SETTLING ON AN INTERPRETATION OF "INSTRUMENTALITY" IN THE FCPA

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Despite—or perhaps because of—the explosion in government enforcement of the Foreign Corrupt Practices Act ("FCPA") since 2005, one of its key terms is shrouded in mystery. Terrified at the prospect of going to trial, major corporations usually settle FCPA charges away from the watchful eyes of federal district court judges. Thus, largely unencumbered by judicial oversight, the government has enforced the FCPA increasingly aggressively.

The statute outlaws bribes paid to any employee of any foreign government "instrumentality." But what is a foreign government "instrumentality" in the first place? This crucial question is mostly ignored by the academy and often inaccessible to the judiciary. In particular, under what circumstances is a corporation an "instrumentality" of a foreign state? If a government holds a minority equity stake, can the corporation be an instrumentality of that state?

The history and purpose of the FCPA indicate that a broad interpretation of the term "instrumentality" is in order. In addition, global trends suggest that the government will remain aggressive in its own interpretation and enforcement. FCPA exposure takes a major toll on transnational businesses; therefore, it behooves them to consider the outermost extremes of what entities qualify as an "instrumentality" of a foreign state. This Note contends that the prevailing interpretations of "instrumentality" are muddled and misguided. Instead, a relatively low government equity stake – well below fifty percent – should be

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sufficient to qualify a corporation as an instrumentality of that state.

I. INTRODUCTION

Enforcing the Foreign Corrupt Practices Act ("FCPA")[1] is, according to some, the Department of Justice's top priority behind protecting the United States from terrorism.[2] Yet, despite its status as a powerful regulator of business conduct, the statute's key element is shrouded in mystery and only recently drew the attention of a federal circuit court for the first time.[3] The explosion in FCPA enforcement since the second George W. Bush administration has transformed the FCPA from an afterthought to a "crown-jewel practice" for major law firms,[4] as well as the subject of substantial media scrutiny.[5]

In the wake of the Watergate scandal, Congress passed the FCPA in 1977.[6] The FCPA features two primary

1 Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012).

2 *See* Joe Palazzolo, *FCPA Inc.: Law's Long Path: Nixon, Carter, Bush*, WALL ST. J., Oct. 2, 2012, at B1 ("FCPA has gone from a carriage trade into what the [Department of Justice] has said at times is [its] No. 2 priority behind terrorism.") (quoting Kirkland & Ellis partner Laurence Urgenson).

3 *See* Verdict, United States v. Esquenazi, No. 1:09-cr-21010 (S.D. Fla. Aug. 5, 2011), *appeal docketed*, No. 11-15331 (11th Cir. argued Oct. 11, 2013). Joel Esquenazi's conviction is under appeal at the Eleventh Circuit.

4 Joe Palazzolo, *FCPA Inc.: The Business of Bribery—Corruption Probes Are Profit Center for Big Law Firms*, WALL ST. J., Oct. 2, 2012, at B1 (quoting Dan Binstock, legal recruiter at Garrison & Sisson).

5 *See id.*

6 Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 87 (2007) ("The FCPA was passed by the U.S. Congress in December 1977 as a response to the Watergate scandal and to a Securities and Exchange Commission (SEC) investigation that uncovered over $300 million of questionable

provisions. It mandates a series of bookkeeping measures designed to ensure a reasonable degree of oversight over a business entity's outgoing payments.[7] And, more significantly, the FCPA anti-bribery provisions grant the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") authority to bring criminal or civil charges against corporations and individuals who bribe a "foreign official" in order to obtain a business advantage.[8] From 1977 until the early 2000s, DOJ and SEC brought just a few cases per year between them.[9] However, during President George W. Bush's second term, Alice Fisher, head of DOJ's Criminal Division, established a unit devoted exclusively to FCPA enforcement.[10] Staffed with only two prosecutors at its founding, the unit has grown tenfold in the few years since.[11]

Despite the explosion of FCPA enforcement activity, there remains only one significant circuit court ruling interpreting the statute,[12] and that ruling pertains to a single definitional issue regarding what constitutes a proscribed payment.[13]

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payments by U.S. firms to foreign government officials. An SEC report listed some 527 companies which had disclosed such payments, including major U.S. corporations such as Exxon Mobil, Boeing, Northrop Grumman, Lockheed Martin, and Gulf Oil.").

7 *See* 15 U.S.C. § 78m(b)(2) (2012).

8 *Id.* § 78dd-1(a)(1).

9 *See* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008) ("Between 1978 and 2000, the SEC and the DOJ together averaged only about three FCPA-related prosecutions a year.").

10 *See* Palazzolo, *supra* note 2.

11 *Id.*

12 *See* J. Scott Ballenger et al., *Reining in the Foreign Corrupt Practices Act: The Supreme Court Ignores a Perfect Opportunity*, 46 CRIM. L. BULL. 625, 625 (2010).

13 The FCPA stipulates that, for a bribe to be illegal, it must be for the purpose of "obtaining or retaining business." 15 U.S.C. § 78dd-1(a)(1)(B) (2012). The Fifth Circuit, in *United States v. Kay*, interprets "obtain[] or retain[] business" broadly to incorporate a wide range of business advantages obtained via bribery, such as a reduction in import taxes. 359 F.3d. 738, 755 (5th Cir. 2004). Interestingly, this ruling preceded the ramped-up enforcement. The Fifth Circuit's broad reading of a particular

The lack of judicial interpretation is a result of corporations' tremendous fright at challenging government charges at trial.[14] Rather than go to trial, corporate defendants routinely settle, plead guilty, or enter into deferred prosecution agreements ("DPAs") with the government,[15] occasionally forking over tens, or even hundreds, of millions of dollars to the government in the process.[16] Thus, in recent years, DOJ and SEC have had carte blanche to bring charges and obtain multimillion dollar settlements from corporations with little or no judicial oversight.

Since 2005, the government has been rather aggressive in its interpretations of the statute, particularly regarding who constitutes a "foreign official." The statute defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof."[17] The government has defined "instrumentality" increasingly broadly, going so far as to say that a telecommunications company was an "instrumentality" of the Malaysian government because its Ministry of Finance owned 43% of the firm.[18] Yet the judiciary has had no meaningful opportunity to weigh in on this type of interpretation. The question of what constitutes an "instrumentality" of a foreign

element of the FCPA may actually have been a precipitating *cause* of the government's decision to bring more charges. *See* Krever, *supra* note 6, at 95.

14 *See* Court E. Golumbic & Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L. 1, 27–28 (2011).

15 *See id.* at 27. DPAs are tantamount to settlements for criminal charges. Under a DPA for a fraud case, a corporate defendant will often agree to pay a criminal fine, implement controls, and admit wrongdoing in exchange for the government's promise to drop charges. *Id.* at 28.

16 *See* Palazzolo, *supra* note 4.

17 15 U.S.C. § 78dd-1(f)(1)(A).

18 Deferred Prosecution Agreement at A-9, United States v. Alcatel-Lucent, S.A., No. 10-CR-20907 (S.D. Fla. filed Feb. 22, 2011). The government's determination was also based on other critical factors, such as the Malaysian government's authority to make "important operational decisions." *Id.*

government is difficult, even in isolation. Further, in a world where so much business is transacted across international borders, and where states are privatizing national corporations while retaining partial ownership, what constitutes an "instrumentality" becomes an even more difficult question.

This Note seeks to shed light on ways to interpret "instrumentality" under the Foreign Corrupt Practices Act. Currently, no appellate court has ruled on the question (the Eleventh Circuit will rule on it in *United States v. Esquenazi*;[19] oral arguments took place on October 11, 2013) and only four district court cases have addressed the issue.[20] Moreover, the academy has largely ignored the definitional issue of what constitutes an "instrumentality" of a foreign government, despite this question's centrality to FCPA enforcement.[21] Thus, this Note will serve as one of the first in-depth assessments of normative and positive frameworks for defining "instrumentality" since district courts began addressing the question. This is especially timely because

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19 *See supra* note 3.

20 United States v. O'Shea, No. 4:09-cr-00629 (S.D. Tex. dismissed Jan. 16, 2012); United States v. Noriega, No. 2:10-cr-01031 (C.D. Cal. filed Sept. 15, 2010); United States v. Esquenazi, No. 1:09-cr-21010 (S.D. Fla. filed Dec. 4, 2009); United States v. Carson, No. 8:09-cr-00077 (C.D. Cal. filed Apr. 8, 2009). *Noriega* is more often referred to as *Aguilar* or as *Lindsey*, as Lindsey Manufacturing Co. and its CEO, Keith E. Lindsey, were two of the four defendants. *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1109 (2011). In the *O'Shea* case, Judge Lynn Hughes of the Southern District of Texas dismissed the charges before the jury even heard the case, as the government could not prove that John O'Shea had bribed employees of the Mexican government-owned electric company. Nathan Vardi, *The FCPA Fiasco: Pressure Tactics In Corruption Cases Backfiring*, FORBES (Jan. 17, 2012, 1:41 PM), http://www.forbes.com/sites/nathanvardi/2012/01/17/ the-fcpa-fiasco/.

21 Until very recently, only one article in the literature offered a normative or prescriptive assessment of how "instrumentality" should be defined. *See* Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1246 (2008). However, this article was written in 2008, before any of the four district court decisions emerged and contributed to the framework of how to define "instrumentality."

the Eleventh Circuit, in coming months, will become the first appellate court to rule on the question, which could open the floodgates to additional trials and appeals.

This Note advances a decidedly stringent interpretation of the term "instrumentality" and does so for a few primary reasons. First, based on the statute's history and purpose, the particular interpretation advanced herein is the most compelling one. In addition, this Note's interpretation generates maximum clarity, which minimizes systemic costs and maximizes enforcement. (In fact, even the U.S. Chamber of Commerce advances a similarly stringent, yet clear, interpretation of what constitutes an "instrumentality."[22]) Finally, given national and international trends in bribery crackdowns, it is valuable to explore the outermost bounds of what could constitute an "instrumentality" under the FCPA. The federal government's enforcement priorities and practices have changed dramatically since 2005. There is reason to believe that they will develop further, since other nations' foreign bribery statutes, led by the U.K. Bribery Act,[23] are noticeably tougher than the FCPA.[24] In a world where the United States is falling behind its peers, it makes sense that the FCPA—and especially its ambiguous elements, like "instrumentality"—could be construed as prohibiting a wider range of corrupt conduct. Businesses are in a frenzy trying to avoid FCPA liability and the judiciary has yet to contribute much to the matter, so it behooves industries to contemplate what the most stringent reasonable

22 *See Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 112th Cong. 20 (2011) [hereinafter *2011 House FCPA Hearing*], *available at* http://judiciary.house.gov/hearings/printers/112th/112-47_66886.pdf (contending that there should be a particular "percentage of ownership by a foreign government that would qualify the entity as an 'instrumentality' [and that] majority ownership is the most plausible threshold").

