2014.

[50] Germany, the UK, Italy, Switzerland, Norway and Denmark. See Transparency International (2012), Fighting Foreign Bribery: Prosecutions Making It Harder for Companies <http://www.transparency.org/news/feature/ fighting_foreign_bribery_prosecutions_making_it_harder_for_companies> accessed 10 February 2014.

political-economic preferences and position of a given country in the anti-bribery playing field. Thus, in order to understand better leading policy goals of anti-bribery enforcement (patterns of enforcement) this chapter builds on theories of state behaviour which might provide interesting insights.

3.1. What are Patterns of Anti-Bribery Enforcement?

The previous chapter demonstrated controversy connected with effects of anti-bribery enforcement. However, different players in the anti-bribery enforcement game have different interests and possibilities to influence a given state of affairs. The understudied question is then what actually motivates enforcement agencies when taking an enforcement action and what objectives such a behaviour might have. In fact the terms "altruistic" and "long-term efficiency" were derived from theories of state behaviour[51]. This chapter adopts a broader scope of possible motivations of state actors.

In this context, literature recognises different theoretical models of state behaviour. For instance, *Davis*[52] describes patterns and trends which might explain motives which drive the U.S. authorities when enforcing the FCPA. He uses three broad theories which explain behaviour of state actors – moralism, self-interest and altruism. According to *Davis*, the debate concerning the reasons for fighting transnational bribery does not encompass just (1) the western standard of immorality of foreign bribery but also (2) economic and political interests of OECD countries and (3) human rights and development of emerging markets. This work adds to this discussion also model of "coordination" which is connected with motivation to ensure collective action and establishment of effective global anti-bribery regime.

The following part shortly introduces basic characteristics of the above mentioned approaches:

1. **Moralism:** This theoretical model provides that states primarily seek to reduce level of corruption and bribery in transnational business. It reflects the position that corruption and bribery should be recognised as morally bad activities which are not ethically acceptable. This pattern might remind what is in the literature called "The Mad Men" story; for instance *Stephan* stated that: *'public pronouncements by canny*

[51] See below.

[52] Davis J. K. (2012). Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism? *NY University School of Law. Public Law & Legal Theory* No. 12-51.

transnational norm entrepreneurs have shifted public preferences and produced a widespread demand for anti-corruption measures."[53] This process is also supported by activities of non-governmental organisation such as Transparency International, granting organisations[54] and multi-stakeholder initiatives[55] which operate within the emerging "moral industry".

2. **Foreign affairs – Altruism and Self-Interest:** These theoretical models are connected with a political preferences and rationality of state actors. On the one hand, the altruistic model explains that state actors have the desire to help developing countries to improve their institutions and corruption climate. On the other hand, the self-interest theory reflects the motivation to use the anti-bribery measures extraterritorially in order to offer domestic companies a competitive advantage over their foreign competitors. It must be noted that both theoretical models are also connected with the clash between a long term and short term motivations. However, the time issue goes beyond the general framework of these theories as it is a matter of their effects.[56]

3. **Practical Constrains – Coordination:** The concept of coordination can be understood in two contexts:

   a) Coordination *stricto sensu* covers the will of national enforcement agencies to coordinate their actions in respect of information exchange and cooperation in education. Especially the U.S. enforcement authorities, particularly the DOJ, have shown a great will to cooperate with their counterparts across the world to educate other national enforcement authorities on bribery and corruption. They are developing relationships to facilitate the multi-lateral approach to enforcement.

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[53] Stephan, P. B. (2012), Regulatory Competition and Anticorruption Law, *Virginia Journal of International Law, 53*.

[54] E.g. The World Economic Forum Partnering Against Corruption Initiative (PACI). By May 2013, 38 energy companies have been participated in the PACI program <www.weforum.org> accessed 10 February 2014. "PACI encompass all dealings with representatives with whom the organization has a business relationship, such as subsidiaries, local partners, agents, and contractors." In Eicher, S. (2009) supra note 38, p. 59; See also The Revenue Watch Institute which is a founding member of the international Publish What You Pay Campaign www.publishwhatyoupay.org accessed 10 February 2014.

[55] See e.g. The Nigeria Extractive Industries Transparency Initiative (NEITI). By January 2013, 33 energy companies are reporting their investment activities conducted in Nigeria <www.neiti.org.ng> accessed 10 February 2014.