23 Bribery Act, 2010, c. 23, § 1 (U.K.).

24 The Bribery Act is widely referred to as "the FCPA on steroids." *See* Dionne Searcey, *U.K. Law On Bribes Has Firms In a Sweat*, WALL ST. J., Dec. 28, 2010, at B1. *See also infra* text accompanying notes 160, 162.

interpretation of "instrumentality" could be. In certain respects, it matters very little what district court judges rule, since large corporations will never allow government enforcement actions to go to trial.

Part II places the FCPA in the appropriate context by delving into the history of its passage, amendment, and enforcement, and also illuminates the pertinent ambiguities and goals. Part III assesses the range of proposed methods of interpreting "instrumentality," based upon interpretations of the term in other contexts: the government's enforcement history; the only three relevant district court cases that reached a verdict; and the Organization for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Part IV critiques the extant interpretive methods. Part V offers suggestions for alternative interpretive methods and anticipates counterarguments. The suggestions aim to be true to the text of the statute and its goals, while accounting for the broader goal of deterring bribery at a minimum cost to industry. Specifically, Part V argues that a corporation qualifies as an "instrumentality" of its home state whenever the government makes an equity investment above a certain percentage threshold. Further, Part V contends that government contracting firms should constitute instrumentalities under some circumstances.

II. CONTEXTUAL AND HISTORICAL EXAMINATION OF THE FCPA, ITS AMBIGUITIES, AND ITS GOALS

A. Understanding the Meaning of "Foreign Official"

1. Ambiguous Language: What is an "Instrumentality" of a Foreign Government?

Any matter of statutory interpretation must begin with a close examination of the text of the statute but then proceed to its background for the purpose of clarifying any ambiguities. Any employee of any "instrumentality" of any

non-American government is a "foreign official" under the FCPA.[25] The problem is that what constitutes an "instrumentality" is very context-dependent and subject to much interpretation.[26] On a very basic level, a government instrumentality is any entity utilized to carry out a governmental objective. The problem with using such a commonsensical definition is that it is overly broad. For example, any corporation (or even any individual) could be deemed an instrumentality of a government for the simple reason that the state uses it (or him or her) as a source of revenue, via taxation.[27] The logic is simple: all governments must collect revenue in order to operate; entities and persons subject to the sovereignty of the state have assets; via taxation, the state utilizes those entities and persons as instruments to fund its own operations; therefore all taxpayers are instrumentalities of the state. Clearly, this plain meaning reading takes "instrumentality" to an untenable and undesirable extreme. Thus, this critical element of the statute needs interpretation.

In fact, Congress itself implicitly indicated that the FCPA contains ambiguities that demand clarification. Congress mandated that DOJ offer advisory opinions in response to questions, which (amongst criminal statutes) is "unique to the FCPA."[28] By implementing such an unprecedented clarification method, Congress indicated that this relatively brief statute is beyond the comprehension of the very people at greatest risk of violating it.

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25 15 U.S.C. § 78dd-1(f)(1)(A) (2012).

26 *See* Golumbic & Adams, *supra* note 14, at 15 ("[T]he FCPA does not define what constitutes an 'instrumentality' of a foreign government . . . . [T]his is problematic given that the DOJ considers every employee of an instrumentality—regardless of rank or position—to be a foreign official.").

27 Black's Law Dictionary defines "instrumentality" as "[a] thing used to achieve an end or purpose." BLACK'S LAW DICTIONARY 870 (9th ed. 2009).

28 James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1237 (2007). *See also* 28 C.F.R. § 80 (2013); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(e), 102 Stat. 1107 (1988).

The ambiguity surrounding what constitutes an "instrumentality" of a foreign government is especially pertinent now. Many countries are privatizing corporations that were formerly wholly-owned by the government[29] and states use sovereign wealth funds to purchase assets over which they previously had no control.[30] The Arab Spring promises to infuse dramatic systemic changes into the economies of formerly totalitarian regimes.[31] So, in times like these, it is especially noteworthy that "determining how state-owned assets will be transferred to private ownership is fraught with the potential for corruption."[32] Thus, identifying what constitutes an "instrumentality" under those circumstances is doubly intriguing. First, privatizing national assets raises questions about whether and when an entity constitutes an "instrumentality." Second, the very transactions that give rise to the tricky definitional questions present circumstances ripe for corruption. The situations where it is a particularly close call regarding whether the entity is an instrumentality are also the situations where illicit bribes are most likely to occur.

2. Why "Foreign Officials"?

In light of the ambiguity surrounding exactly who constitutes a "foreign official" under the FCPA, it is helpful

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29 *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 253 (1997).

30 *See* Golumbic & Adams, *supra* note 14, at 2. Investments by sovereign wealth funds have exploded in recent years and show no signs of slowing. *See* Steven M. Davidoff, *Telling Friend From Foe in Foreign Investments*, N.Y. TIMES DEALBOOK (Apr. 2, 2008, 1:56 AM), http://dealbook.nytimes.com/2008/04/02/telling-friend-from-foe-in-foreign-investments/.

31 As Rep. F. James Sensenbrenner—Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security—noted: "I think most of the Middle East is going to be changing pretty rapidly if the newspaper reports are correct." *2011 House FCPA Hearing*, *supra* note 22, at 75.

32 Salbu, *supra* note 29, at 253.

to examine the relevant context and greater meaning of the statute. Why does the FCPA outlaw bribery specifically amongst foreign officials? The FCPA never sought to outlaw private bribery, even though many of the statute's proponents advocated extending the ban beyond "foreign officials."[33] Foreign officials are agents of the people. They possess discretionary decision-making power over the assets of a diffuse populace, and this power enshrines a "relationship of trust," which is the "key element that distinguishes unacceptable payments."[34] The citizens of the state have little way of overseeing their agents, necessitating a legal mechanism for policing abuse.[35] Government investment is a big business, where private firms compete for lucrative state contracts. "Bribery payments that convince public officials to invest in marginal rather than necessary projects or to award contracts on the basis of kickbacks rather than the overall quality of a bid's value waste assets in developing countries . . . ."[36] Bribery, in short, hurts the citizens of the state whose officials receive the bribes because communal resources are co-opted for private gain.

These, of course, are reasons why a sovereign state would outlaw its *own* officials from *receiving* bribes. In fact, based on this logic, states may even wish to *encourage* the *payment*

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33 *See* Golumbic & Adams, *supra* note 14, at 8 ("The overall focus remained on payments made to corrupt government or political actors within foreign states, and entreaties to consider commercial bribery within the scope of the proposed legislation were generally ignored.").

34 Carl Pacini, *The Foreign Corrupt Practices Act: Taking a Bite Out of Bribery in International Business Transactions*, 17 FORDHAM. J. CORP. & FIN. L. 545, 549 (2012).

35 *Id.* at 550–51 ("The abuse of office here—usually occurring in exchange for large sums of money—involves the discretion of the public official. . . . The possibility of bribery arises from the divergent interests of agents and principals and from information asymmetry, which gives agents a great deal of discretionary power. Opportunities for corruption depend on the size of rents in the control of public agents, the discretion they have in allocating them, and their lack of a sense of accountability to society.") (internal quotation marks omitted).

36 Salbu, *supra* note 29, at 252.

of bribes to officials of a foreign state,[37] as the bribe-paying country stands to gain business revenues that it otherwise may not have obtained.[38] Thus, at least at a certain level, the FCPA contravenes the most immediate American interests and can be seen as a form of foreign aid to developing economies.

The United States has a long history of exporting democratic and free market ideals (especially during the Cold War) and providing foreign aid to developing countries. To a large extent, the FCPA continued that tradition and represents a form of "altruistic legislation."[39] "Therefore, any regulations prohibiting foreign public bribery should not be seen as self-interested regulations, but as selfless regulations motivated by humanitarian concerns."[40] Congress went so far as to protect foreign citizens' assets at the expense of American citizens' assets. This is critical in so far as statutory ambiguities are interpreted in light of the goals of the statute.

Some may contend, however, that Congress backed away from this altruism model when it amended the FCPA to promote and recognize international cooperation on policing bribery.[41] Under this theory, international cooperation mitigates American self-sacrifice, and mitigating self-sacrifice is inconsistent with altruistic motives. This narrow view misses the point. First, the amendments could not have been costless to America: extracting promises from fellow

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37 In fact, as of the late 1990s, many developed countries did encourage bribery. S. REP. NO. 105-277, at 2 (1998) ("Indeed, some of our trading partners have explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses.").

38 *See* Evan P. Lestelle, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 541 (2008) ("[P]erpetrations of the crime [of receiving a bribe] by domestic actors benefit the state welfare of the bribe supplier's nation at the expense of the nation where the bribe is received.").

39 *Id.* at 545.

40 *Id.* at 541–42.

41 *See infra* Part II.B.2 for more on the statute's amendment history.

industrialized nations surely cost diplomatic capital.[42] In addition, even as the United States amended the FCPA, altruistic motives still influenced the process.[43] As President Bill Clinton said upon signing the 1998 amendments, the United States criminalizes bribery of foreign officials because corruption is "harmful to [American] efforts to promote economic development."[44] Even though encouraging OECD involvement and action may have benefited American firms, many developing nations actively lobbied for anti-corruption efforts in the industrialized world.[45] Further, the pattern of government enforcement priorities may be a clue as to congressional intent: empirical studies show that DOJ and SEC disproportionately target those who pay bribes in poorer countries.[46] Therefore, the statute's early history,

42 *See, e.g.*, Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 Va. J. Int'l L. 665, 706 (2004) (explaining that American officials may need to apply "diplomatic pressure" and present "diplomatic threats" in order to secure the compliance of reticent developed countries).

43 Some even suggest that altruism was never actually a factor *until* the 1998 amendments. *See* Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest or Altruism*, 67 N.Y.U. ANN. SURV. AM. L. 497, 503–04 (2012) ("[T]he legislative history to the 1998 Amendments marked the debut of the altruistic idea that the FCPA might serve as a tool for promoting political and economic development.").

44 Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998).

45 *See* Tarullo, *supra* note 42, at 680 ("Anti-corruption efforts were, at the behest of several South American countries, a focal point of the 1994 Summit of the Americas . . . . [T]hey went on to suggest that governments of developed countries had, by failing to act against foreign bribery by their own multinationals, become complicit in that bribery."). *See also* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. Legal Stud. 141, 159 (2002) ("In Africa, Latin America, and other regions, human rights groups and other observers saw how corruption helped maintain authoritarian governments in power and allowed them to carry out policies harmful to vulnerable groups.").

46 Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* 31–33 (NYU Pub. L. Research Paper, Working Paper. No. 12-35, 2012), *available at*

amendment history, and enforcement history all point to altruism as one of the chief motives behind the FCPA.

The immediate precipitating event that spurred congressional action was Congress' discovery of over $300 million in bribes paid overseas in connection with the Watergate scandal,[47] which "led to political repercussions . . . and severely sullied the reputation of American companies throughout the world."[48] The FCPA emanated from the Watergate fallout as a tool designed to "prevent such embarrassments to U.S. foreign policy."[49] In the depths of the Cold War, and immediately after the Vietnam War, Congress determined that the FCPA would project American moral and economic superiority. It is not a stretch to compare Congress' decision to shed the blood of young Americans in a foreign war and Congress' decision to hamper American businesses on behalf of foreign citizens. Whatever other motives may or may not have been present in prosecuting the Vietnam War, the FCPA marked a continuation of the commitment to protecting the liberty of others around the world. Understanding these underlying motives behind the FCPA is very helpful in interpreting statutory ambiguities.

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487. Some, however, argue that the government's enforcement priorities indicate the opposite, because American officials can choose to charge foreign corporations who do business in the United States more aggressively. *See* William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 412–13 (2013) ("If the FCPA is largely a tool for imposing costs on foreign companies, then the Act seems much less like an altruistic or praiseworthy regulation, and much more like a power play by the United States.").

47 *See* Palazzolo, *supra* note 4.

48 S. REP. NO. 105-277, at 1 (1998).

49 Rashna Bhojwani, Note, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 70 (2012).

B. The Evolution of the Statute and its Effects

1. Concerns About Economic Impact on American Firms

As the first nation to bar payment of bribes in foreign lands, the United States risked creating an unfair playing field for American businesses operating abroad. American firms were at a competitive disadvantage vis-à-vis their foreign competitors when pursuing business in other, primarily developing, nations because the United States was the only country to criminalize bribery overseas by its own companies.[50] If two energy companies, one American and one not, bid on a contract to build an electric generation facility in a developing country, the American firm was disadvantaged by not being allowed to bribe the Interior Ministry official who wielded the power to assign the contract. The long arm of the American legal system bound American firms, but left foreign firms unencumbered. It stands to reason that this was one of the primary explanations for the government's relatively scant FCPA enforcement activity between the statute's passage and 2005.[51] As a result, absent any form of international consensus on the need to crack down on foreign bribery, the FCPA lacked teeth. This prompted Congress to amend the statute twice, in 1988 and 1998.

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50 *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 867–71 (2001).

51 Today, the government may even use the FCPA to protect and promote American firms operating in the global marketplace. *2011 House FCPA Hearing*, *supra* note 22, at 69–70 (statement of Greg Andres, then-Acting Deputy Assistant Att'y Gen.) ("In fact, one of the ways that we are hopeful that we are helping American businesses is by the prosecution of foreign companies who are engaged in widespread [fraud.] . . . Eight of the 10 largest FCPA settlements in the history of the statute are against foreign companies.").

2. Amendment History

Congress addressed the disadvantages that the FCPA imposed specifically on American companies in two primary ways: first, by stimulating other nations' anti-bribery legislation and, second, by extending the FCPA's extraterritorial reach. In order to make the FCPA a more effective anti-bribery tool, Congress amended the FCPA in 1988 to urge that the president "pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development," that would lead to other nations adopting similar legislation.[52] The point was "that the United States would no longer be alone in fighting foreign bribery throughout the world," thus restoring the even playing field for American businesses.[53] In addition, the 1988 amendments mandated that DOJ issue guidance and respond to specific questions regarding matters of statutory interpretation.[54]

Nine years later, the OECD issued its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the Convention"), and Congress amended the FCPA again to implement the Convention in 1998.[55] Congress specifically mentioned "improv[ing] the competitiveness of American business" as the aim of the 1998 amendments.[56] Also of note, the 1998 amendments expanded the reach of the FCPA to bring most major international corporations within the grasp of DOJ

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52 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (1988).

53 Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 894 (2011).

54 *See* Omnibus Trade and Competitiveness Act § 5003; *see also* David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 686 (2009).

55 Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 580 (2008).

56 International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

and SEC jurisdiction.[57] The statute's reach is now so expansive that, as Alice Fisher explained, "if a foreign company trades on U.S. exchanges and benefits from U.S. capital markets," then it will be subject to the FCPA.[58]

Today, even in the wake of the amendments, the ambiguities that persist in key elements of the statute inflict a new type of cost on businesses. Uncertainty of the meaning of the law is a cost, albeit one that does not exclusively afflict American issuers.[59] "Clarifying ambiguities in the FCPA could reduce costs to American businesses by minimizing uncertainty in conducting business activity oversees."[60] Loss of business is far from the only cost of the prevailing ambiguity. It is widely accepted that even the most basic and circumscribed internal investigation on FCPA liability costs a company $200,000.[61] However, there is some evidence that the federal government is using this residual ambiguity as a deterrence weapon. "[W]ith respect to whether or not a company could bribe a commercial entity versus bribing a foreign official, the [DOJ]'s position would be that if companies aren't paying bribes, they have nothing to fear with respect to enforcement."[62] DOJ's message is that the best way to avoid running afoul of the FCPA is to cease bribing anyone. This is abundantly obvious. It may be the noble thing to do. But the statute does not criminalize all forms of bribery. Nonetheless, DOJ appears to be using the ambiguity surrounding the meaning of "instrumentality" to

57 *See* International Anti-Bribery and Fair Competition Act.

58 *See* Sebelius, *supra* note 55, at 605.

59 *See* Taylor, *supra* note 50, at 880 ("The inability to determine with certainty whether an activity is not prohibited under the Act's provisions creates anxiety among businessmen leading them to 'err on the side of caution,' causing a loss of business.").

60 *Id.* at 862.

61 *See 2011 House FCPA Hearing*, *supra* note 22, at 56–57, 68, 72. The most galling example is the now-infamous story of the corporation that spent $200,000 on an internal investigation after an employee paid the taxi fare of a person who could potentially qualify as a "foreign official." *Id.*

62 *Id.* at 75 (statement of Greg Andres, then-Acting Deputy Assistant Att'y Gen.).

accomplish an extra-statutory degree of deterrence and enforcement.

C. Recent Enforcement History and Where We Are Today

1. Government Enforcement Shielded from Judicial Scrutiny

The government gained ammunition to enforce the FCPA when Congress extended the statute's extraterritorial reach[63] and when the Fifth Circuit construed the "obtaining or retaining business" clause broadly.[64] The flood of enforcement action, however, did not result in a corresponding increase in courtroom activity. Settlements and DPAs are de rigueur. Large corporate defendants avoid prosecutions at almost any expense, since challenging charges "would require the business to be criminally indicted, which is generally regarded as tantamount to a 'corporate death sentence.' Instead, corporations routinely settle FCPA charges . . . , a practice which has essentially excused the U.S. government from providing any real justifications for its interpretations of the Act."[65] At least in theory, this could hurt the government as well as businesses. Case law that supports a broad reading of "instrumentality" would allow the government to extract even greater settlement payments from corporate defendants. In addition, "over time these unanswered questions risk undermining the legitimacy of the policies behind the FCPA."[66]

In any event, DOJ and SEC have had free rein to interpret "instrumentality" as they see fit, for better or for worse. Two primary cases could have established important

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63 *See supra* note 57 and accompanying text.

64 *See supra* note 13.

65 Golumbic & Adams, *supra* note 14, at 28.

66 Matt Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 443 (2009).

precedent for what constitutes an "instrumentality" of a foreign government, yet did not go to trial.[67] Halliburton and Kellogg Brown & Root ("KBR"), its onetime subsidiary, pled guilty and paid a criminal fine of $402 million (not including $177 million disgorgement of profits).[68] The government asserted that the "officers and employees of Nigeria LNG Limited ('NLNG') [who received bribes from the defendants] were 'foreign officials' even though NLNG was 51% owned by multinational oil companies and [only] 49% owned by" the Nigerian government.[69] Despite the ambiguity in what constitutes an "instrumentality" of a foreign government, and despite the somewhat tenuous nature of Nigerian control over NLNG, Halliburton and KBR refused to challenge the government in court. The very crux of the case was the determination of whether the recipients of bribes were "foreign officials," a question on which the statute is ambiguous and for which there was not an iota of pertinent case law. The recipients' employer was a corporation, the majority of whose shares were privately owned. And yet the defendants paid $579 million rather than challenge the government's interpretation of "instrumentality" in a court of law. In like manner, two years later, DOJ reached a DPA with Alcatel-Lucent over alleged FCPA violations stemming from bribes paid to a Malaysian telecommunications firm.[70] DOJ's reasoning for charging Alcatel was that the "Malaysian Ministry of Finance owned approximately forty-three percent of Telekom Malaysia's shares, had veto power over all major expenditures, and made important operational decisions."[71] Alcatel paid $92 million in criminal penalties

67 *See* United States v. Kellogg Brown & Root LLC, No. 4:09-CR-00071 (S.D. Tex. filed Feb. 6, 2009); United States v. Alcatel-Lucent, S.A., No. 10-CR-20907 (S.D. Fla. filed Dec. 27, 2010).

68 Press Release, Department of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009) (on file with author).

69 Pacini, *supra* note 34, at 565.

70 *See supra* note 18 and accompanying text.

71 Deferred Prosecution Agreement at A-9, United States v. Alcatel-Lucent, S.A., No. 10-CR-20907 (S.D. Fla. filed Feb. 22, 2011).

and settled civil charges with SEC for over $45 million, representing disgorgement of profits and interest.[72]

2. Onset of District Court Influence

Large multinational firms have the luxury of paying tens, sometimes even hundreds, of millions of dollars in order to avoid going to court. Notably, these corporations can maintain operability even while handing out such enormous sums of money. For instance, in the fourth quarter of 2008 alone (the most recent quarter prior to pleading to FCPA charges and agreeing to pay $579 million), Halliburton's net income was $468 million.[73] Despite the substantial financial hit, there was never a threat that the corporation would not be able to persist. The same cannot necessarily be said of the small corporations and individuals that find themselves in the government's crosshairs: for individuals, their very liberty may be at stake if DOJ brings criminal charges. In early 2011, Lindsey Manufacturing Co. was the first company to be convicted of FCPA charges at trial.[74] Executives of Control Components Inc. were convicted shortly thereafter in *Carson*.[75] Just a few months later, a jury found Florida-based businessman Joel Esquenazi guilty of FCPA violations.[76] In each case, defendants bribed energy

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72 Press Release, Department of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010) (on file with author).

73 Press Release, Halliburton, Halliburton Announces Fourth Quarter and Full Year Earnings (Jan. 26, 2009) (on file with author).

74 *See* Pacini, *supra* note 34, at 547. The company's CEO and CFO were also convicted. All three convictions were subsequently overturned due to prosecutorial misconduct. *See* Samuel Rubenfeld, *Judge Overturns Verdicts in Foreign Bribery Case*, WALL ST. J., Nov. 30, 2011, at B4. However, the case—United States v. Noriega, 2:10-cr-01031 (C.D. Cal. filed Sept. 15, 2010)—retains its importance for Judge Howard Matz's interpretation of "instrumentality." *See also infra* Part III.C.2.