[56] For economics analyses see e.g. Eicher, S. (2009) supra note 38, pp. 47-60; Cuervo-Cazurra, A. (2006). Who cares about corruption? *Journal of International Business Studies, 37 (6)*.

b) Coordination *largo sensu* explains that state actors are led by the vision of further institutionalisation of emerging global anti-bribery regime. It can be understood as a general approach to collective action problem. It attempts to reduce problems of the anti-bribery enforcement anarchy connected with partial under-regulation of the playing field (the free-rider problem) and also potential over-regulation of the regime. The over-regulation might be understood as a negative effect of extraterritoriality related to protectionism due to the lack of enforcement coordination between anti-bribery authorities which are active in enforcement. It must be noted that coordination *largo sensu* reflects general economic questions of anti-bribery enforcement and focuses on interplays between enforcement agencies and public officials.

Academic literature provides a number of significant contributions concerning the patterns of anti-bribery enforcement however, rarely; validity of these theories is tested. This is probably because of the fact that the rise of robust enforcement of OECD-based anti-bribery laws is relatively new issue and also that the anti-bribery enforcement agencies are not known for their transparency. Nevertheless, recently, two prominent authors on this topic – *Choi & Davis*[57], empirically tested causes of patterns of the OECD anti-bribery enforcement.

Choi & Davis found empirical evidence that fines imposed by the U.S. agencies differ not only on the basis of companies' moral culpability, but also on the bases of companies' place of incorporation, and place where a given company invested.[58] They conclude that current causes of enforcement can be explained, to a certain extent, by all above mentioned theoretical models. So for instance, moralistic model is supported in the way that enforcement agencies equally reflected moral culpability of companies, i.e. size of bribe and profit arising from the bribe. However, disproportionately higher sanctions were imposed to companies bribing in countries with weak institutions, which supports the model of altruism.[59] Moreover, mixed evidence was found in favour of self-interest. On the one hand, when foreign bribery was committed through cooperation of U.S and foreign companies, the U.S. companies had to pay disproportionately smaller sanctions. On the other hand, when the bribes were paid by

[57] Choi & Davis (2012) supra note 48.
[58] Ibid, pp. 1-4.
[59] Author´s note: national enforcement authorities can impose also other sanctions and obligations such as appointment of an independent corporate monitor who assesses a company's obligations to improve its internal compliance program and system of internal controls. In this respect, it would be also interesting to research how these sanctions are used.

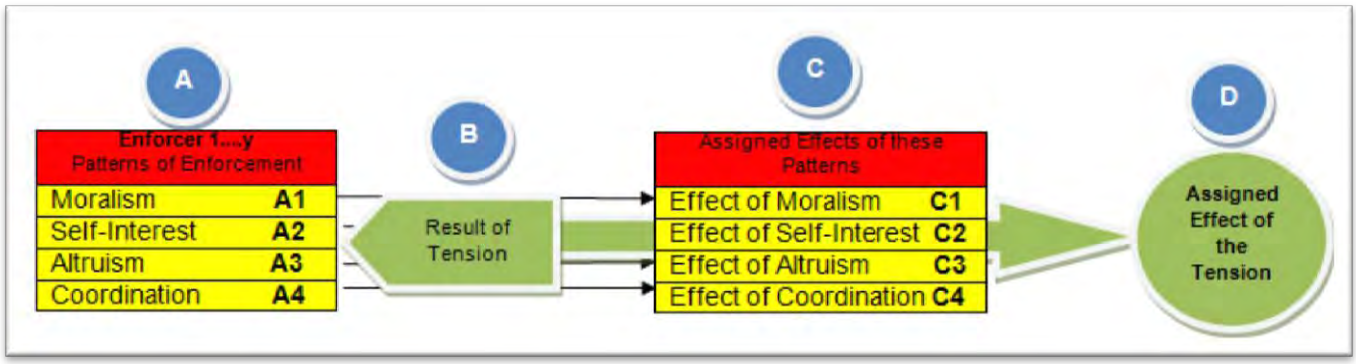
individual U.S. companies, aggregate sanctions were higher for U.S. companies than for foreign companies.[60]

3.2. Fair Critique of Anti-Bribery System: Patterns and Effects in Tension

The patterns of anti-bribery enforcement should not be understood as self-standing concepts. The above mentioned models of state behaviour reflect a number of different motivations, leading policy goals and desired effects of the anti-bribery enforcement. However, these elements are often in a great tension whose understanding remains a black box of the anti-bribery strategies.[61] So for instance, the question is how and to what extent combination of short term economic interests of national authorities (self-interest) and promotion of investment activities in emerging market (altruism) can be balanced with long-term incentives to reduce the level of bribery (moralism and coordination *largo sensu*).