75 United States v. Carson, 8:09-cr-00077 (C.D. Cal. filed Apr. 8, 2009).

76 Press Release, Department of Justice, Two Telecommunications Executives Convicted by Miami Jury on All Counts for Their Involvement

or telecommunications companies that were wholly-owned by their home government. These three cases "are landmark cases in that they represent the first significant effort to limit the government's historically broad latitude to define the terms 'instrumentality' and 'foreign official' by enforcement action."[77] Via their denials of defendants' motions to dismiss[78] and jury instructions,[79] the district court judges offered the first judicial opinions construing the FCPA's usage of "instrumentality." Still, as discussed below, these interpretations are imperfect and do not hold the weight of an appellate court opinion.

III. COMPETING DEFINITIONS OF "INSTRUMENTALITY"

A. Use of "Instrumentality" in Other Contexts

The term "instrumentality" is used in various federal statutes and regulations. These laws, as well as judicial opinions interpreting them, can be useful reference points for those who must interpret the term as it is used in the FCPA. As Judge James V. Selna noted in the *Carson* case, "whether an entity is considered an 'instrumentality' depends on the statute in consideration. However, . . . [another use of 'instrumentality'] is indisputably relevant" to the FCPA.[80] The Foreign Sovereign Immunities Act ("FSIA"),[81] passed less than two years prior to the passage of the FCPA, may provide some insight. In fact, the

in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Aug. 5, 2011) (on file with author).

77 Golumbic & Adams, *supra* note 14, at 45.

78 Order Denying Defendants' Motion to Dismiss, United States v. Carson (No. 8:09-cr-00077), 2011 WL 5101701 (C.D. Cal. May 18, 2011) [hereinafter Carson MTD Denial].

79 Court's Final Instructions to the Jury, United States v. Esquenazi, No. 1:09-cr-21010 (S.D. Fla. Aug. 5, 2011).

80 Carson MTD Denial, *supra* note 78, at *6.

81 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

> FSIA actually defines "agency or instrumentality," requiring any such entity to be . . . "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," [among other criteria.] The FSIA therefore establishes a presumption in favor of "instrumentality" status for entities that are majority owned by a foreign sovereign and, conversely, a presumption against instrumentality status for entities where foreign sovereigns hold a minority share.[82]

However, it "bears noting that Congress does not appear to have intended to apply the FSIA to commercial activity."[83] Moreover, it stands to reason that, if Congress wished to define "instrumentality" in the FCPA the same way it did in the FSIA, it would have done so.[84] The FCPA's silence on the definition of "instrumentality" is, so to speak, the dog that did not bark: the FCPA contains no mention of majority or minority ownership, or even any definition of "instrumentality" at all. The FCPA makes reference to other statutes to define certain terms,[85] but Congress conspicuously chose not to do so for "foreign official" and "instrumentality." By neglecting to insert a definition similar to the FSIA's, Congress did not necessarily foreclose the possibility that what constitutes an "instrumentality" in the FCPA context would also revolve around the percentage of state ownership, but neither did it advance the notion.

Other statutes make it clear that Congress is not consistent in its usage of "instrumentality." Certain statutes clearly contemplate that a corporation could constitute a

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82 Golumbic & Adams, *supra* note 14, at 47 (citing 28 U.S.C. § 1603(b) (2006)).

83 *Id.* at 48 n.293 (citing USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 207 (3d Cir. 2003)).

84 *But see* Carson MTD Denial, *supra* note 78, at *7 ("The fact that Congress passed FSIA [merely] a year before [it passed] the FCPA . . . ultimately supports the [district] Court's conclusion that" the two statutes should be read to dovetail with each other.").

85 *See* 15 U.S.C. § 78dd-1(g)(2) (2012).

government's "instrumentality," while other statutes clearly reject the notion. The Internal Revenue Code refers to a foreign government's "wholly owned . . . instrumentality,"[86] which seems to contemplate that a corporation can constitute an "instrumentality" of a foreign government. Notably, if some instrumentalities are "wholly owned," it stands to reason that an instrumentality could also be *partially* owned by a foreign government. On the other hand, a part of the voluminous Federal Acquisition Regulation ("FAR") seems to imply that there must be a distinction between an instrumentality and a corporation.[87] In short, comparing the FCPA and other law side-by-side to interpret the meaning of "instrumentality" is only so helpful.

B. The Executive Branch

1. DOJ and SEC Enforcement Since 2005

Analyzing instances when the government brought suit against alleged violators of the FCPA is a valuable method for assessing what "instrumentality" could or should mean. However, in such a line-drawing exercise between what is and what is not an instrumentality, the fact that the public does not know when the government chose *not* to litigate is a setback—that is, it stands to reason that some government investigations have concluded that a bribe recipient's employer is *not* an instrumentality. Yet, despite their definitional and line-drawing value, these instances are not public knowledge.[88] Perhaps, for example, DOJ or SEC

86 26 U.S.C. § 1471(f)(1) (2012).

87 *See* 48 C.F.R. § 52.204-3(d) (2012) (instructing those filing corporate taxes to indicate that a Taxpayer Identification Number is not required because the entity in question is *either* a "foreign corporation" *or* "an instrumentality of a foreign government").

88 Then-Acting Deputy Assistant Attorney General Greg Andres said in 2011 that "we don't [release information on decisions *not* to indict], in large part[] because we don't want to penalize a company or an individual that has been investigated and not prosecuted . . . [because] there may be some prejudice from that." *2011 House FCPA Hearing*, *supra* note 22, at 67.

determined that the foreign government in question owned an insufficient share of the corporation in question, or that the control it exerted was noteworthy but insufficient. Therefore, DOJ and SEC charges tell only one side of the story.

In marginal cases, where the foreign government owns merely a portion of the entity alleged to be an "instrumentality" of said government, DOJ and SEC tend to focus on certain key factors in assigning a corporation "instrumentality" status:

> The DOJ and the SEC do not appear to have predicated their allegations of 'instrumentality' and 'foreign official' status on the mere fact the [state-owned enterprises ("SOEs")] at issue had foreign governments as partial shareholders. Rather, they focused on the fact that in each case, the foreign state in question exercised a significant degree of control over the SOE despite holding a less than majority stake . . . . [C]ontrol over the strategic decisions and business affairs over the SOE appears to have been the operative concept.[89]

Of course, "control" is a vague concept, one subject to "arbitrary determination[s]."[90] However, the government finds that the foreign state in question exerts control when it dominates the corporation's board of directors and owns the largest—even if not a majority—stake. The SEC claimed that Nigeria LNG was an instrumentality of the Nigerian government because at "all relevant times, the Nigerian government owned 49% or more of Nigeria LNG and, through the directors that it appointed to the Board of Directors of Nigeria LNG, the Nigerian government exercised control over the company."[91] The government did not specify, though, how many directors the Nigerian

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89 Golumbic & Adams, *supra* note 14, at 40–41.

90 Cohen et al., *supra* note 21, at 1254.

91 Complaint at 4, SEC v. Halliburton Co., No. 4:09-399, 2009 WL 956612 (S.D. Tex. Filed Feb. 11, 2009). *See also* Deferred Prosecution Agreement at A-9, United States v. Alcatel-Lucent, S.A., No. 10-CR-20907 (S.D. Fla. filed Feb. 22, 2011).

government appointed or what proportion of the board it must appoint in order for the company to constitute an instrumentality. If the state appoints only a minority of the board, is the entity still an instrumentality of the state? It remains unclear. In its criminal charges, DOJ also asserted that the circumstances of Nigeria LNG's founding are relevant in determining that it was an instrumentality of the state.[92]

However, the government has not always provided clear and consistent indications of what factors weigh most heavily in determining what constitutes an "instrumentality." "According to the Department of Justice, . . . state-owned business enterprises may, *in appropriate circumstances*, be considered instrumentalities of a foreign government . . . . Among the factors that it considers are the foreign state's own characterisation of the enterprise, . . . the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government."[93] The government may, in fact, deem these important characteristics. But DOJ and SEC have never actually used the foreign government's characterization as a factor in their indictments.[94]

In sum, it is not clear how exactly the government interprets "instrumentality." Its internal decisions *not* to litigate are unknown; there are conflicting indications of the factors that it deems important; and the factors that it unambiguously does deem important, such as "control," are vague. Finally, as the following illustrates, despite prodding

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92 Nigeria LNG "was created by the Nigerian government." Information at 7, United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (S.D. Tex. filed Feb. 6, 2009).

93 ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION (1999) 6, *available at* http://www.oecd.org/investment/briberyininternational business/anti-briberyconvention/2390377.pdf. Then-Acting Deputy Assistant Attorney General Greg Andres said in 2011 that DOJ weighs "the foreign state's characterization of the entity and its employees . . . ." *2011 House FCPA Hearing*, *supra* note 22, at 71.

94 *See* Cohen et al., *supra* note 21, at 1254 n.49.

from Congress, the government waited twenty-four years to issue guidance on its interpretations of ambiguous elements of the statute.

2. FCPA Resource Guide

The 1988 amendments mandated that the government issue guidelines within a year "describing specific types of conduct . . . [that] the Attorney General determines would be in conformance with" the FCPA.[95] DOJ and SEC, however, waited until 2012 to issue the guidelines.[96] The guidelines are wide-ranging. The document seeks to clarify a variety of ambiguities in the statutory language, explain enforcement priorities, and encourage effective compliance initiatives. However, the Resource Guide does not shed much new light on the government's interpretation of "instrumentality." Most notably, the Resource Guide indicates that "an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares,"[97] yet reaffirms the Alcatel-Lucent and KBR/Halliburton enforcement actions, where the foreign governments in question owned a minority stake.[98] The government supports the recent district courts' interpretations,[99] in particular affirming that it is a fact-intensive inquiry meant for the jury.[100] According to the Resource Guide, "whether a particular entity constitutes an 'instrumentality' under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function."[101]

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95 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (1988).

96 *See* Criminal Div., U.S. Dep't of Justice & Enforcement Div., SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA RESOURCE GUIDE], *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

97 *Id.* at 21.

98 *See id.*

99 *See infra* Part III.C.

100 *See* FCPA RESOURCE GUIDE, *supra* note 96, at 109 n.119.

101 *Id.* at 20.

Far from clarifying its interpretation of "instrumentality," DOJ and SEC merely regurgitated extant interpretations in its recent Resource Guide. Although then-Acting Deputy Assistant Attorney General Greg Andres said before Congress in 2011 that DOJ would rely upon the OECD Convention as an interpretive tool,[102] there is no mention of the Convention in the Resource Guide's interpretation of "instrumentality."[103] Thus, not only does the Resource Guide fail to enlighten, but it goes so far as to confuse the public by omitting important considerations that DOJ previously announced and even used in court.[104]

This Note advances the notion that a government ownership stake substantially under fifty percent, by itself, could or should qualify a corporation as an instrumentality of its home government, since the purpose of the FCPA is to protect a foreign state's resources.[105] On the surface, this seems incompatible with the Resource Guide's indication that a corporation is "unlikely to qualify as an instrumentality" absent majority state ownership. However, as a practical matter, when a government owns a smaller percentage of the corporation, the other factors that DOJ and SEC deem important are almost invariably present, as well.

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102 *See 2011 House FCPA Hearing*, *supra* note 22, at 67 ("[I]t is important when we think about that concept [of defining 'foreign official'] that the foreign official definition in the statute is consistent with our own treaty obligations.").

103 The Resource Guide clearly contemplates the importance of abiding by the OECD Convention—but never with reference to interpreting "instrumentality"—since the section on extraterritorial enforcement directly references the Convention and the importance of conforming to treaty obligations. *See* FCPA RESOURCE GUIDE, *supra* note 96, at 107 n.55.

104 DOJ successfully argued in *Lindsey* that an SOE can be an "instrumentality" based on the OECD Convention. *See* Criminal Minutes – General at 10–11, United States v. Noriega, 783 F. Supp. 2d 1108, (C.D. Cal. Apr. 20, 2011) (No. 2:10-cr-01031).

105 *See infra* Part V.C.1.

C. Federal District Courts Since 2009

1. *Carson*

The recent federal district court cases failed to set specific boundaries for what constitutes an "instrumentality" in the FCPA context. It makes sense that district court judges would decline to announce a grand interpretation of "instrumentality" in a jury trial where the entity in question is wholly-owned by a foreign state, as in *Carson*, *Lindsey*, and *Esquenazi*. Legal practitioners and academics do not call upon district court judges to announce finer points of statutory ambiguities with major policy implications. The lower court finds the facts, but appellate courts are trusted to interpret nuances as a matter of law. Nonetheless, the district court judges' interpretations may have compounded the confusion regarding what constitutes an "instrumentality."

First, Judge Selna of the *Carson* case found "that the statutory language of the FCPA is clear."[106] Therefore, he ruled that "instrumentality" "must be given its ordinary meaning" and turned to the dictionary before defining the term as "something that is used to achieve an end."[107] Most significantly, Judge Selna stated that "simply assuming that a company is wholly owned by the state is insufficient for the Court to determine as a matter of law whether the company constitutes a government 'instrumentality.'"[108] As a result, the matter invariably becomes a question of fact, not law. Along those lines, Judge Selna offered a non-exhaustive list of six considerations pertinent to the "question of fact" as to whether an entity is an instrumentality.[109] In his view, a jury should consider: how the foreign government characterizes the entity; its degree of control over the entity; the purpose of the entity's operations; the entity's "obligations and privileges" (i.e., its degree of independence);

106 Carson MTD Denial, *supra* note 78, at *8.

107 *Id.* at *4.

108 *Id.* at *3.

109 Carson MTD Denial, *supra* note 78, at *3–4.

how the entity was created; and the "extent of [state] ownership," including whether it receives special financial treatment.[110] Judge Selna did not directly indicate which of these factors may weigh more or less heavily, but he hinted that the state's financial stake and the purpose of the entity's operations would be especially important.[111]

2. *Lindsey* and *Esquenazi*

The *Lindsey* and *Esquenazi* district court judges took a similar route as Judge Selna in *Carson*. In *Lindsey*, Judge Howard Matz pointed to a "non-exclusive list" of "various characteristics" that make an entity an instrumentality.[112] Judge Matz indicated that the pertinent factors to consider are: whether the directors and officers are appointed by the state; if the state finances the entity; if the entity provides a public service; if *only* that entity may/does provide such a service; and if the perception is that the entity performs a governmental function.[113] The *Lindsey* defendants stood accused of bribing employees of the wholly-government-owned Mexican electric company. Judge Matz cited extensively to the Mexican constitution as evidence that supplying electricity was the domain of the state.[114] Thus, Judge Matz implicitly indicated that what constitutes a governmental function is country-dependent. This is significant because it further erodes predictability and uniformity. Judge Matz also found the circumstances of the

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110 Carson MTD Denial, *supra* note 78, at *3–4.

111 *See id.* at *5 ("[W]hen a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity *would qualify* as a governmental instrumentality.") (emphasis added).

112 United States v. Aguilar, 783 F. Supp.2d 1108, 1115 (C.D. Cal. 2011). *See also* Court's Final Instructions to the Jury at 24, United States v. Esquenazi, No. 1:09-cr-21010 (S.D. Fla. Aug. 5, 2011) (listing the same "non-exclusive" list of items that make an entity an instrumentality in instructions to the jury).

113 *Aguilar*, 783 F. Supp. at 1115.

114 *Id.* at 1115, 1119.

corporation's founding to be important, noting that the Mexican electric company was "created by statute."[115]

D. The OECD

In the 1990s, the OECD, at Congress' prodding, got involved in cracking down on international bribery.[116] The OECD's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the Convention"), ratified by Congress as part of the 1998 FCPA amendments,[117] paints a somewhat clearer picture of who constitutes a foreign official.[118] According to the Convention, "any person exercising a public function for a foreign country, including for a public agency or public enterprise," qualifies as a public official.[119] The Commentaries to the Convention proceed to define "public function," "public agency," and "public enterprise."[120] In sum, a foreign official is one who:

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115 *Aguilar*, 783 F. Supp. at 1115.

116 *See* discussion *supra* Part II.B.2.

117 *See* ORG. FOR ECON. CO-OPERATION & DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF 20 NOVEMBER 2012 (2012), http://www.oecd.org/daf/anti-bribery/antibriberyconvention ratification.pdf; *see also* S. REP. NO. 105-277, at 2 (1998) (noting that Congress amended "the FCPA to conform it to the requirements of and to implement the OECD Convention").

118 ORG. FOR ECON. CO-OPERATION & DEV, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (1997), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD CONVENTION].

119 *Id.* at art. 1.

120 ORG. FOR ECON. CO-OPERATION & DEV., COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 15 (1997), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter COMMENTARIES TO OECD CONVENTION].

(a) performs "any activity in the public interest, delegated by a foreign country";[121] AND is employed by either:
(b) "an entity constituted under public law to carry out specific tasks in the public interest;" [122] OR
(c) a business where:
    (i) "a government, or governments, may, directly or indirectly, exercise a dominant influence";[123] AND
    (ii) the business does *not* "operate[] on a normal commercial basis in the relevant market" like any other corporation.[124]

The Convention offers greater clarity by organizing the factors and denoting which are mandatory. Government ownership is probably necessary, but not sufficient. Government control over both decision-making and decision-makers are very important factors, as is whether or not the entity operates in a free and open market.

Notably, the *Charming Betsy* doctrine mandates that domestic law be construed to align with congressionally-ratified international agreements, to whatever extent possible.[125] Therefore, those charged with interpreting "instrumentality" must use the Convention, at the very least, as a lens through which to view the term. Still, even though the "United States' participation as a signatory to the OECD Convention compelled Congress to introduce a number of conforming changes to the FCPA . . . , the language from the OECD Convention covering individuals associated with 'public enterprises' . . . [was] conspicuously not incorporated" in the 1998 amendments.[126] For this reason, the extent to

121 COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 15.

122 *Id.*

123 *Id.* *See* Golumbic & Adams, *supra* note 14, at 13 (known as the "dominant influence" test elsewhere in the literature).

124 COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 15.

125 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804).

126 Golumbic & Adams, *supra* note 14, at 13.

which the Convention can be useful in interpreting "instrumentality" is questionable.[127]

IV. CRITIQUING THE EXTANT DEFINITIONS OF "INSTRUMENTALITY"

A. Lack of Clarity

There are a variety of problems that plague the current methods of assessing what constitutes an "instrumentality" within the context of the FCPA. The factors postulated by the government, the district courts, and the OECD do not necessarily adhere to the purpose of the FCPA. Moreover, the lack of clarity within those factors inflicts burdensome costs on industry and calls into question whether a criminal defendant had sufficient notice. As a general matter, having a non-exclusive list of considerations exacerbates this problem.[128] The question of what constitutes an "instrumentality" is fundamentally a matter of statutory interpretation: it should be a matter of law, not a matter of fact left to the jury.

Judges Selna and Matz, by announcing "general categories of information that should be taken into account in conducting a fact-based analysis[,] . . . missed an opportunity to articulate a more precise standard of ownership and control that could determine the conditions under which the application of the FCPA to SOEs is appropriate."[129] Thus, "it remains unclear what level of government ownership or control will make a business an 'agency or instrumentality' of the state."[130] Although the courts advanced,[131] and the government supported,[132] a more

127 *See* discussion *infra* Part V.C.3.

128 *See* Doty, *supra* note 28, at 1233 ("Case-by-case enforcement is not a satisfactory substitute for a rule enabling the board and senior management to protect the corporation from vicarious liability for the actions of officers and employees.").

129 Golumbic & Adams, *supra* note 14, at 45.

130 Pacini, *supra* note 34, at 564–65.

131 *See supra* text accompanying note 100.

lenient reading of "instrumentality" that concedes that some wholly-owned corporations might not be instrumentalities, this hardly represents a gift to industry. The case-by-case analysis preferred by the district court judges creates definitional uncertainty that "puts up barriers to U.S. businesses trying to sell their goods and services abroad . . . ."[133] In addition, as the Eleventh Circuit's Judge Adalberto Jordan emphasized during oral arguments in the *Esquenazi* appeal, "in the criminal law arena, [] notice is important. If you're letting juries figure out on a case-by-case basis what entity is an instrumentality and which one is not, you may run into vagueness problems."[134]

Given the KBR/Halliburton and Alcatel indictments[135]—where the foreign government owned only a minority share of the entities in question—one could argue that firms in the investment portfolios of sovereign wealth funds ("SWFs") could be instrumentalities of a foreign government. Gulf states awash in oil revenues, China, and other nations purchase huge stakes in corporations listed on stock exchanges around the world. Were someone to bribe a Citigroup employee in pursuit of a business advantage (the Abu Dhabi Investment Authority bought approximately a 5% stake in Citigroup in 2007),[136] could that possibly violate the

132 DOJ and SEC voiced hearty support for the district court findings in the recent Resource Guide. *See* FCPA RESOURCE GUIDE, *supra* note 96, at 20–21.

133 *2011 House FCPA Hearing*, *supra* note 22, at 20 (statement of Michael Mukasey, former Att'y Gen.). *See also* Kayla Feld, Comment, *Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a "Foreign Official" in the Foreign Corrupt Practices Act*, 88 Wash. L. Rev. 245, 265 (2013) (arguing that compliance programs are less effective because the courts have not indicated what level of state ownership qualifies a corporation as an instrumentality of its home government).

134 Oral Argument at 28:18, United States v. Esquenazi, No. 11-15331 (11th Cir. argued Oct. 11, 2013).

135 *See supra* Part II.C.1.

136 Eric Dash & Andrew Ross Sorkin, *Fund in Abu Dhabi To Pay $7.5 Billion For 4.9% of Bank*, N.Y. TIMES, Nov. 27, 2007, at C1.