These tensions between patterns of enforcement and also the fact that enforcement agencies use anti-bribery laws extraterritorially have raised the question to what extent assigned effects of these models actually correspond with practical outputs. It might be interesting to conduct an empirical research focusing on 2 main questions: (1) how the tension between these variables is resolved in different business contexts; in other words, how national enforcement agencies actually face altruism, moralism, coordination and self-interest and whether their behaviour in various investment sectors and cultural environments differs and (2) how these combinations actually affect the coordination game in a given marker and anti-bribery collective action in general. These ideas are demonstrated in Figures I and II below.

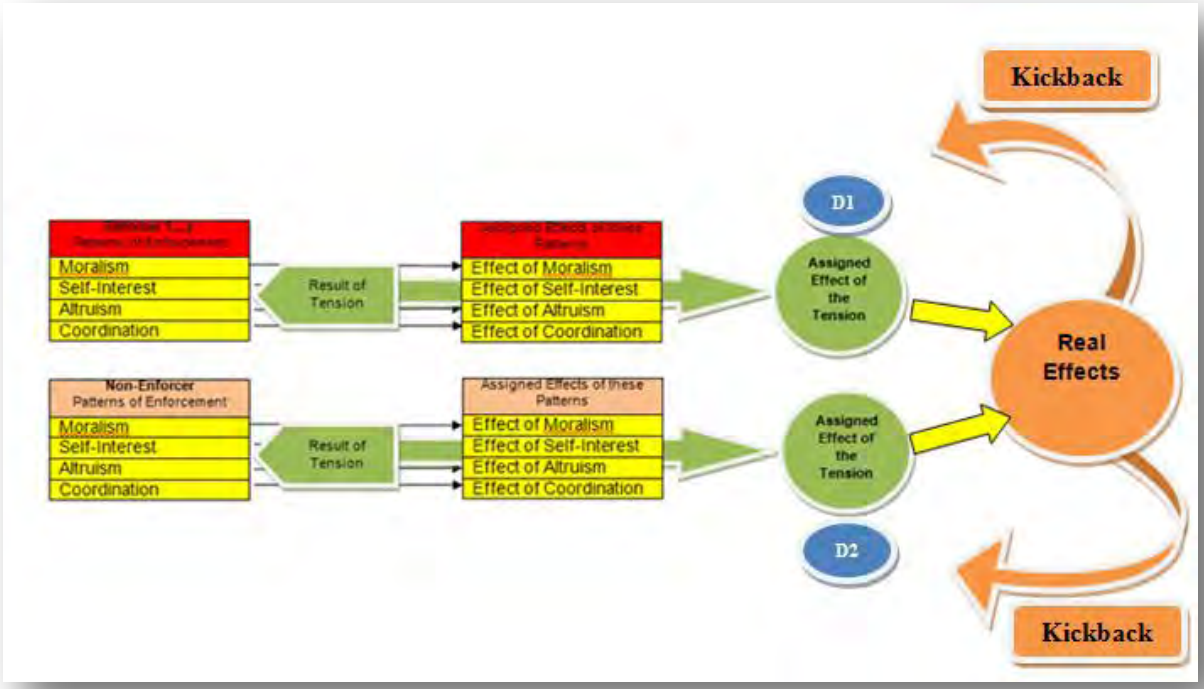
Figure I: Assigned Effects of Patterns v. Assigned Effect of the Tension (source: Hock)



[60] Choi & Davis (2012) supra note 48, pp. 42-44.
[61] Garret, B. L. (2011). Globalized Corporate Prosecutions, *Virginia Law Review*, *97*.