FCPA?[137] There is no clearly articulated floor indicating the minimum amount of government control that qualifies an entity as an instrumentality. Certainly, the government has not announced one, while the judiciary has not had the opportunity.

While most believe that such a small investment stake would not establish sufficient state control, it bears noting that the OECD Convention leaves the door open. The Convention does not state that a government must have *the* "dominant influence" over the corporation, but merely "*a* dominant influence."[138] The linguistic choice of "a" rather than "the" indicates that the Convention contemplates a scenario where multiple influences dominate an entity. The Convention reinforces this notion by twice referring to the "government or governments" that exert such an influence.[139] If a corporation could be an instrumentality of multiple governments, then a state could wield less control than we tend to think necessary for the entity to become an instrumentality. Clearly, it is not possible for multiple states to own more than half of the shares of a given corporation, meaning that less-than-majority stake could be sufficient. Thus, the OECD Convention only fuels the ambiguity that confounds the business world.

Likewise, ascertaining whether an entity performs a governmental or public function is an exercise fraught with ambiguity.[140] As the *Lindsey* court implicitly indicated by quoting so extensively from the Mexican constitution, what is a government function in one nation may not be in

137 *See* Golumbic & Adams, *supra* note 14, at 47 ("It would be odd, to say the least, if the DOJ and SEC were to label all employees of Blackstone and Morgan Stanley to be 'foreign officials' by reason of China Investment Corporation's minority investment in those firms. [Yet] this is a conceivable extension of the government's approach in KBR and Alcatel.").

138 COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 15 (emphasis added).

139 *Id.*

140 This Note will also explain why, in the first place, it is unnecessary to determine whether the entity performs a governmental or public function. *See* discussion *infra* Part V.

another.[141] During oral arguments in *Esquenazi*, the defense and prosecution agreed that each nation defines its own functions and that what constitutes a state instrumentality must follow suit.[142] Country-by-country dependency inserts a high degree of ambiguity. Moreover, the American district courts and the OECD Convention do not see eye-to-eye on what it means for an entity to perform a governmental or public function. From the perspective of the OECD Convention, if the entity "operates on a normal commercial basis,"[143] then it cannot be an instrumentality of the state. However, Judge Selna in *Carson* "rejects the idea that governmental and commercial actions are necessarily incompatible."[144] An entity may be an instrumentality of the state even if it "carr[ies] out commercial activities that can be characterized as private in nature, [since the entity's] transactions must further the policy interests of the federal government."[145] What is a government action in one country may not be in another. What is a government action under the currently prevailing American interpretation may not be a government action under the international standard. Thus, for the purpose of determining whether an entity is an instrumentality of the state, assessing whether that entity performs a governmental action may be a fruitless endeavor.

Finally, even the foreign government's characterization of the entity opens the door to ambiguity and invites an additional layer of corruption.[146] First, "the distinction

141 *See supra* text accompanying note 115.

142 Oral Argument at 16:07, United States v. Esquenazi (No. 11-15331) (defense counsel David Simon indicating that "we would go to the constitution and statutes of that [foreign] government" to determine what constitutes an instrumentality). DOJ prosecutor Kirby Heller later added: "Do we define it by the United States' core functions or by other countries'? . . . It has to be by looking at other countries and how they define their functions." *Id.* at 27:05.

143 COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 15.

144 Carson MTD Denial, *supra* note 78, at *6.

145 *Id.* at *6 (citing Optiperu, S.A. v. Overseas Private Inv. Corp., 640 F. Supp. 420, 424 (D.D.C. 1986)).

146 This Note will also explain why the foreign government's characterization of the entity is irrelevant. *See* discussion *infra* Part V.

between public officials and private parties may be obscured in transitional economies that are in the process of privatization."[147] In other words, a foreign government's characterization is often a moving target. States privatize corporations and nationalize corporations. The status of an official is tied to the status of the entity for which she works, and ownership of the entity is increasingly likely to change hands. In addition, the possibility of a bribe is predicated upon the presence of a corrupt state official in the first place. This implies an affiliation between the bribe recipient and the one who characterizes whether that bribe violates the FCPA. Even if "a [foreign] domestic regulator is better able to identify its own 'officials' or 'instrumentalities' than the DOJ [and] SEC [are]," that regulator may have perverse incentives in its dealings with DOJ and SEC.[148] If the state can characterize an entity simply as it sees fit, and if there is any hint of a culture of corruption in that state, then the state and its officials have every incentive to characterize the entity as a private enterprise so that its officials may receive bribes without the payer facing FCPA repercussions.[149] Even proponents of relying upon the foreign government characterization acknowledge the likelihood that certain foreign governments may corruptly deceive the federal government.[150]

147 Salbu, *supra* note 29, at 240 n.67. This is another reason why the circumstances of the entity's founding are not relevant to ascertaining whether the entity should be deemed an instrumentality of the state. *See* discussion *supra* Part II.A.1.

148 Cohen et al., *supra* note 21, at 1254–55.

149 *See* Lestelle, *supra* note 38, at 548–49. Take Nigeria and Russia, for example. Both states have significant resource-extraction industries that are at least semi-privatized, and both states are "afflicted by pervasive demand-side corruption." *Id.* Why, then, should those states' characterizations of the entities in question be given weight? Rep. Sensenbrenner may have said it best: "Oh, come on now. China is a communist country. They are not going to tell you what the governmental involvement is or who gets paid which way." *2011 House FCPA Hearing*, *supra* note 22, at 75.

150 *See* Cohen et al., *supra* note 21, at 1255 n.50.

B. Not in Keeping with the FCPA

While some factors used for ascertaining whether an entity is an instrumentality of a foreign government are merely unclear or irrelevant, other factors are not in keeping with the FCPA. Examining the purpose of the statute,[151] though not conclusive in and of itself, is a persuasive analytical tool to arrive at a truer interpretation of "instrumentality." The overriding purpose of the FCPA is to protect a nation's resources from abuse at the hands of its own agents. One may argue that this reflects a form of imperialistic or paternalistic imposition of so-called "American values" upon less powerful nations. One may argue that this reflects a Cold War-era effort to establish international moral supremacy over the Soviets. Whatever the ulterior motive, the FCPA was and is an American attempt to prevent resources belonging to the citizens of a state from being abused for private gain. Thus, any interpretation of "instrumentality" must take this into account.

For this reason, the possibility that a wholly-state-owned corporation might not qualify as an "instrumentality," as *Carson* indicated,[152] is not in keeping with the FCPA.[153] Because the term "instrumentality" is ambiguous, it begs for interpretation.[154] In construing the term, it is reasonable and rational to examine what the statute seeks to accomplish. Because the FCPA seeks to protect resources that belong to a foreign state's people, "instrumentality" should be interpreted in light of that fact. Therefore, when an entity is *entirely* owned by the people, under this view of

151 *See* Part II.A.2, *supra*, notes 39–40 and accompanying text.

152 *See supra* note 108 and accompanying text.

153 This Note offers prescriptive solutions in Part V.

154 Judge Selna also found, however, that the FCPA is "clear." Carson MTD Denial, *supra* note 78, at 4, *8. This conclusory finding is contradicted by the statute itself, which mandates that DOJ offer advisory opinions to clarify FCPA questions. *See supra* note 28 and accompanying text.

the statute, it is invariably an "instrumentality" of that state.

Likewise, it is not in keeping with the FCPA to state that the purpose of an entity's activities should be considered in determining whether that entity is an instrumentality of the state. The notion that the entity should or must perform a governmental function in order to be an "instrumentality" is irrelevant. If the state owns a catering company, real estate development firm, or hotel, then that entity is a national resource, even if it is not a widely-consumed service or product like electricity or telephone services. Suppose that a developing country depends upon tourism for a substantial portion of its revenues. As a result, that state invests in a corporation that develops high-end resort hotels. These hotels serve almost no domestic citizens, and providing hotels is not a typical government function. Yet one cannot deny that the corporation is an instrumentality of that particular state.

Separately, as the *Lindsey* court reasoned, what constitutes a governmental function is dependent on the country.[155] It is not the province of an American court or jury to decide what a foreign government views as its own purpose. Therefore, if a state makes a significant financial investment, then that constitutes an indication by proxy that the state views that entity as performing a governmental purpose; the inquiry into the activity itself should be done away with. Even if governmental function is a worthwhile factor, it should be determined indirectly, by virtue of the state investment.

V. MOVING TOWARDS A BETTER INTERPRETATION

A. Staying True to the FCPA

From a certain perspective, any private company can be an "instrumentality" of a foreign government because the government uses it as a tool for revenue (via taxation).

155 *See supra* note 114 and accompanying text.

Under the broadest definition of "instrumentality," it is conceivable that any company could qualify. But no one would propose that this is a defensible definition under the FCPA. The statute is clearly meant to disrupt those who abuse their official grant of power by conferring business advantages to bribe-payers. For this reason, the proper definition of "instrumentality" must be tied to the purpose of the FCPA. "[T]he meaning of 'instrumentality' should be considered both within the context of the preceding terms of the FCPA and *in view of the FCPA as a whole*."[156] The *Lindsey* court urges that we must examine "the structure of the statute as a whole, including its object and policy."[157] The fact that the FCPA allows firms to make a "facilitating or expediting payment"[158] (often referred to as a "grease payment" because it greases the proverbial wheels to speed up routine, non-discretionary actions like issuing permits or clearing customs) clarifies the true purpose of the FCPA to crack down on abuses of discretion. If Congress' paramount concern was with promoting ethics, it stands to reason that it would have banned *all* bribes paid to foreign officials, not just bribes related to their discretionary decision-making. The emphasis on acts of discretion that fundamentally affect allocation of state resources, to the exclusion of other forms of bribery, shows that Congress specifically meant to target abuses of public investments. Close examination of the statutory text reveals congressional intent, which must drive interpretations of any ambiguities.

B. International Harmonization in Theory and Practice

In the wake of the OECD Convention, other developed nations began instituting their own versions of the FCPA. Harmonization across countries is important for practical

156 Carson MTD Denial, *supra* note 78, at *5 (emphasis added).

157 Criminal Minutes – General at 10, United States v. Noriega, 783 F. Supp. 2d 1108, (C.D. Cal. Apr. 20, 2011) (No. 2:10-cr-01031) (citing Levi Strauss & Co. v. Abercrombie & Fitch Trading Co., 633 F.3d 1158, 1171 (9th Cir. 2011)).

158 15 U.S.C. § 78dd-1(b) (2012).

reasons, and harmonization with the OECD Convention is important for legal reasons, as well. On the surface, congressional ratification of the Convention should mean that interpretations of "instrumentality" must adhere to the Convention; the *Charming Betsy* doctrine mandates that domestic law be construed to align with an international agreement, to the extent possible.[159]

International uniformity is important because it reduces costs to businesses. In prior years, when the FCPA was the only such anti-bribery statute, American corporations feared that they would be less competitive in global business deals because they were proscribed from offering bribes. Now, since the U.K. Bribery Act is stiffer than the FCPA in some respects, British corporations may have the same fear, while American corporations fear that FCPA enforcement is moving in that direction.[160] "The existence of a more stringent anti-corruption law in the U.K. has led to speculation that U.S. enforcement authorities will apply even more pressure to companies through the FCPA so as not to be outdone in this area of traditional U.S. dominance."[161] Harmonization is important because it puts businesses on a level playing field and provides less incentive to shift standards in one direction or another.

The primary obstacle, however, to interpreting the FCPA in a manner consistent with foreign statutes (most significantly the U.K. Bribery Act) is that they are unambiguously different. "[M]ost other countries [including the U.K.] do not make an exception for facilitating payments and conclude that such payments only exacerbate the culture

159 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804). *See infra* Part V.C.3, for the difficulties of extending *Charming Betsy* to the FCPA.

160 *See* ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 5 (2010), *available at* http://www.uschamber.com/reports/restoring-balance-proposed-amendments-foreign-corrupt-practices-act.

161 *Id.*

of bribery."[162] This critical difference between the statutes limits the extent to which they can be harmonized, but should not necessarily hamper efforts to interpret the FCPA's use of "instrumentality" in a way that is consistent across international borders.[163]

There is, however, an obstacle to harmonization between the FCPA and the Convention that pertains directly to the interpretation of "instrumentality." A critical element of the Convention is not in keeping with the purpose of the FCPA. The OECD's emphasis on public function obfuscates and weakens the FCPA's purpose of protecting national resources.[164] The few federal district courts to weigh in on the interpretation of "instrumentality" in the FCPA context included a public function among the non-exclusive list of qualifying factors. However, the statute itself is silent on the matter and the courts have also indicated that a purely governmental function is not strictly necessary.[165] The Convention is therefore inconsistent with both current jurisprudence and with this Note's concept of how courts should interpret "instrumentality."

C. Proposals

1. Degree of State Ownership

A certain degree of home state ownership should be sufficient on its own to qualify an entity as an instrumentality of its home government. A state-ownership threshold is in keeping with the FCPA's goal of protecting state resources.[166] And, in a world where other countries are increasingly aggressive in their anti-corruption efforts, American officials may become even more aggressive

162 Vega, *supra* note 66, at 445.

163 *See infra* Part V.C.3.

164 *See supra* Part III.D.

165 *See* Carson MTD Denial, *supra* note 78, at *6 ("Given this country's long history of using corporations to carry out governmental objectives, the Court rejects the idea that governmental and commercial actions are necessarily incompatible.").

166 *See supra* Part II.A.2.

themselves.[167] DOJ and SEC "ramped up . . . enforcement of the FCPA at the same time that [other OECD nations] remain[ed] stubbornly non-compliant with" their own commitments to crack down on foreign bribery.[168] Now that certain nations are becoming aggressive themselves, American authorities may need a way to maintain their role as the predominant anti-bribery enforcers.

As a result, it is beneficial to examine the outermost bounds of what could possibly constitute an "instrumentality" of a foreign government under the FCPA. "Who is considered a foreign official under the anti-bribery provisions [of the FCPA] should be presumed to have as broad an application as possible."[169] Or, as Gibson Dunn & Crutcher partner Mark Schonfeld put it, "you need to anticipate that the SEC is going to pursue any legal theory that it feels is remotely supportable. To some extent, you have to expect the unexpected."[170] Since there is little or no judicial oversight of the biggest FCPA enforcement actions,[171] it is perhaps less important to ascertain how the judiciary will or should define "instrumentality" and more important to explore the broadest possible reading of the term.

This type of threshold would deter corruption at a minimum cost to industry and remain true to the statutory text. In practice, if a state investment in a domestic corporation exceeds a certain percentage of the outstanding equity—say, twenty percent—then that entity would be construed to be an instrumentality of the state. Benchmarking the threshold in percentage terms is useful for a few reasons. First, a threshold based in dollars would be much more difficult to administer. Publicly traded

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167 *See supra* notes 160–61 and accompanying text.

168 Magnuson, *supra* note 46, at 406.

169 STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 11 (2005).

170 Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 Ga. L. Rev. 489, 530–31 (2011).

171 *See supra* Part II.C.1.

corporations fluctuate in value, and it would be nonsensical for an entity's status as an "instrumentality" to change based on a steep increase or decrease in market value. A minimal investment should not transform the entity into an "instrumentality" just because publicly traded shares skyrocket. The reverse is true as well. Additionally, for privately-held corporations, this would require a mark-to-market accounting system that would be cumbersome and potentially unreliable.

Adopting a sub-majority percentage threshold also comports with the popular notion that a state must exert managerial control in order for the entity to constitute an instrumentality. Percentage ownership serves as a proxy for managerial influence. Power necessarily accrues to a shareholder who owns a certain percentage of the corporation. However, contrary to the preferences of the U.S. Chamber of Commerce,[172] it makes sense for this percentage to be substantially less than fifty percent. Large corporations—the type of corporation that tends to receive an equity investment from its home government—have diffuse bodies of shareholders, meaning that it is difficult to coalesce for votes and that rational apathy amongst shareholders is more widespread. In many instances, "the [state] control may consist of a . . . minority share large enough to prevent unsolicited bids or, through super-majority provisions, changes to the corporate articles of association."[173] For this reason, a minority stake is sufficient for the state to possess substantial power over the entity.

A percentage threshold would be ideal because it would clearly establish which entities are instrumentalities of the

172 *See 2011 House FCPA Hearing*, *supra* note 22, at 20 (statement of Michael Mukasey, former Att'y Gen.) (suggesting that a good definition would "indicate the percentage of ownership by a foreign government that would qualify the entity as an 'instrumentality' [and that] majority ownership is the most plausible threshold").

173 ORG. FOR ECON. CO-OPERATION & DEV., PRIVATISATION IN THE 21ST CENTURY: SUMMARY OF RECENT EXPERIENCES 28 (2010), *available at* http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/43449100.pdf.

state.[174] The consensus appears to be that what constitutes an instrumentality depends upon the state.[175] Yet some in the legal community do not trust foreign governments to abide by their own word.[176] As a result, even if governmental function is a core element of what constitutes an instrumentality, the clearest indication of governmental function is shown by whether the state makes a substantial equity investment.

Additionally, clarity serves as a deterrent, because it makes prosecution simpler. If fewer DOJ and SEC resources are needed to prosecute offending parties, then the government can prosecute more cases, incentivizing industry to steer clear of illicit bribes. Tellingly, even the U.S. Chamber of Commerce advocates for a percentage threshold (albeit a higher one).[177] It is noteworthy that corporate America's primary lobby advocates for a stance that is, arguably, tougher than what the *Carson* court and the other district courts articulated.[178] Industry is willing to accept a stiffer rule in exchange for greater predictability. Limiting the interpretation to cover only domestic corporations ensures that, for example, Citigroup will not be construed to be an instrumentality of Abu Dhabi.[179] It would be inappropriate to construe a corporation as subject to another nation's authorities and dominion as an instrumentality of the investor state. Finally, setting a threshold inserts an

174 *See* Agnieszka Klich, Note, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 Stan. J. Int'l L. 121, 135 (1996) ("Equity analysis is easier than analyzing control[,] which is factually more complicated.").

175 *See* Oral Argument at 16:07, United States v. Esquenazi (No. 11-15331).

176 *2011 House FCPA Hearing*, *supra* note 22, at 75 (statement of Rep. F. James Sensenbrenner). *See also* Oral Argument at 16:13, United States v. Esquenazi (No. 11-15331) (Judge Richard Suhrheinrich opining that "a lot of countries have very nice constitutions and in no way follow them").

177 *See supra* note 172.

178 *Carson*'s Judge Selna indicated that even a wholly-government-owned corporation might *not* be an instrumentality. *See supra* note 108 and accompanying text.

179 *See* supra note 136 and accompanying text.

implicit de minimis exception for truly insignificant state investments.

Many commenters on the FCPA scoff at the notion that an entity could be an instrumentality of the state when the home government owns less than a majority stake.[180] They reject the notion out of hand, noting that (if applied domestically) this stance would mean that every General Motors employee constitutes an "official" of the United States.[181] Primarily, this reflects a fundamental misunderstanding of how to read a statute. It certainly may be absurd to consider an employee of a corporation a "foreign official" under the plain meaning of "foreign official." But "foreign official" is a term of art in the FCPA: it means only what its statutory definition says it means. Here, the statute says that it means any employee of any state instrumentality. Therefore, the pertinent question is whether the employer is an "instrumentality" of the state, not whether the individual is a "foreign official." To return to the General Motors example, it is reasonable to conclude that a corporation that receives an investment of $49.5 billion of citizens' money is an "instrumentality" of its home government, especially when it is "subject, in effect, to government limits."[182]

Many, if not all, countries support certain industries via favorable tax treatment. By granting certain industries—or even certain corporations within particular industries—tax

180 *See, e.g.*, Mike Koehler, *"Foreign Official" Limbo ... How Low Can It Go?*, FCPA PROFESSOR (Jan. 10, 2011, 5:30 AM), http://fcpaprofessor.blogspot.com/2011/01/foreign-official-limbo-how-low-can-it.html (noting that the government "set a new foreign official limbo low" when it brought FCPA charges against Alcatel-Lucent for bribing officials of a corporation when the home state held a forty-three percent stake; and commenting that, like the stick in a game of limbo, the percentage could decrease further still).

181 *See 2011 House FCPA Hearing*, *supra* note 22, at 72 (statement of George J. Terwilliger, senior partner at White & Case, including comments and questions by Rep. Ben Quayle); Golumbic & Adams, *supra* note 14, at 42.

182 Michael J. de la Merced & Bill Vlasic, *U.S. Says It Will Sell the Rest of Its Stake in G.M.*, N.Y. TIMES, Dec. 20, 2012, at B1.

breaks, the state effectively spends money on particular corporations. At a basic level, a direct cash infusion in the form of an equity investment and an indirect cash infusion in the form of a tax break are more or less the same: both use state resources to support a particular entity or industry. Yet it would be outlandish to contend that a recipient of a corporate tax break is an instrumentality of the state. The difference is that equity ownership comes with certain rights of control and establishes an enduring bind that is necessarily deeper than a simple cash transfer. A state investment may be sufficiently liquid that the state can move quickly in or out of ownership. But if, at the time the bribe took place, the state held a sufficient stake such that the entity qualifies as an instrumentality, then its employees should be deemed "foreign officials" under the FCPA.

2. Government Contracting

In addition, under certain circumstances, government contracting firms (even absent any state ownership) should be construed as instrumentalities under the FCPA. If the FCPA's goal is to prevent someone with control over national resources from abusing this access by granting business opportunities to bribers, then it stands to reason that government contractors should be considered instrumentalities of governments. In essence, this expands the concept of "instrumentality" by unhinging it from the realm of entities and re-conceptualizing it in line with the plain meaning of the word. States use government contracts as tools to carry out their objectives; as such, a government contract is an instrument of the state and the owner of the contract an instrumentality.