(A1)⟶ **(C1)**; **(A2)**⟶ **(C2)** etc. However, because of a tension between these patterns the "Result of Tension" has to be identified: **(A1) + (A2) + (A3) + (A4) = (B)**. The "Result of Tension" then leads to "Assigned Effects of the Tension" **(D)** which might be different from "Assigned Effects" of the patterns of enforcement: **(B)** ⇒ **(D)** and **(C1…4) ≠ D**

Figure II: The Enforcement Game – Real Effects (source: Hock)



The Figure II above then demonstrates a complete picture of the anti-bribery enforcement game with virtually undefined number of enforcers and non-enforcers (free-riding countries). These subjects use different enforcement or non-enforcement strategies based on different combinations of the patterns of enforcement which are in a tension. The "Result of Tension" then leads to the "Assigned Effects of the Tension" **(D1, D2…Dn)** which are however different from reality because "Assigned Effects of the Tension" will further be modified by other players in the game. Different combination of the "Assigned Effects of the Tension" of different players of the game then leads to "Real Effects" (effects e.g. on inflow of FDIs, competitiveness of given firms or level of corruption): **(D1) + (D2) + …(Dn) = "Real Effects"**. The "Real Effects" then lead to kickback influencing every step in the described game.

These complexities demonstrate that legalistic approaches are questionable because the hypothetical tensions between patterns of enforcement lead to different effects at multiple

levels of understanding. The discussion should not be limited just to the substantive anti-bribery provisions because jurisdictional approaches are maybe even more influential. Broad jurisdictional claims enable an anti-bribery game to be influenced by different anti-bribery players and multiplicity of enforcement agencies equipped with wide enforcement discretion. Therefore, the discussion on competitive disadvantage has its essence in rationality of relevant actors and their political-economic position in the anti-bribery enforcement game and not so much in legislative - substantive defects.[62]

4. EFFECTIVENESS OF ENFORCEMENT: ENSURING PROCESS

It was already said that a unique combination of different motives of each enforcer represents a black-box of anti-bribery regime. It is then a very difficult task to identify direct effects which anti-bribery-laws might have on for instance inflow of foreign direct investments. This paper claims that research should go beyond legalistic discussion on "defects in law" and rather explore basic relationship between enforcers and non-enforcers within the anti-bribery regime.

It was said that the OECD anti-bribery system is about economic objectives and in particular about establishment of level playing field.[63] However, no governance reform at the global level can prove to be effective if it does not reflect pro-social preferences.[64] A group which adopts such preferences can take collective action with shared ideal of for instance fair and equal playing field which is free of transnational bribes. The collective action should then lead to better economic results of the whole group and global market in general. The underlying question is then: why do we see a collective action problem (CAP) when there is a good (economic) reason to enforce anti-bribery laws by any country in the world? Answer to this question is crucial for researching the effectiveness of available legal institutions. The institutions might be evaluated as effective if they are capable to resolve the CAP.

4.1. Level Playing Field and Collective Action Problem

Establishment of collective anti-bribery action might be considered as the first step towards effective anti-bribery regime. The way towards collective action however usually leads to fundamental challenges because such an agreement is very much influenced by group

[62] See Turk (2013) supra note 37.
[63] See above, p. 8.
[64] See for instance Tabellini, Guido (2008). "The Scope of Cooperation: Values and Incentives." *Quarterly Journal of Economics*, 123(3): 905–50.

size, timing of actions of different members and ultimately threat of cheating.[65] Thus, beneficial collective preferences of a group might be attacked by selfish free-riders within and outside the group. This is the question how a variety of legal institutions can effectively support cooperation and coordination among relevant subjects.

These questions are frequently analysed by political-economic literature which describes these interactions as multi-person prisoner's dilemmas.[66] Successful resolution of the CAPs and effective form of its governance is summarized by *Dixit* who recognizes three main requirements. Firstly, governance of collective action might be successful if the composition of a group is stable with good set of information about its members, prohibited behaviour and consequences of misbehaviour. Secondly, he points on importance of ability to identify unacceptable behaviour. At last but not the least, governance of collective action should establish effective system of sanctions.[67] It must be noted that these requirements overlap and selected set of institutions within a given regime might have different levels of effectiveness at various stages of collective action.[68]

4.2. Two Order Free-Rider Problem and Effectiveness of Enforcement

The politico-economic approaches accurately explain why a "collective anti-bribery action" is so difficult to be established. The main challenge is that anti-bribery regulation faces a two-order free-rider problem. This is because relevant subjects face two choices whether to cooperate or free-ride.[69] At the first level, each enforcer has to decide whether to join a given group and participate in activities connected with generation of public goods, limitation of negative externalities and building of trust between stakeholders. Second level of CAP is connected with a design of coordination and enforcement models to resolve first CAPs.[70] These two levels of collective action are interdependent. The first stage problems are problems of market failure. The successful resolution of the first CAP problems however

[65] Masten, Scott E. and Prufer, Jens, On the Evolution of Collective Enforcement Institutions: Communities and Courts (February 2014). Ross School of Business Paper No. 1169; CentER Discussion Paper No. 2011-074. Available at SSRN: http://ssrn.com/abstract=1874694 or http://dx.doi.org/10.2139/ssrn.1874694, pp, 5-6.

[66] Dixit, A. (March 01, 2009). Governance institutions and economic activity. *American Economic Review, 99,* 1, 5-24.

[67] Ibid, pp. 16-17.

[68] Biddle J. and N. Darnaal, The Collective Action Continuum: Identifying Critical Elements for Enviromental Improvement, George manson University, 2010 <http://acwi.gov/monitoring/conference/2010/manuscripts/L4_1_Biddle.pdf> accessed 1 April 2014.

[69] HECKATHORN, D. D. (1989). Collective Action and the Second-Order Free-Rider Problem. *Rationality and Society, 1,* 1, 78-100.

[70] Ferguson, W. (2013). *Collective action and exchange: A game-theoretic approach to contemporary political economy*. S.l.: Stanford University Press. (Chapter 3).

requires some prior resolutions of the second level COAs problems. The second level resolutions thus in fact facilitate the formation of institutional environment and trust at the first level.[71]

The model based on two layers of collective action might be also applied to the problem of transnational bribery. On the one hand, the OECD anti-bribery regime aims to establish a situation where foreign bribery is regulated by all countries in the world. In the current context, it refers to relationships between OECD and non-OECD worlds as an external dimension of the collective action. However, the issue has also an internal element connected with problems of enforcement coordination within the OECD regime. Politico-economic literature indicates that because of the dynamic relationship between these two layers, institutional setting which would establish optimum on one or the other layer would not necessarily be the most effective one.[72]

4.3. The Role of Legal Researcher - Discussion

One of the most important issues connected with the enforcement of the anti-bribery laws is that national enforcement agencies are enforcing their laws extraterritorially.[73] In general, it means that national enforcement authorities will assert jurisdiction on the basis that, for example, a given firm has assets in the OECD Convention signatory country or is even partially owned by nationals from that signatory. For instance, U.S. authorities have used such arguments to claim jurisdiction to investigate and eventually punish Chinese companies for their operations outside the United States.[74] Therefore, broad extraterritorial jurisdiction potentially reaches both domestic and foreign companies anywhere in the world.

This way of enforcement of law has been long debated in legal theory because national states are constantly being overplaying jurisdictional limits as set by public international law.[75] In this context, political – economy helps in modelling the effectiveness of an

[71] Ibid.
[72] Heckathorn (1989) supra note 69.
[73] Extraterritoriality exists when an enforcement authority applies national laws for conduct occurring beyond the countries' borders; See Developments in the Law: Extraterritoriality (2011). 124 Harvard Law Review, 1226, 1280-1291.
[74] Author's note: for example Rino International, a China-based issuer was investigated in 2008 for its business activities in China*;* See also US v. DPC (Tianjin) Co. Ltd. DPC; OECD firms are being investigated as well - Royal Dutch Shell was investigated and penalised by U.S. authorities for its operations in Nigeria. For more information see FCPA Blog, www.fcpablog.com accessed 10 February 2014.
[75] General international public law recognizes jurisdiction based on three types of conduct: 1) conduct which appears within the territory of the given state; 2) conduct which is considered to have effects within its territory

international regime. It is important in particular because it offers new perspective which goes above methodological limitations of public international law. However, still, it does not say much about specific features of relevant legal institutions and extraterritoriality in particular. This is the role of legal research to identify which legal rules are relevant for initiation or disapproval of level playing field.

a) First Layer of CA

It is important to bear in mind that legal institutions have interrelated effects on both layers of the anti-bribery collective action. First layer is connected with the question how legal rules address issues of coordination within the OECD anti-bribery regime. At first, preliminary analysis needs to delineate substantive elements which constitute the offense of bribery. In this context, Article 1 of the Convention delimitates what the offence of bribery of foreign public officials is and sets a minimal standard for its implementation; i.e. defines what kind of behaviour should be criminalized. Once the implementation of these provisions differs, the scope of the prescribed behaviour (do not bribe foreign public officials) would be based on the fact who the enforcement authority is. These differences might consequently create a competitive disadvantage for subjects who are subjected to "stricter laws" than their competitors. This part of the analysis is closely connected with the existing legalistic discussion as provided above.