American case law exists to validate this notion. A federal bribery statute, using substantially similar language to the FCPA, bars bribery of domestic "public officials."[183] The definition of who constitutes a public official under the statute is slightly more stringent than the definition of "foreign official" under the FCPA. Namely, the statute

183 *See* 18 U.S.C. § 201 (2012).

barring bribery of domestic officials defines "public official" as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or *branch of Government* thereof."[184] Without question, a *branch* of government is something more directly affiliated with the government than an *instrumentality* of that government. The very word "branch" necessitates a physical connection to the larger entity, without which the branch could not survive. In contrast, an "instrumentality" is merely an implement—an external device used for a particular aim. In light of this, it is noteworthy that the Federal District Court for the Southern District of Indiana held that a government contractor is a "public official."[185] If a government contractor satisfies the more stringent "branch" requirement then, *a fortiori*, he must satisfy the less stringent "instrumentality" requirement. Moreover, a British court has extended *Griffin* to apply to the FCPA.[186] In a breach of contract case that stipulated that the deal would be void if it violated the FCPA, the British court found that an executive at a construction firm operating under a government contract counted as a "foreign official" under the FCPA.[187] Many corporations, however, have both commercial and

184 18 U.S.C. § 201(a)(1) (emphasis added). Contrast this with the definition of "foreign official" in the FCPA: "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, . . . or any person acting in an official capacity for or on behalf of any such . . . instrumentality." 15 U.S.C. § 78dd-1(f)(1)(A) (2012).

185 United States v. Griffin, 401 F. Supp. 1222, 1230 (S.D. Ind. 1975) ("The mere fact that defendant . . . is an employee of the corporation and not of the United States does not prevent him from acting as a 'public official' as defined in 18 U.S.C. § 201(a). The purpose of the statute is to protect the public from evil consequences of corruption in the public service."), *aff'd sub nom.* United States v. Metro Management Corp., 541 F.2d 284 (7th Cir. 1976).

186 *See* Rachel Davies, *Commission contract contravenes US law*, FIN. TIMES, Oct. 25, 1989, at 41.

187 *Id.* The article cites the case as Ali and Another v. Carrier Trans-Continental Co. Ltd., Q.B. *See also* Delia Poon, Note, *Exposure to the Foreign Corrupt Practices Act: A Guide for U.S. Companies with Activities in the People's Republic of China to Minimize Liability*, 19 HASTINGS INT'L & COMP. L. REV. 327, 344 n.116 (1996).

government customers. Thus, a firm with government clients should only be deemed an instrumentality of the state to the extent that the bribe recipient wields influence over business conducted with the state.

3. Anticipating Counterarguments

In reality, though, the FCPA does not exist in a vacuum. It exists in the context supplied by Congress—most significantly, congressional ratification of the OECD Convention. The purpose of the FCPA—along with the goals of providing notice, deterring misconduct, and minimizing cost to industry—would best be served by reading "instrumentality" to incorporate a state investment threshold and to permit government contracting firms to be deemed instrumentalities under certain circumstances. In light of the centuries-old *Charming Betsy* doctrine, however, one could argue that this is not possible.[188] By ratifying the OECD Convention as part of its 1998 amendments of the FCPA, some would argue that this constitutes an implicit congressional mandate to interpret the FCPA's ambiguities in light of the stipulations found in the Convention.

Under this line of reasoning, in interpreting the FCPA's use of the term "instrumentality," one must turn to the Convention's definition of "public enterprise."[189] The *Lindsey* court found the *Charming Betsy* doctrine applicable in advancing a more stringent reading of what constitutes an "instrumentality" under the FCPA; Judge Matz determined that an SOE could conceivably be an instrumentality of the government based on the Convention.[190] The *Charming Betsy* doctrine, however, represents a double-edged sword: in contrast to the *Lindsey* outcome, close adherence to the Convention could result in a less aggressive interpretation of

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188 *See* OECD CONVENTION, *supra* note 118; Cohen et al., *supra* note 21, at 1255 n.50.

189 *See* COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 15.

190 *See* Criminal Minutes – General at 10–11, United States v. Noriega, 783 F. Supp. 2d 1108, (C.D. Cal. Apr. 20, 2011) (No. 2:10-cr-01031).

the term. Under the Convention, in order to qualify as an instrumentality, the entity may *not* "operate[] on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges."[191] Therefore, some may argue that the proper interpretation of "instrumentality" in the context of the FCPA must incorporate this limitation. This would mean that a simple, but substantial, state investment, by itself, would be insufficient for the entity to constitute an instrumentality of that state. Absent some other qualitative or quantitative advantage granted by the state to tip the competitive balance, a corporation could not constitute an instrumentality of the state.

This sort of slavish adherence to the *Charming Betsy* doctrine and the 1997 OECD Convention is misguided. First, the class of people who may not receive bribes is narrower under the Convention than under the FCPA, as "inducements to political parties, party officials, or candidates for political office are not specifically addressed by the OECD Convention."[192] Next, there is very limited international adherence to the OECD's definitions. For example, the definition of "public enterprise" in the Japanese anti-bribery statute differs from the OECD's.[193] In addition, the Convention specifically demands that an entity must have "preferential subsidies or other privileges" in order to constitute an instrumentality, but the *Carson* court implicitly rejected this notion.[194] Judge Selna indicated that

191 COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 15. The Convention uses the term "public agency" instead of "instrumentality." Based on the usage and definitions of "public agency" in the Convention, as well as the fact that most controversies surrounding "instrumentality" in the FCPA revolve around its applicability to SOEs, "public agency" and "instrumentality" are interchangeable for the purposes of this Note.

192 DEMING, *supra* note 169, at 96.

193 *See* Cohen et al., *supra* note 21, at 1261.

194 *See* Carson MTD Denial, *supra* note 78, at *6 ("Given this country's long history of using corporations to carry out governmental objectives, the Court rejects the idea that governmental and commercial actions are necessarily incompatible.").

an entity can be an instrumentality while operating as a normal private entity. However, the *Charming Betsy* doctrine also should not entirely control interpretations of the FCPA because the OECD Convention is now a shadow of its former self.

The OECD itself, along with many Convention signatories, essentially repudiated one of the most substantial elements of the Convention. The Commentaries to the Convention following the FCPA indicate that "small 'facilitation' payments do not constitute [illegal] payments . . . and, accordingly, are also not an offence."[195] However, twelve years later, "the OECD changed its tune and called on all signatory nations to the Convention to end the permissibility of 'corrosive' facilitation payments."[196] Moreover, in its "Phase 3" report on the United States,[197] the OECD "put the United States under strong international pressure to change its policies regarding facilitation payments."[198] Further, ten signatories have grease payment exceptions and twenty-four do not.[199] *Charming Betsy* holds that "an act of [C]ongress ought never to be construed to violate the law of nations."[200] Yet, from a certain perspective, there is no true "law of nations" when the international body and the vast majority of the states have since turned their backs on a substantial element of the governing agreement. Even though facilitation payments and the definition of "instrumentality" are undeniably

195 COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 15.

196 Jordan, *supra* note 53, at 882 (citing *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, appended to COMMENTARIES TO OECD CONVENTION, *supra* note 120, at 20).

197 ORG. FOR ECON. CO-OPERATION & DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES (2010).

198 Jordan, *supra* note 53, at 882.

199 Andy Spalding, *Facilitating Payments (De)mystified (Conclusion)*, THE FCPA BLOG (June 28, 2012, 7:02 AM), http://www.fcpablog.com/blog/2012/6/28/facilitating-payments-demystified-conclusion.html.

200 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 81 (1804).

separate matters, it would be odd for an American court to adhere slavishly to the finest points of the Convention given the current state of affairs. Congress' refusal to amend the FCPA to adhere to the now-prevailing international norm is telling. The American commitment to the international standard is shaky. Thus, it is debatable whether the *Charming Betsy* doctrine should mandate a particular, narrower interpretation of "instrumentality."

VI. CONCLUSION

One of the most pressing legal questions facing multinational corporations is how to mitigate exposure to FCPA liability. This is a matter of particular significance because the federal government enforces the statute much more stringently than it did in prior years, despite—or perhaps even because of—substantial ambiguity in one of the statute's operative terms. The FCPA bars corporations and individuals from paying many types of bribes to any employee of any "instrumentality" of a foreign government. However, it is unclear what constitutes an "instrumentality."

It stands to reason that the judiciary has much to say about this matter of statutory interpretation, but judges can only rule on cases that appear before them. The government's most aggressive interpretations of "instrumentality" have come in actions brought against multibillion-dollar corporations,[201] but large corporations uniformly prefer to settle with the government rather than go to trial. Therefore, no appeals court has weighed in on the proper way to interpret "instrumentality." The Eleventh Circuit will do so in the coming months,[202] but appears unlikely to rule conclusively on the matter, since the corporation in question is wholly owned by its home government.

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201 *See* Complaint at 4, SEC v. Halliburton Co., No. 4:09-399, 2009 WL 956612 (S.D. Tex. filed Feb. 11, 2009); United States v. Alcatel-Lucent, S.A., No. 10-CR-20907 (S.D. Fla. filed May 23, 2011).

202 *See supra* note 3. Oral arguments took place on October 11, 2013.

In light of this ambiguity, the history and purpose of the statute are valuable interpretive tools. These indicate that a broad reading of "instrumentality"—one that encompasses a host of private corporations with large home-state equity investments—may be truest to the statute. One of the primary purposes of the FCPA, from the time of its inception and still today, is to protect the assets of foreign nationals from corrupt agents of their home state. Therefore, this Note contends that the truest interpretation of "instrumentality" is one that accounts for a broad, but reasonable, series of state assets, such as ownership stakes in corporations and government contracts. Current interpretations proffered by federal district courts, the executive branch, and the OECD are either unclear, not in keeping with the purpose of the statute, or both. This Note primarily contends that any corporation with an equity investment from its home country above a certain percentage threshold (such as, say, twenty percent) should qualify as an "instrumentality" of the home state. Prudential reasons, like deterrence and cost-minimization, also urge such an interpretation.

Even if this interpretation is not the *best* one, there are a few reasons why it behooves corporations to be aware of the most stringent plausible interpretation. Corporations fear FCPA liability to such an extent that they are sometimes willing to pay hundreds of millions of dollars to the federal government rather than challenge its most aggressive interpretation of "instrumentality."[203] Understanding the outer limits of what could feasibly constitute an "instrumentality" will help corporations stay out of trouble. More importantly, the FCPA is no longer the strictest anti-bribery statute. In light of the international trend towards even tougher mandates, as well as the federal government's evolving enforcement practices, DOJ and SEC may try to keep up with the U.K. and other nations by adopting increasingly broad readings of what constitutes an "instrumentality."

203 *See supra* note 68 and accompanying text.