Moreover, besides technical differences caused by implementation defects, the key legislative aspect which might undermine or support internal collective action is what level of enforcement coordination between national enforcement agencies is provided by law. The analysis above showed that there is a good reason to anticipate that national enforcement agencies might tend to use the enforcement strategically in order to protect their own national interests.[76] The question is than whether and what legal institutions does the OECD regime offer to face these threats. Another related issue is how law deals with potential of under and over regulation i.e. how it solves situations when several enforcers claim that they have jurisdiction over the given bribery case and how the OECD system reflects non-action of enforcement agencies.

b) Second Layer of CA

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and 3) conduct of nationals which takes place abroad. See Developments in the Law: Extraterritoriality (2011). 124 Harvard Law Review, 1226, 1280-1291.

[76] See above pp. 11-12.

When it comes to the second - external layer, legal analysis should focus on the question how and to what extent anti-bribery laws are applicable to subjects operating in the global market. In order to answer this question both procedural and substantive elements which determine jurisdictional scope of national enforcement authorities must be identified. From the procedural perspective, it needs to reveal how jurisdiction is established over operations of foreign and domestic subjects outside enforcing state's territory. Moreover, the scope of application has also very deep substantive dimension because establishment of jurisdiction is very much dependent on many substantive concepts such as notions of briber, bribee or indirect bribery which is connected with a matter of control over intermediaries, subsidiaries, agents and other subject which act on behalf or are controlled by the headquarters.

Analysis assessing the scope of application is important because it can reveal to what extent the global playing field is fragmented when the jurisdictional scope is not strictly bound by a territory of an enforcing state. Moreover, this is also important because it helps to assess which subjects can be stamped as free-riders i.e. firms (or individuals) whose domestic anti-bribery laws (if they exist) or other laws do not prevent their potential bribing and thus create competitive distortions. Ultimately, these findings might reveal a lot about how and to what extent free-rider problem at the first level (state level) matters for collective action at the firm's level.

CONCLUSION

The paper analyses current "legalistic" debate on effects of anti-bribery enforcement and attempts to explain it while using theories of state behaviour. The analysis of patterns of anti-bribery enforcement revealed that it is extremely difficult to find direct causal link between patterns of enforcement and their effects on competitiveness of companies coming from OECD Convention signatories. This is because extraterritorial potential of OECD-based anti-bribery laws has various effects on different transnational players and in particular OECD countries, emerging markets, firms and also the phenomenon of bribery itself. Thus, identification of more effective solutions for functioning of law in a global economy cannot be limited just by classical knowledge and methods of public international law. The crucial questions are how formal and informal institutions should be designed in order to effectively ensure public policy objectives and economic sustainability.

It was found that political – economy and international relations provide useful research frameworks for accessing effectiveness of existing legal institutions. The case of regulation of transnational bribery can be modelled as two order free-rider problem connected with a) partial under-regulation on the one hand and b) lack of enforcement coordination on the other. These problems are interconnected and relevant legal institutions might be effective in the first layer but ineffective in the second.

The final discussion of this paper prepared a field for future analysis of legal provision which might in connection with politico-economic frameworks lead to a model accessing the effectiveness of extraterritorial enforcement. These findings represent current stage of author's research - work in progress. This is a future challenge to analyse the normative nature of applicable legal institutions and in particular answer how extraterritorial enforcement functions in practice. It will lead to interesting normative questions. If extraterritoriality proves to be effective within the global anti-bribery enforcement regime, the question would be why and when international community needs to rely on formal regimes. However, if extraterritoriality proves to be ineffective, the question is whether, why and when international anti-bribery community should look for more formal coordination of the anti-bribery enforcement (e.g. via an independent international tribunal). The intuition is that extraterritorial application is used differently in various areas of law. In practice, extraterritoriality differs because it is set in enforcement regimes characterized by different stages of institutional maturity. The question is then whether and under what conditions the given regime might evolve into a more institutionalized form.

[END]